

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
ANTI DOPING NO. 15 OF 2018

IN THE MATTER BETWEEN

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

-Versus-

HENRY KIPROTICH SANG.....RESPONDENT

DECISION

**Hearing** : 13<sup>th</sup> September 2018

**Panel** : Mr. John M. Ohaga - Chair  
Njeri Onyango - Member  
Mary Kimani - Member

**Appearances:** Mr. Bildad Rogoncho, Advocate for the Applicant;  
Henry Kiprotich Sang, Athlete in person.

## The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter 'ADAK' or 'The Agency') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is an adult male of presumed sound mind and a national level Athlete (hereinafter 'the Athlete'). His address of service for purposes of this suit has been in the care of the Applicant.

## Brief Background

3. The proceedings were commenced by the Applicant filing a Notice to Charge against the Athlete dated 22<sup>nd</sup> June 2018 addressed to the Chairman of the Sports Disputes Tribunal.
4. Directions were issued on 16<sup>th</sup> July 2018 whereby a Panel was constituted to hear the matter and the same scheduled for mention before the Tribunal on 1<sup>st</sup> August 2018.
5. On 1<sup>st</sup> August 2018, the Athlete present and identified as Henry Kiprotich Sang -Identity Card No. 28535338 admitted to the Charge. Thereafter, Counsel for ADAK, Mr. Bildad Rogoncho requested for seven (7) days to enable him to file the Charge Document; whereupon directions were issued, and the matter scheduled for hearing on 23<sup>rd</sup> August 2018.
6. Notably, the Applicant vide the Charge Document filed at the Tribunal on 23<sup>rd</sup> August, 2018 brought charges against the Respondent observing that on 3<sup>rd</sup> December, 2017 CHINADA Doping Control Officers ("DCOS") collected a urine sample from the Athlete. Aided by the Doping Control Officer, the Respondent split the Sample into two separate bottles, on each occasion, which were given reference numbers as follows; **A 6213312** (the "**A Sample**") and **B 6213312** (the "**B Sample**") under the prescribed World Anti-Doping Agency (WADA) procedures.
7. Subsequently, both Samples were taken to the WADA accredited laboratory in Beijing, China. The laboratory analyzed the "**A Sample**" in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The analysis of the "**A Sample**" returned an Adverse

Analytical Finding (AAF) indicating the presence of a prohibited substance *Norandrosterone*.

8. The findings were communicated to the Athlete who requested for an analysis of "**B Sample**" which equally came out positive.
9. The Athlete in his response through a letter dated 19<sup>th</sup> January 2018 stated that he does not use any banned drugs and is ready to cooperate with ADAK.
10. He posited that he notified ADAK of the medication prescribed to him by his Doctor prior to the marathon, in which he did use Neurobine and venofer. He, however, failed to notify CHINADA of the same on the day of the doping test. He equally went ahead to provide a list of the medicines he was prescribed and stated that he only drank red bull before participating in the race.
11. Norandrosterone is an S1 (Anabolic Agent) prohibited at all time (in and out of competition) therefore it is not a Specified Substance.

### The Charge

12. The Anti - Doping Agency of Kenya is therefore preferring the following charge against the Athlete: -  
**Presence of a prohibited substance norandrosterone in the Athlete's sample under Article 2.1 of the WADC as read with ADAK's ADR Article 2.1 and Rule 32.2 (a) and Rule 32.2 (b) of the IAFF Competition Rules 2016 - 2017**

### Jurisdiction

13. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti- Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

### Hearing

14. At the hearing ADAK was represented by Mr. Bildad Rogoncho while the Athlete appeared in person.

## Respondent's Case

15. In his examination in chief, the Athlete sought for leniency in respect of the charge. He did not dispute the presence of the prohibited substance found in his body.
16. The Athlete acknowledged his failure to inform the Doctors that he was an Athlete when he attended Kericho District Hospital that being his first stint of illness. Prior to the doping instance, he stated that he had been winning since 2006.
17. On the material date, when he was taken ill, he noted that he had no appetite and his knees were hurting, a fact that he attributed to the race he had run in Indonesia where the weather was very hot. Thereafter, he further travelled to China.
18. He noted that he had previously been tested six (6) times and had not returned a negative result. On this occasion, he failed to disclose to the DCO that he had this medical prescription. He nonetheless noted that he had not received any education on doping.
19. On his educational background, he stated that he only went to school until Standard 4 and he did not have an alternative source of livelihood. Previously, he had been employed as a herds boy by a retired Athlete, one Dominic Kirui who spurred his interest in running and had since then been training with other athletes in Kericho.
20. On cross examination, he admitted that he took the prohibited substance.
21. He begged for leniency since he was an orphan and was the only breadwinner in his home and had three other younger siblings who depended on him.
22. He admitted that he indeed wrote the letter dated 1<sup>st</sup> March 2018 in which he acknowledged the offence.
23. It was from the foregoing, that the Applicant and the Athlete closed their respective case and resorted to the Tribunals finding on the same

## THE LAW

24. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations. The same is reinforced by the provisions of Article 2 of the WADA Code that provide circumstances and conduct which constitute anti-doping rule violations.

25. Section 31 of the Anti-Doping Act provides that; -

**“(1) The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organizations. (2) The Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention against Doping in Sports, the Sports Act, and the Agency’s Anti-Doping Rules, amongst other legal sources.”**

26. Consequently, the Tribunal's decision will be premised on the provisions of the Anti-Doping Act 2016, the WADA Code, the IAAF Competition Rules and other legal sources.

## REASONING

27. Paramount to the findings of the Tribunal are the provisions of Article 2.1.1 and 22 of the WADA Code and the ADAK Rules which are premised on the fact that it is the Athlete’s personal duty to ensure that no prohibited substance enters his or her body. The Athlete is essentially deemed to be personally liable for any prohibited substance or its metabolites or Markers found to be present in their samples. This position is reinforced by the decision in **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26** where it was stated:

*“the athlete’s fault is measured against the fundamental duty that he or she owes under the Programme and WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.*

28. Having said that, the Tribunal notes that it is not contested that the Athlete’s test did return an Adverse Analytical Finding (AAF) indicating the presence of a prohibited substance **Norandrosterone**.

29. The Athlete indeed admitted to the fact that a prohibited substance was found in his body and prayed for leniency.
30. It is therefore not disputed that the Athlete was found to have acted contrary to the provisions of Article 2.1 of the WADA Code and as such the consequent results as enumerated in Article 10.1 and 10. 2 of the WADA Code follow.
31. The subsequent penalty as enumerated in Article 10.2.1 of the WADA Code and the ADAK rules provides that the period of ineligibility shall be four (4) years where the anti-doping rule violation involves a specified substance, unless the Athlete can establish that the anti-doping rule violation was not intentional.
32. In view of the nature of the substance, the Athlete has the burden of establishing that the ADRV was intentional. The standard of proof here is greater than a mere balance of probability but less than proof beyond reasonable doubt.
33. The provisions of Article 10.2.3 of the WADA Code / ADAK rules provide that in order for a violation under the Code to be deemed 'intentional' the Athlete should have known that the conduct constitutes an anti-doping rule violation; and that there was a significant risk that the conduct could constitute or result in an anti-doping rule violation and that he or she manifestly disregarded that risk.
34. The Applicant in this case has produced a prescription from Kericho District Hospital and has testified that the medication that he ingested was prescribed by a doctor at the hospital. The treatment notes further set out in some detail the condition for which the Athlete was being managed, being iron deficiency anemia and the further complaints.
35. We note that in **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel placed the burden on the Athlete to demonstrate that the substance was not intended to enhance his or her performance. The Panel in its finding 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*

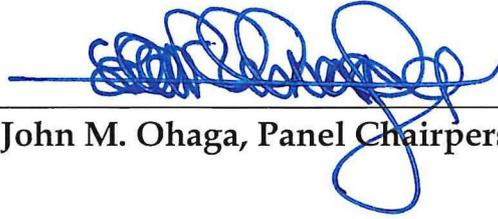
*know that the substance contained a prohibited ingredient does not establish absence of intent."*

36. The Tribunal notes that there was no demonstration by the Athlete that he exercised any extra caution when ingesting the alleged medication and as such the mere fact that the Athlete did not know that the medication contained a prohibited substance does not entirely absolve him of responsibility.
37. The Tribunal notes that the Athlete is 30 years old and in his defence he stated that he had been tested six (6) times previously. It is therefore difficult for the Tribunal to believe that the Athlete had no knowledge of what constitutes a prohibited substance and had equally not received any training on the same. Consequently, ignorance of the Anti-Doping law which is in the first place, the sole reason why the Respondent Athlete found himself in this bind, is unacceptable.
38. However, even though he was clearly negligent when taking the medication, we are satisfied from his testimony and demeanour that he did not take the same knowingly and intentionally with the aim of inducing or enhancing his performance.

### **Conclusion**

39. In light of the above, the following Orders commend themselves to the Tribunal:
  - a. The period of ineligibility for the Respondent shall be two (2) years from the date of provisional suspension pursuant to Article 10.2.2 of the WADA Code/ ADAK rules;
  - b. The Respondent's results obtained during the Men's 2017 Macao Galaxy Entertainment International Marathon, on 3<sup>rd</sup> December, 2017 including any points gained and prizes, are disqualified pursuant to Articles 9 and 10 of the WADA Code;
  - c. Each party shall bear its own costs;
  - d. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and Part IV of the Anti-Doping Act No. 5 of 2016 as amended.

Dated at Nairobi this 17<sup>th</sup> day of \_\_\_\_\_ October, \_\_\_\_\_ 2018



\_\_\_\_\_  
John M. Ohaga, Panel Chairperson



\_\_\_\_\_  
Ms. Mary N. Kimani, Member



\_\_\_\_\_  
Ms. J Njeri Onyango, Member