REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 32 OF 2017

ANTI-DOPING AGENCY OF KENYA……APPLICANT

-Versus-

ERIC MUTHOMI RIUNGU…… RESPONDENT

DECISION

Hearing: 4th April, 2018

Panel:

Elynah Shiveka	Deputy Chairperson
GMT Ottieno	Member
Gichuru Kiplagat	Member

Appearances: Mr.Omariba for Applicant

Ms.Wanyama for Respondent

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 and international 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 27th November, 2017.
4. The Applicant brought charges against the Respondent that on 05/08/2017 Anti Doping Suisse Doping Control Offices in an in-competition testing at Glacier 3000 Run & Marathon collected a urine sample from the Respondent and split into two and gave it code numbers A 3614433 ("A" sample) and B 3614433("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The "A" sample was subsequently analyzed at the WADA accredited laboratory in Switzerland and an Adverse Analytical Finding revealed the presence of prohibited substance *salbutamol greater than the decision limit 1.2 ug/ml* which are prohibited under the 2017 WADA prohibited list.
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 26/09/2017 to which the Respondent responded to.
7. The Respondent in his response to the letter dated 26/09/17 through his email dated 28/09/17 stated that he fell ill on 02/07/2017 and went to Muki Medical Clinic where he was diagonized with cold and pneumonia. Further, he said that he was given Cold Combat for

medication only to realize later that the same was listed ın the Prohibited List.

8. The Applicant states that the Respondent's did not request a sample B analysis.

9. 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.

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

    Presence of a prohibited substance Salbutamol greater than the decision limit 1.2 ug/ml in the athlete's sample.

11. 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 drinks 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.

12. 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.

13. ADAK prayed for:

    a) All competitive results obtained by Eric Riungu Muthomi from and including 5th August,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) Eric Riungu Muthomi be sanctioned to a four 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.

14. 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.

THE RESPONSE

15. The Respondent represented by the firm of Wanyaga & Njaramba Advocates filed his statement of defence dated 25/01/18 denying each and every allegation contained in the Charge Document.

16. He stated that he did not intentionally take nor was he aware of the prohibited substance in his body until he tested positive.

17. The Respondent contends that he sought medical attention on 02/07/17 for his ailments when he visited Muki Medical Clinic in Gilgil.

18. The medical personnel in the clinic diagnosed him and found him to have pneumonia and asthma and prescribed a number of drugs namely: Combact Cold,Levofloxacin and Brustan.

19. He finished the medication and was still unwell. He then went to a chemist in Naivaisha Town on 18/07/18 where he was given painkillers to decongest his chest. The medication happened to contain *salbutamol*.

20. The Respondent avers that he was not negligent when seeking medical attention and that such treatment was for credible non-doping use.

21. The Respondent further noted that the criteria for "no fault or negligence" is that the athlete must establish that he did not know or suspect and could not reasonably have known or suspected even with utmost caution that they had committed an ADRV.

22. He further stated that he is a promising athlete with a bright future but obviously hampered by his lack of awareness on doping issues which makes it hard to understand complicated matters.

23. The Respondent prayed that:

a) The Honorable Tribunal grants a substantial reduction from the maximum penalty to be allowed to the athlete.

b) Any other relief that the Tribunal deems just and fair.

HEARING

24. When the matter came up for mention on 04/04/18 both parties confirmed to have filed written submissions. They urged the Tribunal to adopt the written submissions and set a date for the delivery of the decision.

25. The Applicant filed submissions on the 04/04/201 dated 03/04/18 which reiterated the contents of the charge sheet. The Applicant however noted that the Respondent should be given a maximum of four years sanction for failure by the Respondent to inform the pharmacist that he was an athlete and subject to anti-doping rules, failure by the respondent to cross-check the medication given to see if the same contained prohibited substances and failure to exercise due care in observing the products ingested and used which amounted to an ADRV.

26. Secondly, the Applicant stated that sınce the Respondent was unsatisfied with the testing process he should have requested to have a Sample B analysis.

27. Thirdly, the Applicant noted that under Article 3 of ADAK ADR and WADC, it has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel and may be established by any reliable means as outlined by Article 3.2.

28. The Applicant submitted further that the athlete did not disclose in the Doping Control Form that he had been taking any medication despite having taken it very close to the race.

29. The Applicant quoted the case of **CAS 2012/A/2804 & 10 Others V International Weightlifting Federation (IWF)** where the court stated 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."*

30. The Applicant stated that the Respondent has failed to adduce such evidence. They added that the Respondent did not declare any use of medication or supplements that could have otherwise resulted or occasioned the AAF.

31. The Applicant therefore prayed for sanction provided for in Articles 10.1 and 10.2 of the ADAK Rules.

32. The Respondent on his part relied on submissions dated 28/03/2018 which were filed on the same day at the Tribunal.

33. The Respondent also relied on his response to the charge sheet while making his submissions.

34. The Respondent did not dispute that he ingested the substances in question. He noted that he took prescribed drugs when he became unwell from pneumonia and asthma. He further stated that he sought medication from a clinic.

35. The Respondent denied that he intentionally used the prohibited substance *salbutamol* greater than the prescribed limit of 1.2 ug/ml to enhance his performance.

36. He also complained of the language barrier he experienced in Switzerland that hindered his knowledge of the Anti-Doping Regulations. He claimed to have obtained grade D- (Minus) in his Form Four Education and has low literacy levels.

37. He further stated that he had heard about doping vaguely in the media but that he had no idea about what drugs should not be taken. He also noted that he is equally unaware of the TUE.

38. On the issue of taking the medication too close to the race the Respondent stated that no one can predict when they will fall ill and that it is not enough to simply claim that the proximity to the date of the competition was a valid justification of the intention to dope.

39. The Respondent quoted the case of **CAS 2015/A/3945 Sigfus Fossdal v International Powerlifting Federation (IPF)** where the court stated that *"…a pre-condition for having the period of ineligibility reduced is that the athlete should establish how the prohibited substance entered his or her system. The burden of proof is on the athlete and this should be established on the balance of probabilities."*

40. In this case the Respondent submitted that the prohibited substances entered his body through prescribed medication to treat allergic reactions.

41. The Respondent submitted further that a range of factors determines the period of ineligibility that should applied. These included type of violation, the prohibited substance or method used, the nature of the athlete's conduct and the degree of fault.

42. The Respondent relied on the case of **CAS 2013/A/332 Cilic v.International Tennis Federation** where an elite tennis player was

found to have an ADRV after she consumed glucose tablets that contained prohibited substances. The product label though was in a foreign language. Since Mr.Cilic inadvertently consumed a specified substance his "light" fault in committing the ADRV yielded a four-month period of ineligibility.

43. The Respondent pleaded with the Tribunal to be lenient on account of that he was honest and cooperated with the results management authorities, admitted in a timely fashion that the prohibited substance arose from medication, received prescription from a government approved facility, his doctor was not aware about anti-doping rules, he is an inexperienced athlete with a young family with diminished capacity in doping awareness.

44. In closing the Respondent prayed for a substantial reduction from the standard penalty and for it to be reduced into a reprimand, costs of the suit and any other relief that the Tribunal deems just and fit.

DECISION

45. The panel has carefully analyzed the documents before us and arrived at this outcome.

46. The Respondent's urine sample is claimed have presence of *Salbutamol* which is prohibited under S9 of the 2017 WADA prohibited list.

47. 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"*

48. 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).

49. 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….."*

50. We find the Applicant has demonstrated the presence of a prohibited substance in the Athlete's A sample and the athlete agreed with this outcome.

51. 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 as exemplified by Article 2.1 WADC on account of strict liability.

52. The athlete should be commended for admitting to using the prohibited substances *Salbutamol* in his pleadings and written submissions. However, he did not reveal the drug *Salbutamol* in his doping control form.

53. Being an athlete the Respondent is well aware of the rules that govern athletics including anti-doping rules. He never made any attempts to find out what doping entails and what ingestible elements are prohibited. He travels the world over and one cannot say that his exposure is diminished.

54. Moreover, he never sought Therapeutic Use Exemption (TUE) under Article 4.4 of the Code even though he claims not to have come across this term. Indeed, as an athlete the onerous duty to understand the environment and the latitude within which to operate lies squarely with him.

55. However, we find the Applicant has not discharged the burden to establish whether the ADRV by the Respondent was intentional under Article 10.2.3 of WADC to our comfortable satisfaction.

56. In **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** the court outlined these factors when assessing the degree of fault on the part of an Athlete: the Athlete's professional experience; his age; the perceived and actual degree of risk; whether the athlete suffers from any impairment; the disclosure of medication on the Doping Control Form; the admission of the ADRV in a timely manner; any other relevant factors and specific circumstances that can explain the athlete's conduct. The relevant legal provision is WADA Code Article 10.5.1.1.

57. The Respondent also referred us to the **Cilic** case where the court had these to say:

> *"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."

58. We have invariably applied the **Maria Sharapova** and the **Cilic** standard locally on a case by case basis so as to warrant reduction from the standard penalties. In sum the Respondent has ably demonstrated mitigating factors such as being a first time offender and the fact that he is indeed remorseful. He also admitted to the ADRV in his pleadings and written submissions.

CONCLUSION

59. In the circumstances, the Tribunal ımposes 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 03/10/17 pursuant to Article 10.2.2 of the WADC;
b. The disqualification of the Glacier 3000 Run and Marathon results of 05/08/17 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
c. Each party to bear its on 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.

60. 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 29th **November**_____, **2018**.

Signed:

Elynah Shiveka

Shivelle

Vice-Chairperson, Sports Disputes Tribunal

Signed:

GMT Ottieno

Member, Sports Disputes Tribunal

Signed:

Gichuru Kiplagat

Member, Sports Disputes Tribunal