

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 32 OF 2018

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

-versus-

DANIEL ROTICH CHEBOLEI..... RESPONDENT

DECISION

Hearing: 26th November, 2018

Panel: John M Ohaga - Chairman
Mrs. Elynah Sifuna-Shiveka - Member
E Gichuru Kiplagat - Member

Mr. Bildad Rogoncho - Counsel for Applicant (ADAK)

Daniel Rotich Chebolei - Respondent in person.

The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (ADAK), a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016. It is the body charged with managing Anti-Doping activities in the country including results management.
2. The Respondent Daniel Rotich Chebulei is a male adult of presumed sound mind, an International Level Athlete to whom the Anti-Doping Act No. 5 of 2016 and the ADAK Anti-Doping rules apply.

Brief Background

3. On 1st April, 2018, ESKAN Doping Control Officers in an in-competition testing during the International Marathon, Megas Alexandros, held in Thessaloniki, Greece collected a urine sample from the Respondent, and split the sample into two separate bottles as is required by the WADA procedures which were marked A500881 (the A Sample) and B500881 (the B Sample).
4. The samples were analysed in the WADA accredited laboratory in Maroussi, Greece in accordance with the procedures set out in WADA's International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding (AAF), being the presence of Salbutamol.
5. These findings were accordingly communicated to the Athlete by way of Notice to Charge and mandatory Provisional Suspension dated 20th June, 2018, and the athlete was offered an opportunity to explain the same by 3rd July, 2018. In the Respondent's response dated 26th June, 2018, the Respondent confirmed the charges and explained that he had fallen ill and taken medication for a cold which was purchased at a local pharmacy by his mother. He, however, did not produce a receipt for the purchase of the medication or confirm the details of the pharmacy.

THE LAW

6. 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.

7. 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.”

8. 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

9. Paramount to the findings of the Tribunal are the provisions of Article 2.1.1 and 2.2 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.

10. 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 **Salbutamol**.

11. The Athlete indeed admitted to the fact that a prohibited substance was found in his body and prayed for leniency.

12. 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.

13. 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.

14. 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.
15. 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.
16. 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."

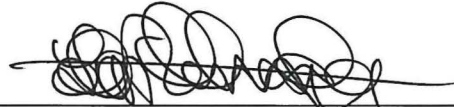
17. The Tribunal notes that there was no demonstration by the Athlete that he exercised any extra caution when ingesting the alleged medication and as such the mere fact that the Athlete did not know that the medication contained a prohibited substance does not entirely absolve him of responsibility.
18. The Tribunal notes that the Athlete is 21 years old and in his defence he stated that he had been tested several 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.

Conclusion

19. In light of the above, the following Orders commend themselves to the Tribunal:

- a. The period of ineligibility for the Respondent shall be four (4) 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 from 1st April 2018 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 31st day of _____ January, _____ 2019



John M. Ohaga, Panel Chairperson



Elynah Sifuna-Shiveka, Vice- Chair



E Gichuru Kiplagat, Member