

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 12 OF 2018

ANTI-DOPING AGENCY OF KENYA.....APPLICANT

-versus-

NICHOLAS KIPLAGAT KOSGEI..... RESPONDENT

RULING

Hearing: 11 July, 2018

Panel: Elynah Shiveka Deputy Chairperson
Gabriel Ouko Member
Robert Asembo Member

Appearances: Mr.Omariba for Applicant
Respondent unrepresented

THE PARTIES

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a male athlete competing in national events.

BACKGROUND AND THE APPLICANT'S CASE

3. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 12th June, 2018.
4. The Applicant brought charges against the Respondent that on 13/05/2017 ADAK Doping Control Officers in an in-competition testing at the "Kenya Prisons National Athletics Championships" collected a urine sample from the respondent. Assisted by the Doping Control officer, the Respondent split the Sample into two separate bottles, which were given reference numbers A 4058559 (the "A Sample") and B 4058559 (the "B Sample") under the prescribed World Anti-Doping Agency procedures.
5. The "A" sample was subsequently analyzed at the WADA accredited laboratory in Paris, France and an Adverse Analytical Finding revealed the presence of prohibited substance *prednisone* and *prednisolone* which are prohibited under the 2016 WADA prohibited list. They also are specified substance under Article 4.2.2 WADC.

6. The findings were communicated to the Respondent by Japhter Rugut, Chief Executive Officer of ADAK through a Notice of Charge and provisional suspension vide letter dated 18/07/2017. In the said communication the athlete was offered an opportunity to provide an explanation for the Adverse Analytical Finding to which the Respondent failed to respond to by the deadline of 25/07/17.
7. The Applicant states that the Respondent's did not request a sample B analysis as informed by the same letter. The letter also informed the athlete of other avenues for sanction reduction including prompt admission and requesting for a hearing.
8. Moreover, the Applicant states that there is no departure from the international standards for laboratories and international standards for testing and investigations that could reasonably have caused the AAF as outlined in Article 3.2.3.
9. The applicant contends that the respondent athlete failed to provide an explanation by the deadline granted. He, however, provided an explanation through a letter dated 9 August 2017 in response to the letter notifying him of the charges he faces dated 18 July 2017. In his letter, he admitted to taking prednisolone to remedy chest blockage, irritation on body and a runny nose.
10. The respondent athlete through an email on 10/08/17 requested that the hearing of his case be moved to February 2018 as he was still actively engaged in his work/military related training program and therefore could not be present at the time.

11. The respondent athlete, through a hand-written letter addressed to the agency dated 11/08/2017 admitted to the charges and admitted to the accuracy of the Adverse Analytical Finding emanating from the analysis of his Sample A. He further stated that he did not wish to have his Sample B analysed and that he was willing to accept any sanction imposed.

12. The athlete in an email addressed to the applicant dated 24/05/18 confirmed that he had taken prednisolone which he acknowledged was a prohibited substance. In the same e-mail, he stated that he took the said substance to cure an illness and not to enhance performance. The respondent did not provide any evidence to substantiate his claims.

13. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substance prednisone and prednisolone in the athlete's sample.

14. The Applicant further stated that the Respondent had no TUE recorded at the IAAF for substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused adverse analytical finding. Furthermore, the Applicant states that the Respondent has a duty to know what he ingests or whatever gets into his body in whichever way and comply with the WADA international standards as per Article 22.1 of the ADAK ADR.

15.ADAK also notes that the ingestion was intentional and no possible explanation can be given on fault or negligence by the athlete or a third party.

16.ADAK prayed for:

- a) All competitive results obtained by Nicholas Kiplagat from and including 13th May,2017 until the date of determination of the matter herein be disqualified with all resulting consequences including forfeiture of medals and prizes as outlined by Article 10.1 ADK ADR
- b) Nicholas Kiplagat be sanctioned to a two-year period of ineligibility as provided by the ADAK Anti-Doping Code as per Article 10 of ADAK and WADC Rules.
- c) Costs as per Article 10.10

17.The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act.

HEARING

18.When the matter came up for on 11/07/18 both parties were present. The Applicant was represented by Mr. Rogoncho while the Respondent Athlete, Nicholas Kiplagat was unrepresented.

19. Mr. Rogoncho took the respondent through his admission statement dated 09/08/17. The athlete confirmed that the statement was his. He also confirmed that the fact as shown on the statement were correct.

20. When the respondent was asked if he understood what he was being charged with he confirmed that he did. He admitted that he did compete in the Prisons games and was tested. He also confirmed and accepted that the results of his tests confirmed the use of the drug prednisolone.
21. The Respondent admitted the use of the drug prednisolone due to the fact that he had an irritation on the body, runny nose and a blockage in the breathing system. He stated that he went to a chemist who gave him 4 tablets pf prednisolone over the counter for Sh 3 per tablet and that he was to take one per day for 4 days.
22. Mr. Rogoncho asked the athlete if the testing officer had asked if he had used any drug and the athlete confirmed that he had been asked. He also confirmed that he had answered "NO" to the use of any drug.
23. The athlete in mitigation said that he had used the drug unknowingly as he was "unaware" that it was a banned drug. He said that it was his first time to be tested and had never been aware of issues of doping. He stated that he had no personal doctor and that he had in the past taken any medicine available in the home oblivious of the content and consequences.
24. The athlete stated that he trains alone, he has no coach. He has no passport. He stated that he agreed with the results and did not wish to have the Sample B tested. He was ready for the consequences. When asked if he was aware of the consequences he stated that he had been informed by ADAK that it was a ban of two years.

25. The athlete is 23 years old, works with the Kenya Airforce and lives in Ngong. He finished his Form 4 exams in 2014 and got a D+. He hails from Ziwa in Eldoret.
26. When the athlete was asked if he had any final comments, he stated that during the testing he was taken to a room and left alone with nobody to take a sample. He feels that the process was unprofessional. He also feels that more should be done in the education of athletes at an early age. He also reiterated that the issue of Chemists selling drugs that are banned over the counter should be dealt with.
27. In closing the applicant stated that they would not make any further submissions and would rely on the athlete's admission and their charge sheet for their case.

DECISION

28. The panel has taken the liberty to examine all the documents and the evidence adduced at the hearing. These are our findings.
29. *Prednisone* and *prednisolone* which is prohibited under S9 of the 2016 WADA prohibited list is alleged to have been found in the Respondent's urine sample.

30. Article 2 of the WADC states that:

“Athletes or other persons shall be responsible for knowing what constitutes an anti-Doping rule violation and the substances and methods which have been included on the prohibited list”

31. Additionally Article 2.1 WADC provides that:

“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 sample.

Accordingly, it is not necessary that intent, fault negligence or knowing on the athlete’s part be demonstrated in order to establish an anti-doping rule violation under WADC Article 2.1 (emphasis ours).

32. Consequently, as provided in Article 2.1.2 WADC sufficient proof of an anti-doping rule violation under 2.1 is:

“presence of a prohibited substance or its metabolites or markers in the athlete’s A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or.....”

33. The Applicant has demonstrated the presence of a prohibited substance in the Athlete’s A sample and this has admitted by the athlete.

34. Article 2.1 of the WADA code establishes “strict liability” upon the athlete. Where presence is established as in this case the onus is upon the athlete to render an explanation and to dispel the presumption of guilt on his part. Such explanation must however be assessed while bearing in mind sections of Article 2.1.1 of WADC as set out above and emphasized.

35. The athlete by his own admission had confirmed buying 4 tablets of prednisolone over the counter from a chemist in Eldoret and ingesting the same.

36. The Tribunal has invariably stated in various decisions that Athletes bear the ultimate duty to ensure that anything that gets into their system does not result into an ADRV. In the Tribunal Case of **Anti Doping Case No.13 Of 2017 ADAK V Sarah Kibet** while reprimanding the athlete we stated:

“...that even with her modest education and at 26 years of age the Respondent has been able to muster her resources and piece up a response and defence to the notice to the ADRV from the Applicant as seen from her letter dated 13/07/2017. She has travelled the world finding her way out of and into international airports without much difficulty. With such kind of international exposure, we find it hard to comprehend why the Respondent who has been competing in world marathons has not taken the liberty to understand what doping entails.”

37. The Respondent is no different here. He is a high school graduate who is exposed to the world. His actions are inexcusable especially where now with the internet revolution he is able to access information on doping easily and freely.

38. We have always said that the drafters of the Code were also alive to the fact that athletes would occasionally fall sick and seek medical attention. But they also gave a window of opportunity for athletes to seek Therapeutic Use Exemption (TUE) under Article 4.4 of the Code

and use it as a defence against any charge of this nature or an ADRV outcome. The Respondent sought never sought any such exemption.

39. In the **Cilic** case the court said:

“an athlete’s youth and/or experience: language or environmental problems encountered by the athlete, the extent of anti-doping education received by the athlete, any personal impairments such as those suffered by an athlete who has taken a certain product for a long period of time without incident,..... an athlete who is suffering from a high degree of stress and an athlete whose level of awareness has been reduced by a careless but understandable mistake.”

40. We are alive to the fact that the Respondent is a first-time offender, he is also remorseful and admitted to the ADRV in his pleadings at the first instance and at the hearing. However, in every sport including athletics there are rules and it is the duty of every sports man and woman including the Respondent to abide by them faithfully.

CONCLUSION

41. In the circumstances, the Tribunal imposes the following consequences:

- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 2 years from ~~25~~25/07/17 pursuant to Article 10.2.2 of the WADC;

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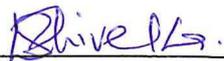
- b. The disqualification of all competitive results from and including results of 13/05/17 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- c. Each party to bear its own costs;
- d. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.

42. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated and delivered at Nairobi this day of 6th September _____, 2018.

Signed:

Elynah Shiveka



Vice-Chairperson, Sports Disputes Tribunal

Signed:

Gabriel Ouko



Member, Sports Disputes Tribunal

Signed:

Robert Asembo



Member, Sports Disputes Tribunal