REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 8 OF 2018

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

-Versus-

RONALD KIPTAI MATAKAT…….. RESPONDENT

DECISION

Hearing: 15th August, 2018

Panel:

Elynah Shiveka	Deputy Chairperson
GMT Ottieno	Member
Gichuru Kiplagat	Member

Appearances: Mr.Rogoncho for Applicant

Ms.Olembo H/B for Ms.Odhiambo 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.

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 25/04/18.
4. The Applicant brought charges against the Respondent that on 21/10/17 the Applicant's Doping Control Officers in an in-competition testing at Laikipia University Half Marathon held in Nyahururu collected a urine sample from the Respondent and split into two and gave it code numbers A4163441 ("A" sample) and B 4163441("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The "A" sample was subsequently analyzed at the WADA accredited laboratory of in Doha,Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance *Glucocorticoids/prednisolone and its metabolite 20beta-hydroxy prednisone* which are prohibited under S9 the 2018 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 9/03/2018 to which the Respondent responded through email stating that he had taken the banned substance prednisolone at the time to remedy breathing problems he was experiencing due to a cold.

7. Adak also noted that the Respondent admitted that the contents of the letter dated 09/03/18 are correct and that he clearly understood the reason behind the communication.

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 prohibited substance Glucocorticoids/prednisolone and its metabolite 20beta-hydroxy prednisone in the athlete's sample.

    Use of prohibited substance Glucocorticoids/prednisolone and its metabolite 20beta-hydroxy prednisone 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 Ronald Kiptai Matakat from and including 21/10/2017 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) Ronald Kiptai Matkat 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 Dennis Anyoka Moturi & Company Advocates filed his statement of defence dated 15/05/18 denying each and every allegation contained in the Charge Document. He also relied on his witness statement dated 15/05/18 and filed on 16/05/18 as well as list of documents dated 05/06/18.

16. The Respondent in response stated that due to continuous cold reactions he decided to seek medical attention as the situation was worsening affecting him physically and he could not prepare for the Laikipia University Half Marathon that he was qualified to participate.

17. The Respondent decided to visit a chemist called Glory Chemist in Iten town where he bought drugs over the counter prescribed to him that is panadol, cough syrup, prednisolone and some multivitamins to help alleviate the condition.

18. Its worth noting though that as much as the Respondent claims to have bought the drugs from Glory Chemist, in his witness statement he attached a receipt bearing the names of Iten Glorious Pharmacy in Iten that dispensed to him the drugs.

19. With respect to the TUE the Applicant stated that he was not aware of the ADRV as at the time of his ailment and the time before the marathon was limited and scarce to facilitate him to apply for TUE as prescribed by the ADRV.

20. He stated further that the he was unwell and time was limited for him to apply a TUE and that the AAF outcome should be attributed to the medication he took following his allergic condition.

21. He further maintains that he is not in violation of Article 2.1 of ADAK ADR since at no point did he plan to ingest the substances or use them intentionally even though his sample A exhibited an AAF outcome.

22. The Respondent prayed that:

    a) The Honourable Tribunal finds the Respondent not guilty of the ADRV and therefore to dismiss this appeal as it is misinformed and misconstrued without legal basis.
    b) The provisional suspension be lifted and that the Respondent be allowed to participate in competitions, events and other activities organized by WADA.

HEARING

23. When the matter came up for hearing on 14/06/2018, the Respondent gave his statement under oath. Parties agreed to file written submissions and the matter was fixed for mention on 18/07/18. On 18/07/18 no written submissions had been filed. The matter was again fixed for mention on 08/08/15.The matter was

given a last mention for 15/08/18 by which time all parties had filed their written submissions.

24. The parties 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 15/08/2017 dated on the same day which reiterated the contents of the charge sheet verbatim.

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

27. Thirdly, the Applicant submitted that the ADRV was intentional under Article 3.2.

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

29. The Respondent on his part relied on submissions dated 07/08/18 which were filed on the same day at the Tribunal.

30. The Respondent also to a larger extent relied on his response to the charge sheet while making his submissions.

31. The Respondent did not dispute that he ingested the substances in question. He noted that he took prescribed medication from a hospital when he became unwell.

32. The Respondent denied that he intentionally used the prohibited substances to enhance his performance and that prior to his positive test he had not received any training on anti-doping. He noted further that he was not aware of the existence of a prohibited list.

33. The Respondent prayed to the Tribunal to impose a substantial reduction from the standard penalty which should be reduced to a reprimand.

34. 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.*"

35. In this case the Respondent submitted that the prohibited substances entered his body through prescribed medication to treat his condition.

36. 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.

37. The Respondent contended that for violations involving no fault or negligence, Athletes are not subject to any period of ineligibility. For violations involving no significant fault or negligence and prohibited substances that are not specified substances Athletes are subject to a 12 to 24 month period of ineligibility.

38. 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.

DECISION

39. We have listened to all parties and appraised all documents submitted by the parties. We express ourselves as follows.

40. *Prednisolone* which is prohibited under S9 of the 2018 WADA prohibited list is alleged to have been found in the Respondent's urine sample.

41. 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"*

42. 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).*

43. 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….."*

44. The Applicant has been able to display to our comfortable satisfaction the presence of a prohibited substance in the Athlete's A sample and this has not been denied by the Athlete.

45. 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 2.1.1of WADC as set out above and emphasized.

46. Despite the fact that the athlete admitted to using the prohibited substances in his pleadings and written submissions he did not reveal the drugs namely prednisolone that were prescribed to him on the doping control form. He only disclosed that he had ingested Panadol, Airtal, Ribena, Vitablitz, Vo2, Iso drink, Reginer and Diclofhenac tablets.

47. The Tribunal has time and again stated that Athletes bear the ultimate duty to ensure that anything that gets into their system does not result into an ADRV. The Respondent's actions cannot escape censure given his modest education and the benefit of the current dispensation christened "the information age". He is able to access information on doping easily.

48. As we have always said the drafters of the Code gave a lifeline to 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 never took advantage of this exemption.

49. On the flipside the Applicant needs to establish that the ADRV by the Respondent was intentional under Article 10.2.3 of WADC. We find that that burden has not been sufficiently discharged by the Applicant.

50. On the limb of "no significant fault" the Respondent's Counsel

referred as to the much quoted **Cilic** case. We also had the opportunity to dig into **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** where we examined factors to consider 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.

51. 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."*

52. We note that the Respondent has no known previous charge (s) or ADRV. He also did admit the instant ADRV in his pleadings and written submissions.

CONCLUSION

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

    a. The period of ineligibility for the Respondent shall be for 2 years from 17/03/18 pursuant to Article 10.2.2 of the WADC;
    b. The disqualification of the Laikipia University Half Marathon results of 21/10/17 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.

54. 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

Shiveka

Vice-Chairperson, Sports Disputes Tribunal

Signed:

GMT Ottieno

Member, Sports Disputes Tribunal

Signed:
Gichuru Kiplagat

Member, Sports Disputes Tribunal