REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ADAK CASE NO.5 OF 2018

IN THE MATTER OF THE SPORTS ACT NO.25 OF 2013 LAWS OF KENYA

IN THE MATTER OF ANTI -DOPING ACT NO.5 OF 2016 LAWS OF KENYA

IN THE MATTER OF ADAK ANTI-DOPING RULES

WORLD ANTI- DOPING CODE 2015

IN THE MATTER OF INTERNATIONAL ATHLETICS FEDERATION RULES

IN THE MATTER OF ARBITRATION OF SPORT DISPUTES

ANTI-DOPING AGENCY OF KENYA (ADAK)…….. APPLICANT

VERSUS

PETER KIPTOO KIPLAGAT ……. RESPONDENT

PANEL

ELYNAH SHIVEKHA -SDT VICE-CHAIR

NJERI ONYANGO -MEMBER

GABRIEL OUKO -MEMBER

APPEARANCES

MR. ERIC OMARIBA –ADVOCATE APPEARING FOR ADAK

MR. LUMUMBA -ADVOCATE INSTRUCTED BY LUMUMBA & AYIEKO ADVOCATES-APPEARING FOR THE RESPONDENT

PETER KIPTOO KIPLAGAT -RESPONDENT IN ATTENDANCE

ABBREVIATIONS AND DEFINATIONS

The following abbreviation used here in have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR-Anti- Doping Rule Violation

AK-Athletics Kenya

IAAF-International Association of Athletics Federation

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

All the definitions and interpretation shall be construed as defined and interpreted in the constitutive document both local and international.

1. THE PARTIES
   1.1 The applicant The Anti –Doping Agency of Kenya (ADAK) is a State Agency established under section 5 of the Anti-Doping Act No.5 0f 2016. It is the body charged with managing Anti-Doping activities in the country including results management.
   1.2 PETER KIPTOO KIPLAGAT (the Respondent) is a male long-distance runner, specializing in running marathons.
   1.3 The Sports Dispute Tribunal (hereafter 'Tribunal') is an independent sports Arbitration Institution created under the provisions of the Sports Act, 2013, Laws of Kenya. Members of the Tribunal are appointed in terms of section 6 of the said Act.

2. THE CHARGE

   2.1 By a charge dated 26th March, 2018 and filed at the Tribunal on the 27th March 2018, the Respondent is charged with "Presence of a prohibited substance Clenbuterol in the athlete's sample."
   2.2 Clenbuterol is listed as a prohibited substance under S1.1B of the 2017 WADA Prohibited List (Anabolic agents) and is a non-specified substance (Article 4.2.2. of WADC).
   2.3 The presence of a prohibited substance or its metabolites or markers in an athlete's sample or the use of a prohibited substance constitute an anti-doping rule violation under Article 2.1 of WADC and rule 32.2 and rule 32.2(b) of the IAAF rules.
   2.4 Article 2.1.2 provides
   "It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or the metabolites or markers found present in their sample."
   Accordingly, it is not necessary that intent, fault, negligence or knowingly use on the athlete's past be demonstrated in order to establish an anti-doping rule violation under Article 2.1
   2.5 The respondent participated in a marathon in 2017 held in Casablanca, Morocco. on 29th October, 2017, where in competition his urine sample was collected.
   2.6 The sample was transported to the WADA accredited laboratory in Lausanne, France where the 'A' sample (4113021) was analyzed in accordance with the procedure set out in WADA's international standard for laboratories. The A sample returned an AAF for the presence of a prohibited substance Clenbuterol.

2.7 Clenbuterol is listed as a prohibited substance under Section 1.1B of the 2017 WADA prohibited list (Anabolic Agents) and in a non-specified substance (Article 4.2.2 of WADC)

2.8 The respondent was notified of the AAF by a letter from ADAK dated 5th February 2018. He was also notified of his right to pursue the testing of the 'B' sample but he elected not to pursue that option.

2.9 ADAK in its charge document states that the Respondent has failed to explain the presence of Clenbuterol in his sample and is guilty as

"The presence of prohibited substance or its metabolites or markers in the athlete's sample or the use of a prohibited substance constitutes an anti- doping rule violation under Article 2.1. of ADAK ADR..."

2.10 ADAK therefore states that as no explanation has been rendered nor any mitigating factor set out for reduction of the sanction as provided in the rules, it prays that

a) All competitive results obtained by Peter Kiptoo Kiplagat from and including 29th October 2017 until the date of determination of the matter herein be disqualified with all resulting consequences (including forfeiture of medals points and prizes)". **Article 10.1 ADAK ADR**

b) Peter Kiptoo Kiplagat be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code. Article **10 of ADAK and WADC Rules**.

c) Costs. Article **10.10**

3. JURISDICTION

3.1 The Sports Dispute Tribunal has jurisdiction under Section 55, 58 and 59 of the Sports Act NO.25 OF 2013 and Section 31 and 32 of the Anti-Doping Act No.5 of 2016 as Amended to hear and determine this case.

3.2 ADAK states that the ingestion of the prohibited substance by the Athlete was intentional and no possible explanation can be given on fault or negligence by the athlete or a third party.

4. PRELIMINARY MATTERS

4.1. The matter first came to the Tribunal by way of a notice of charge filed at the Tribunal on 21ST March 2018. It was mentioned before the Tribunal Chairman on the same day for directions. The athlete was in attendance in person. The orders of the Chairman was that the tribunal was to arrange for a pro-bono legal representative for the athlete, Adak to serve the charge document within t days and a further mention on 11 April 2018.

4.2. The matter was mentioned on 11/4/2018, the Respondent had been served and was present and represented by Lumumba Fleming. It was confirmed that the athlete had filed his statement of response and the hearing was set for 17 May 2018.

4.3. On 17/5/2018, the matter came up for hearing before this panel. All the parties were present. The hearing proceeded with Mr. Omariba presenting a doctor as a witness while the defence had the athlete present as a witness. Mr. Lumumba requested for three weeks to file his written submissions, while Mr. Omariba would respond and file his within a week thereafter. The matter would be mentioned on 20th June 2018 after the hearing to confirm the same.

5. THE RESPONDENT'S EVIDENCE

5.1. The Respondent, Peter Kiptoo Kiplagat, who was in attendance was sworn in and testified in English. He was identified by his National Identity Card No. 24769729. He is 33 years old (born 10/10/1984).

5.2. He stated that he understood the charge and why he was before the Tribunal. He had received the ADRV notification that his sample collected during the marathon held in Casablanca, Morocco on 29/10/2017 had returned an AAF.

5.3. He stated that he had been an athlete for 10 years participating in races both locally and internationally. Some of the races he had participated in included: Peter Mulei Half Marathon (3rd), Kass FM Half Marathon (28th), Standard Chartered Marathon (42nd), Reims Marathon (1st)-2014, Istanbul Marathon (3rd) - 2016, Lagos Marathon (8th) - 2016, Barcelona marathon (4th) - 2017, and Casablanca Marathon (2nd) – 2017.

5.4. He stated that in all the national and international competitions there were anti-doping tests. He confirmed to having been tested in Istanbul, Reims, and Morocco, Casablanca. He reiterated that in all his tests no AAF had been there and that his results varied from winning to much lower positions.

5.5. He stated that he was shocked when he was informed by ADAK of the adverse findings. He responded to ADAK and said he would comply as required. He disclosed to ADAK all the supplements he took which he thought could be the source of the Clenbuterol. He also produced evidence with copies of pictures of the supplements.

5.6. In his evidence he stated that he travelled on 25 October 2017 from Eldoret passing through the various towns of Nakuru, Naivasha to Nairobi. On 27 October the flew into Morocco and stayed in a college. In all these places they ate various foods and he does know what they may have contained. He could not tell if the AAF was as a result of the food or the supplements that he had taken. He stated that he had always been professional.

5.7. On cross examination by Mr. Omariba he confirmed to have taken supplements for energy and recovery and also to rehydrate in preparation for competitions. When asked if the other athletes who they had travelled with and who participated in the race and were tested produced any AAF he said none tested positive. He confirmed that they had all eaten the same food as they travelled together.

5.8. Mr. Lumumba for the athlete contended that the illegal substances could be in the supplements from unscrupulous manufactures without being shown on the bottles and used by the athletes unknowingly.

6. DOCTOR'S EVIDENCE

6.1 The doctor, Julius Ogetto, has a Bachelor of Medicine & Surgery degree. He also has a post Graduate Diploma in Sports Medicine & Tropical Medicine from Japan. Dr. Ogetto has 34 years in the practice of medicine and 18 years in Sports Medicine.

6.2. The doctors confirms that the adverse results for the athlete for clenbuterol, which is an anabolic steroid which can be used for (i) Treatment of asthma (ii) Loose weight as a result of decreasing amount of fat with the resultant increase in muscle bulk and strength.

6.3 The doctor states that it does not occur naturally in the body. It attached to the receptors and relaxes the muscles, especially lung, and dilates the lung space – bronchodilator.

6.4 The ways of ingesting the drug according to the doctor are orally or through inhalation (puffs) from inhalors. Concentration in sample was 70pg.

6.5. Doctor states that Clenbuterol used by vets to increase body mass of animals (Mexico and China especially). He however states that food from fattened animals cannot reach the level found in the sample. He also states that the supplements shown do not have the steroids that have been found in this case.

7. ADAK SUBMISSIONS.

7.1. ADAK's final submission were filed on 7 July 2018 by Damaris Ogamba. Their legal submissions are as captured here below.

7.2. The applicant submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

A. PRESUMPTIONS

1. It further provided at Article 3.2 that facts relating to anti-doping rule violation may be established by **any reliable means** including **admissions** and the methods of establishing facts and sets out the presumptions. Which include;
   a) ***Analytical methods or decision limits*** ……
   b) *WADA accredited Laboratories and other Laboratories approved by WADA are **presumed to have conducted Sample analysis** and custodial procedures in accordance with the International Standard for Laboratories*
   c) *Departures from any other International Standard or other anti-doping rule or policy set forth in the code or these Anti-Doping **Rules which did not cause an Adverse Analytical Finding** or other anti-doping rule violation shall **not invalidate** such evidence or results.*
   d) *The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of a pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other person establishes that the decision violated principles of natural justice.*
   e) *The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the athlete or other person who is asserted to have committed an anti-doping rule violation based on the athlete or other persons refusal, after a request has been made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the agency.*

B. WHAT ARE THE ROLES AND RESPONSIBILITIES OF THE ATHLETE?

2. That under Article 22.1 the Athlete has the following Roles and responsibilities
   a) To be knowledgeable of and comply with the anti- doping rules.
   b) To be available for *Sample* collection at all times
   c) To take responsibility, in the context of anti-doping, for what they ingest and U*se*

d) To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-doping rules
e) To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years.
f) To cooperate with Anti-doping Organisations investigating Anti-doping rule violations.

3. The Athlete herein is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;
.....The spirit of sport is the celebration of the human spirit, body and mind and is reflected in values we find in and through sport including;
    - *Ethics, fair play and honesty*
    - *Health*
    - *Excellence in performance*
    - *Character and education*
    - *Fun and joy*
    - *Dedication and commitment*
    - *Respect for the rules and laws*
    - *Respect for self and other participants*
    - *Courage*
    - *Community and solidarity*

4. In his defence, the Respondent made a number of admissions and a few general denials. In his **evidence in chief** the respondent made the following admissions;
    a) He admitted the results of "Sample A" and he waived his right to "Sample B" analysis. Thereby accepting the "Sample A" results Under Article 7.3.1.
    b) By accepting the 'Sample A' results under Article 7.3.1, the Athlete thus admitted to the presence of a prohibited substance in his sample. (Article 3.2 of ADAK ADR)
    c) The athlete admitted that he has been an active participant in athletics events in previous occasions and has provided samples for testing on those occasions.

5. The respondent/athlete having admitted the presence of a prohibited substance Article 2.1.1 provides for *"strict liability"* on the part of the athlete. Similarly Article 10.2.1 the burden shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction.

6. The athlete herein has the burden of demonstrating how the prohibited substance entered her body.

C. PROOF OF ANTI-DOPING RULE VIOLATION

Intentional Violation

7. The Athlete was charged with the presence of *clenbuterol* in his sample a violation of Article 2.1 of the ADAK ADR. Clenbuterol is a Specified Substance and in fact accepted that it was there throughout the entire proceeding.

8. Rule 40.3 of the IAAF Rules sets out that the term intentional is meant to "identify those athletes who cheat. The term therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule

violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk"

9. For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, **he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV. According to established case-law of **CAS 2014/A/3820, par. 77** the proof by a balance of probability requires that **one explanation is more probable than the other possible explanation**. For that purpose, an athlete must provide actual evidence as opposed to mere speculation.

10. A failure to explain the concrete origin of the prohibited substance only means that an athlete cannot prove the lack of intent. In the matter of Canadian Weightlifting Federation and Taylor Findlay, the CAS Arbitrator Yves Frontier stated that:

    77. 'It appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says, contained Clenbuterol. With respect to the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body'

11. From the above, it is clear that to prove lack of intention, the Athlete must show sufficiently the manner in which the prohibited substance entered his body. We submit however that the athlete must demonstrate that the substance "<u>was not intended to enhance</u>" the athlete's performance. It does not suffice to say that one did not know that the medication contained a banned substance. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that *'The athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that Oliveira should not be followed'*

12. The applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the <u>violation was not intentional</u>. It follows then that he must necessarily establish how the substance entered his body.

13. The Applicant submits that, contrary to the submission made by the Athlete that merely stating possible scenarios that led to the Athlete ingesting a prohibited substance for the Tribunal to select the most probable of the lot is ill-founded. The CAS Panel in **UCI v. Alberto Contador Velasco & RFEC** had to assess each scenario independently on its merits to assess its likelihood before weighing the likely scenarios against each other. It is not the correct position as asserted by the Respondent that the possible scenarios should be considered likely at first instance without assessing any evidence to support the assertions.

14. The Respondent has failed to provide any evidence that he may have ingested contaminated meat making his allegation baseless. The Applicant urges the Panel to disregard the Respondent's assertion as it has been rendered unable to weigh the likelihood based on the absence of evidence.

15. It is the Applicants submission that the Respondent has failed to prove lack of intention to cheat based on his inability to prove origin and his knowledge on the overall fight against doping as premised by his participation in local events, international events and Ant-Doping educational seminars conducted by ADAK. The Respondent also demonstrated his ability to conduct research on doping matters as evidenced in his letter addressed to the Applicant detailing the performance enhancement mechanism of clenbuterol.

Origin

16. From the explanation given by the athlete, it is alleged that the athlete likely ingested the prohibited substance through contaminated food.

17. It is our submission that the athlete is required to prove the origin of the prohibited substance on a 'balance of probability'. The Balance of Probability standard entails that the athlete has the burden of convincing the panel that the occurrence of the prevailing circumstances is more probable than their non-occurrence.

18. In **Arbitration CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)** states that in order to establish the origin of a Prohibited Substance by the required balance of probability, the Athlete must adduce actual evidence as opposed to mere speculation. More is required by way of proof given the Athlete's basic personal duty to ensure that no prohibited substance enters her body.

19. It is clear from the above mentioned CAS case law that it is not sufficient for an athlete to merely suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine, food or other product the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that the medication the athlete took contained the particular substance.

20. The athlete in this case supposes that the substance may have entered his body through ingesting contaminated food. The Respondent failed to give details as to the possible location where he suspects he ingested contaminated meat. His omission casts a shadow of doubt on his explanation as he has failed to adduce concrete evidence as dictated by CAS Jurisprudence. Moreover, clenbuterol contamination in meat is region specific since not all cattle breeders use the same to increase meat production.

21. The above is made clear by the observations of the panel in **CAS 99/A/234 and CAS 99/A/235 Meca-Medina v. FINA** 'The raising of unverified hypothesis is not the same as clearly establishing the facts'.

22. Further in **CAS 2006/A/1067 IRB V. KEYTER** the panel held as follows:

> "The Respondent has stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of the cocaine occurred".

23. In that regard, we do submit that the origin of the prohibited substance has not been established.

Fault/Negligence

24. The athlete contends that he may have ingested contaminated meat leading to an AAF.

25. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

26. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body

> ***2.1.1*** *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1*

27. In **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26** *the panel observed that 'the athlete's fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.* In the event that the Athlete's assertion that he ingested contaminated meat is true, the applicant contends that the athlete in this case fell short of this requirement as he failed to carefully consider the eating establishments to which he has been a patron in the past. This lack of consideration is evidenced by the glaring absence of the mention of any establishment by name. This implicates that the Athlete is not keen on upholding his duties under the rules and regulations.

28. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before consuming meat of unknown origin. He was thus grossly negligent.

Knowledge.

29. The Applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

30. Further the applicant contends that the Athlete being an elite athlete has had a long career in athletics and it is only questionable that he has had no exposure to the crusade against doping in sports. In his Evidence-In-Chief, the Athlete stated that he has participated in more than 5 international events where his sample has been tested.

31. The Applicant holds that an athlete competing at national and international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as

a general rule that the products he ingests are free of prohibited/ specified substances

32. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited or specified substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product.

33. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that "an Athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of the Athlete's intent to enhance sport performance.

Sanctions

34. For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a Specified Substance *"and the Agency ... can establish that the (ADRV) was intentional"*. If Article 10. 2. 1 does not apply, the period of ineligibility shall be two years.

35. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. The athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance performance. If, but only if, those two conditions are satisfied can the athlete adduce evidence as to his degree of culpability with a view to eliminating or reducing his period of suspension.

36. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the Respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADC to warrant sanction reduction.

Conclusion

37. Article (WADC 2.1.1) emphasizes that it is an athlete's personal duty to ensure that no prohibited substance enters his or her body and that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation. There is sufficient proof of the anti-doping rule violation by the analysis of the athlete's sample which confirms the presence of the prohibited substance

38. We find that ideal considerations while sanctioning the athlete are:
    A. The ADRV has been established as against the athlete.
    B. The admission made by the athlete concerning "Sample A".
    C. The failure by the athlete to establish the origin of the prohibited substance.
    D. Failure by the athlete to take caution when ingesting meat of unknown origin.

E. The knowledge and exposure of the athlete to anti-doping procedures and programs.
F. The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was as a result of his negligent acts.

39. The maximum sanction of 4 years of ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

40. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.2.1 of the ADAK Rules and sanction the athlete to 4 years of ineligibility.

8. RESPONDENTS SUBMISSIONS

8.1. The respondents submission were prepared by Mr Lumumba of the firm Lumumba & Ayieko Advocates and filed on 28 June 2018.

1. Peter Kiptoo Kiplagat ('the Athlete') is an elite athlete of over ten (10) years' experience. He has participated in both local and international competitions. Equally, he has represented Kenya at various competitions. Like any other athlete, Peter has had mixed-results, sometimes winning, sometimes losing. Occasionally, he has come within the medal positions.

2. It is alleged that the Athlete committed an anti-doping rule violation ('ADRV') following an adverse analytical finding ('AAF') of clenbuterol detected in an in competition testing during a long distance Marathon, 2017 held in Casablanca, Morocco on 29th October, 2017.

3. At the said competition, the Athlete's urine sample was collected and split into two samples namely: A4113021 (Sample A) and B 4113021 (Sample B). Both samples were transported to the World Anti-Doping Agency ('WADA') accredited laboratory at Lausanne, Switzerland ('the laboratory'). The laboratory analysed the A4113021. The laboratory Analysis Result Record ('ARR') for the A Sample returned an Adverse Analytical Finding (AFF): showing presence of prohibited substance Clenbuterol; level roughly estimated at 1.015 ng/mL.

4. Clenbuterol is an Anabolic Agent (Section 1.2 Other Anabolic Agents) under the WADA Prohibited List for 2014 (and also for 2015). The Athlete does not have a therapeutic use exemption for clenbuterol.

5. Following the laboratory Analysis Record, the Athlete was notified in writing via the Anti-doping Agency of Kenya through a letter dated, 9th March 2018 that he might have committed an ADRV contrary to Regulation 21.2.1. The Athlete was provisionally suspended, pending the outcome of these proceedings, with immediate effect.

6. The Athlete was left in utter shock upon receipt of the Notice of Charge and provisional suspension from ADAK. He made representation showing how the prohibited substance could have found itself in his system.

7. Through the Statement of Defence filed on 11th April 2018, the Athlete, inter alia, gave evidence as to the sports supplements he used during the preparation for the race. He indicated he used Quamtrax (Gluta 5) Glutamine + Taurine + BCAA and Quamtrax multivitamin mineral. He gave evidence that he used the supplement to keep him healthy and

has never contemplated using supplements, which contain prohibited substances, knowingly, or with the intention of enhancing his performance or for doping reasons.

8. Further, in tracing the possible route of ingestion of Clenbuterol, the Athlete disclosed that during his journey to Morocco, he ate meat at various restaurants all the way from Eldoret, Naivasha, and Nairobi, at Kenyatta International Airport as well as in Morocco. The Athlete testified that meat is his favourite delicacy and that he regularly partakes of it at his home or at hotels whenever he travels. He further maintained that he could not have reasonably suspected that either the meat he ate or the sports supplements he has used were contaminated.

9. It is the Athlete's submission that he has always exercised utmost caution at all times in relation to his diet as well as sports supplements to ensure that he does not ingest any prohibited substances as well as substances that may compromise his health. As such, the Athlete submitted that the violation of the Anti-doping rules was not intentional and that he has honestly disclosed all the possible reasons why Clenbuterol could have been found in his system.

10. Moreover, Athlete confirms that he has submitted to more than one in competitions test, in which, the test results have been favourable. He has availed copies of the in-competition test results showing the Athlete's history. Save for the Morocco in-competition test, all the tests that the Athlete has undertaken shows that he has never violated Anti-doping rules. These competitions include: a) National Competitions

i. Kass Marathon- 2013

ii. Peter Mulley Half Marathon- 5/10/2014 b) International Competitions

i. Riems Marathon- 19th October 2014

ii. Rennes Marathon- 25th October 2015 iii. Istanbul Marathon- 13th November, 2016 iv. Madrid Marathon-24th April 2016

v. Lagos Marathon- 6th February 2016

vi. Barcelona Marathon – 12th March 2017 vii. Casablanca Marathon -29th November, 2017 (The only AAF)

11. Dr. Ogeto, the expert witness called by the Applicant in this matter adduced evidence indicating that clenbuterol are sometimes used to promote growth in livestock including cattle, lamb, poultry, swine among others. As such, he indicated that an athlete who ingests contaminated meat product may test positive for Clenbuterol. He indicated that the clenbuterol problem was largely in China and Mexico. Thus ingesting contaminated meat product was a probable cause of the adverse analytical finding.

12. Further, in his testimony, the expert witness did indicate that in as much as some of the sports supplement used by the Athlete are not in the WADA prohibited list, he would not be surprised to find traces of prohibited substances including clenbuterol in them. He led evidence at this Honourable Tribunal indicating that there are documented examples where traces of Clenbuterol and other prohibited substances have been found in non-prohibited sport supplements. As such he pointed out that this would be a likely root of ingestion of Clenbuterol, a prohibited substance.

13. It was noted that ADAK has done little in terms of educating the athletes no the WADA prohibited substance.

14. From the foregoing, and in accordance with Article 22.1 of ADAK ADR, which provides that the Athlete is responsible for his or her own actions, and being an offence of strict liability, the issue for determination is whether the athlete has succeeded in proving his case.
B. Whether the Athlete has proved his Case.

15. Your Honour, the Respondent we proceed to address this question under the

following sub-headings:

i. Whether the Athlete has discharged the Burden of Proof

16. It is our submission that the burden of proof is on a balance of probability. That is a lesser standard than 'beyond reasonable doubt' or 'comfortable satisfaction'. It is therefore important to pose the question, what does it mean? In a word, 'probably'. We draw inference from the CAS Panel in **Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo,** Arbitration, hereinafter, the **''Contador Case''** where it was explained as at paragraph 8 that:

"The athlete can only succeed in discharging his burden of proof by proving that in his particular case meat contamination was possible and that

(2) other sources from which the Prohibited Substance may have entered his body either do not exist or are less likely. The latter involve a form of negative fact that is difficult to prove for the

athlete and which requires the cooperation of the Appellants. Thus, it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established on a balance

of probability how the Substance entered his system, since in such situations the scenario he is invoking will have met the necessary 51% chance of it having occurred..."

17. The central question is thus- has the Athlete established that the clenbuterol probably came from his consumption of contaminated meat? In addressing this question, we submit that the tribunal must be mindful of the possible routs of ingestion of the clenbuterol-contaminated meet product.

18. In order to address this question fully, and without leaving it partly answered, it is the Respondent's submission that this requires more than establishing "that the clenbuterol concentration is consistent with the Athlete having eaten contaminated meat. As such, it should be established to the requisite standard that the specific meat he consumed was contaminated or that such meat (if eaten) caused the AAF.

19. In this regard, we make reference to **Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo**, Arbitration CAS 2011/A/2384, where the CAS Panel stated at para 177 that:

"[a]s the parties agreed that it is possible that a contaminated piece of meat could cause an adverse analytical finding of 50pg/mL of clenbuterol, the only remaining element (the "missing link") is whether that specific piece of meat was contaminated with clenbuterol. The

Panel is not prepared to conclude from a mere possibility that the meat could have been contaminated that an actual contamination occurred."

20. The Contador's case thus summarised its position at paragraphs 332, 333-334 as follows:

"332. The Panel has to assess the likelihood of different scenarios that – when looked at individually – are all somewhat remote for different reasons. 334.... In weighing the evidence on the balance of probabilities and coming to a decision on such basis, the Panel has to take into consideration and weigh all of the evidence admitted on record, irrespective of which party advanced which scenario(s) and what party adduced which parts of the evidence.."

21. Therefore, in this instance, the Athlete must establish that it is more likely than not that the Adverse Analytical Finding was caused by his consumption of contaminated meat. As such, it is our submission that the athlete's case is based on the following sequence of events:

a) Before the sample was taken, he ate meat;

b) The meat he ate was contaminated with clenbuterol; and

c) Eating that clenbuterol-contaminated meat caused the AAF.

22. It is therefore our submission that the Athlete's evidence on this should be accepted. As a matter of fact, that the Athlete ate meat when and where he described has not been challenged by the Applicant. The starting point is thus- the Athlete ate meat more than once shortly before the in-competition test in Morocco on the 29th October 2017.

23. Understandably so, the Athlete cannot recover the meat he ate. He was not notified of the AAF until some months after he consumed the meat, particularly, vide a Notice of Charge and Provisional Suspension dated 9th March 2018. Moreover, he consumed meat at more than one restaurant. We submit that no meat has been recovered from the restaurants pointed out by the Athlete, as such, no clenbuterol tests were conducted.

24. We also submit that no comparison was made on the findings on clenbuterol on A4113021 (Sample A) and A4113021 (Sample B). Therefore it cannot be established whether the level of Clenbuterol in Sample A and Sample B were identical, namely, 1.05 ng/mL.

25. Dr. Ogeto, the expert witness, pointed out that the urine level is not diagnostic. We submit that, attempts to provide a reliable, validated scientific method for distinguishing between the Pharmaceutical administration of clenbuterol and its consumption through contaminated meat are at a promising but early stage. Current tests are highly time dependent and cannot provide unequivocal evidence in such cases. In that context we submit, that the opinion of Dr. Ogeto of ADAK that at present there is no way to determine whether an AAF for clenbuterol results from contaminated meat or pharmaceutical preparations is correct.

26. He said that the low level readings could be the result of one of two scenarios: (1) the end of exertion of the administration of clenbuterol to enhance sport performance two weeks earlier to the testing or (2) the ingestion of very low amounts of clenbuterol in the two previous days. The latter would not, in his opinion, "enhance performance" and be of "no benefit" to an Athlete. It is our submission that the Honourable Tribunal should accept the Athlete's evidence before itself, unchallenged by the Applicant, that he did not knowingly take clenbuterol.

27. On the contaminated meat route, the Applicant pointed out that meat contamination is only prevalent in Mexico and China, and that the Athlete had not indicated that he was in those jurisdiction a few weeks to the in-competition test. While we note the history of the two jurisdiction, it is our humble submission, that livestock products from both China and Mexico have found themselves within the Kenyan territory, through imports. Moreover, Clenbuterol is not only available to farmers in the two jurisdictions but also Kenya, who may administer the same product on various livestock to hasten their maturity. On similar fact evidence, and as a matter of public concern, we invite this Tribunal to take Judicial Notice of the fact that harmful and contaminated products have found themselves at the shelves into Kenyan jurisdiction, sometimes, without the knowledge of the relevant authorities. So there is a high probability of the presence of clenbuterol in livestock products in Kenya.

28. Dr. Ogeto, the expert witness, further, in his testimony, did indicate that in as much as some of the sports supplement are not in the WADA prohibited list, he would not be surprised to find traces of prohibited substances including clenbuterol in them. He led evidence at this Honourable Tribunal indicating that there are documented examples where traces of Clenbuterol and other prohibited substances have been found in non-prohibited sport supplements. As such he pointed out that this would be a likely route of ingestion of Clenbuterol, a prohibited substance. It is for this reason that we invite this Honourable Tribunal to consider this route of ingestion as canvassed by the expert witness. This is in-line with the decision in **Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo**, Arbitration CAS 2011/A/2384, at paragraph 334 where the panel indicated:

".... In weighing the evidence on the balance of probabilities and coming to a decision on such basis, the Panel has to take into consideration and weigh all of the evidence admitted on record, irrespective of which party advanced which scenario(s) and what party adduced which parts of the evidence..."

29. In the absence of any other possible source or explanation, and in light of the clenbuterol level and Dr. Ogeto's professional opinion, we submit that the Athlete has established on a balance of probability that there is a chance that the meat he ate was contaminated with clenbuterol.

30. Eating that clenbuterol-contaminated meat caused the AAF. The Athlete has never tested positive before. It is our submission that his unchallenged evidence that he had not taken clenbuterol knowingly should stand. We further submit that the Athlete's evidence that the food supplement used are not listed under the WADA list on prohibited substances and as such he did not knowingly ingest Clenbuterol. The Respondent thus have no reason whatsoever to doubt the expert witness opinion that showed that though some supplements may not be on the WADA list of prohibited substances, some may be laced with prohibited substances as a result of the manufacturer's negligence or unethical conduct.

31. There is no other known or possible source or explanation for the clenbuterol. ADAK did not suggest one. Therefore it is our humble submission that the Athlete has discharged his burden of proof.

32. We further submit that the facts of this matter raises similar issues to the **Condator Case** as described herein. It is our submission that its worthy of note that in Contador there was three possible and competing sources of, or possible explanations for the clenbuterol, namely:

contaminated meat (imported into Spain where it was said to have been consumed), blood transfusion or supplements, at paragraphs 65, and 333.

33. Thus we invite this Honourable Tribunal to consider all the possible routes of ingestion as presented herein to enable it reach a fair and just determination. This is reflected in the Contador's Case where the panel considered all the possible routes of ingestions as advanced. In particular, the Panel noted:

"....the Panel considers it very unlikely that the piece of meat ingested by him was contaminated with clenbuterol, it finds that, in light of all the evidence on record, the Athlete's positive test for clenbuterol is more likely to have been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat."

34. As a consequence, it is our submissions that, in Contador the CAS panel observed that if an athlete raises a prima facie case, as the Respondent has demonstrated, as to how the Prohibited Substance came into his body, the anti-doping authority cannot simply sit back and say that the athlete has not proven it on the balance of probabilities. Rather it has a duty to raise a counter explanation if it sees one, and the role of the Tribunal is then to assess which of the explanations is most likely on the evidence. The same point was made in the Case of Mariano Puerta. The Applicant having considered all the evidence, did not advance a contrary explanation as to how the Prohibited Substance came into the Athlete's system.

ii. Whether there was no fault or negligence on the part of the Athlete

35. Accordingly, we submit that that his consumption of clenbuterol-contaminated meat was the source of the Prohibited Substance detected in his sample. This is in accordance with Regulation 21.22.4, which prescribes for no fault or negligence. The 2009 WADC defines no fault or negligence thus:

"The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method".

36. Also, Anti-Doping Tribunals have approached the definition of No Fault or Negligence, for instance, in the case of **In Fédération Internationale de Natation ('FINA') v Cielo** (29 July 2011) the CAS Panel observed (para 8.8):

"It is very easy to imagine situations where a party would be held neither to be at fault nor negligent in circumstances of contamination or mis-labelling of a supplement by third parties if civil law or common law principle were strictly be applied. However, the comments to the Rule [Article 10.5.1] makes it clear that wherever there is such contamination or mis-labelling of a supplement then a sanction of some sort must be applied, and it follows, that notwithstanding the definition of 'no fault or negligence' in the FINA Rules/WADC, some fault or negligence has to be found to exist whenever an Athlete uses a contaminated or mis-labelled supplement."

37. By its use of the words "has to be found" it seems that the CAS Panel meant that there must be some fault or negligent imputed (whatever the other facts of the case) where athlete takes a contaminated supplement. That is not what the words of the 2009 WADC and the definition of 'no fault or negligence' therein provide. They were also used deliberately by WADA, being words derived from, and well understood by lawyers.

38. The 2015 WADC provides this definition:

"No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of

Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system."

39. Further the constituted CAS panel in **Fédération Internationale de Football Association ('FIFA') v WADA**, CAS Advisory Opinion (dated 21 April 2006, paragraph 73 provides:

"The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impracticable expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the commentary to Art 10.5.2 of the WADC as cases of 'no significant fault or negligence' may reasonably be judged as cases of 'no fault or negligence'."

40. Further, in **CJS GAI FOREST v FEI**, FEI Tribunal decision (dated 14 September 2010, paragraph 33, it is noted that:

"With regards to the question of fault or negligence, the Tribunal is of the opinion, in line with the CAS Advisory Opinion of 2006 issued by CAS upon request of FIFA and WADA, that the prerequisite of 'no negligence no fault' has to be achievable and that a 'reasonableness test' has therefore to be applied".

41. It is our submission that the Applicant Respondent has presented himself for in competition test on a number of occasion and has never had an AAF. Moreover, the History of the Athlete indicate that prior to the Morocco competition, the Athlete has never had any Anti-doping violations.

42. We also submit that the Honourable Tribunal should take into consideration the role of the Applicant in educating the athlete on anti-doping issues, and how well it has played its role. We submit that an indictment on the role of the Applicant, in terms of advocacy surrounding anti-doping issues, can be termed as contributory negligence on the part of the Applicant, should the tribunal find that the Athlete was negligent in one way or another. iii. Conclusion on no fault or negligence

43. We submit that the Athlete succeeded on the route of ingestion and as such it is inevitable that this was a no fault or no negligence case.

44. Though the Athlete has neither been to Mexico nor China, meat products from these countries have found themselves in Kenya. The Athlete did not know then of the risk of contaminated meat. It was clear during cross examination that he had not read any information on that topic available on the websites about possible meat contamination. ADAK did not tell him of it or of the risk of clenbuterol contaminated meat.

45. In those circumstances and on these particular facts it is our submission that the Athlete has discharged his burden under Regulation 21.22.4 and established that he was not at fault or negligent.

46. In the circumstances, the Athlete prays for a substantial reduction from the maximum penalty of four (4) years by the Applicant to a reprimand.

9. PANEL'S REVIEW OF THE MATTER

9.1. The panel is of the view from the foregoing that there are unchallenged facts. These are:

i) That the athlete Respondent has not in any way challenged the validity of the process of sample collection, handling, transportation and testing.

ii) The laboratory finding for the AAF for Clenbuterol has been admitted and the Respondent in deed waived the right for the testing of the "B" sample.

iii) Clenbuterol is listed as a prohibited substance under S1.1B of the 2017 WADA Prohibited List (Anabolic agents) and is a non-specified substance (Article 4.2.2. of WADC).

9.2 The issues that then render themselves for discussion, review and determination are;

i) Whether the ADRV was inadvertent

ii) The applicable period of ineligibility

iii) Whether the Respondent can benefit from any reduction

iv) What period of ineligibility to impose and any other orders.

9.3 The central question to be dealt with is, has the athlete established that the clenbuterol came from his consumption of contaminated meat? In this case the athlete must establish that it is more likely than not that the AAF was caused by his consumption of contaminated meat.

9.4. It is the athlete's contention that the tribunal should be conscious of the various "routes" of ingestion. He contends that he ate meat at various restaurants on his way to the competition and that he could have ingested the substance in any of those places. He is however not specific of the names of these restaurants or the specific location of contamination.

9.5 The athlete submits that no meat was tested and therefore he cannot be blamed for that fact. The athlete passes the onus of the lack of meat to be tested on testing agencies. The onus however on how the substance got into his body remain with the athlete because only he knows how that could have happened and cannot be passed on to the testing bodies.

9.6 On the contention that the contamination could have been from the supplements, this has been disproved by the doctor that none of the supplements as shown by the evidence contains clenbuterol and therefore there was no possibility of contamination from them.

9.6 The contention by the athlete that no comparison was made on the findings of Sample A and Sample B cannot be upheld as the athlete was given the option to have their Sample B tested and they passed up the opportunity and cannot therefore fall back on the fact that there was no comparison of the two tests done.

9.7 It is the view of the panel that the athlete has misapplied the view in the Contador case. The athlete has failed to provide evidence he ingested contaminated meat on a "balance of probability" that it is more probable than their non-occurrence. In our view the athlete merely speculates that as being one of the "options" for the panel to "consider". The athlete had suggested that the AAF could have been from meat, supplements, medicine or ''other products". The athlete speculates that there is possibility that meat may have been imported from China and Mexico but does not provide proof thereof. The athlete also avers that the substance could have found its way to Kenya and used on livestock but again no proof of the same is provide

9.8 The responsibility as to the knowledge of how the substance was ingested remains the personal duty of the athlete. It is the view of the panel that the principle of strict liability does indeed lie with the athlete. The respondent has indeed failed to discharge his duties under Rules 22.1.1 and 22.1.3 of ADAK ADR. In view of this it is the panel's view that the ADRV has been established in the prescribed manner **(Article 3.2)** and thus from that point the burden shifts to the Respondent to demonstrate that such ADRV occurred without any fault or negligence on his part. We think that the submissions by the Respondent's counsel regarding the burden of proof are in error as already noted and without due regard for the obligations placed on the Athlete both under the ADAK ADR and WADC.

9.9. By his own admission, the Respondent has undergone testing before, he is familiar with the doping controls. He has travelled variously to run in several local and international events. He therefore cannot be considered to be naïve or totally unknowing. In any event the provisions of both the Anti-Doping Act Kenya and the WADC make it his obligation to be knowledgeable on matters on Doping (Article 22.1) and take responsibility for what he ingests and uses.

9.10 From the Respondent's evidence at the hearing this panel is convinced that the Respondent has **NOT** demonstrated to the comfortable satisfaction of this panel (see **Maria Sharapova case –[case 2016 /A/4643**]) that the ADRV occurred without intent on his part or after the exercise of due diligence and that there is no significant fault OR NEGLIGENCE . The panel is more inclined to believe that the ADRV arose from a deliberate action or an act of total and reckless abandon of duty of care expected of him and imposed by the applicable Anti-Doping Rules.

9.11 We do not agree with the Respondent's counsel submission that the ADAK has failed to discharge the burden of proof of facts in view of there being no meat to be tested or comparatives done of the Samples, which had not been requested for the Case of Sample B. ADAK does not have to show that the Respondent used the substance intentionally. That burden is on the Respondent to show LACK OF INTENTION IN ORDER TO ATTRACT a reduced period of ineligibility, to show no fault or negligence. In this case the Respondent has failed to do so in both counts.

10. CONCLUSION

Having Considered this matter in totality, the evidence of the Respondent and doctor, the admission and the fact that there was no reason adduced to show how Clenbuterol was ingested, this Panel is not convinced that there are any grounds for reduction of the Period of ineligibility. Accordingly, we are of the view that the Athlete's deliberate assumption of risk

must attract the full period of ineligibility of 4 years being a first offender. **[Art.10.3.1. of the ADAK Rules]**

DECISION

This Panel therefore holds as follows:

i. The ADRV has been sufficiently proved. There are no grounds for reduction of sentence. The Respondent shall be ineligible for a period of 4 years with effect from 9th March 2018 (the date of provisional suspension).
ii. All result obtained by the Respondent from 29th October 2017 inclusive of points and prizes are disqualified.
iii. The parties shall bear their own costs of these proceedings.

DATED at **NAIROBI** 16th day of August 2018.

Signed:
Elynah Shiveka

Shiveka

Deputy Chairperson, Sports Disputes Tribunal

In the presence of:

1. Njeri Onyango

2. Gabriel Ouko