REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 20 OF 2018

ANTI-DOPING AGENCY OF KENYA……APPLICANT

-versus-

DANIEL KIPCHIRCHIR BII……..…… RESPONDENT

DECISION

Hearing: 27th November, 2018

Panel: John M Ohaga - Chairman
Gilbert M T Ottieno - Member
Peter Ochieng - Member

Mr. Bildad Rogoncho Counsel for Applicant (ADAK)

Daniel Kipchirchir Bii – Athlete present

The Parties

1. The Applicant, The Anti-Doping Agency of Kenya (ADAK) is 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 Kipchirchir Bii is a male adult of presumed sound mind, an International Level athlete specialized in long distance running to whom the Anti-Doping Act No. 5 of 2016 and the ADAK Anti-Doping rules apply.

Brief Background

3. On 3rd December, 2017, CHINADA Doping Control Officers in an in-competition testing during the Jieyang International Half Marathon in China collected a urine sample from the Respondent which was split into two separate bottles in the normal manner in accordance with the prescribed WADA procedures. The samples were marked as A6282367 (the A Sample) and B6282367 (the B Sample). Both samples were analysed at the WADA accredited laboratory in Beijing, China and the analysis of the A sample returned an Adverse Analytical Finding (AAF) being the presence of a prohibited substance Norandrosterone. These findings were communicated to the Athlete by the Applicant through a Notice of Charge and mandatory Provisional Suspension dated 20th June, 2018. Upon receipt of the Charge, the Respondent by email dated 15th June, 2018 denied ever using the prohibited substance and stated that he had fallen ill shortly before his departure for China and while in China, and specifically on 24th November, 2017 he was taken ill once again during the marathon race.

4. The matter came before the Tribunal on 27th November, 2018 at its sitting in Eldoret. The Applicant was represented by Mr. B. Rogoncho, Advocate while the Athlete attended in person and was identified vide his passport number A160334.

5. The Athlete gave the panel a brief history of his running career which though colourful, need not be restated here. Suffice it to state that eventually the Athlete through his friend who was a student in Shanghai was invited to participate in a marathon in China. He travelled to China and participated in three races being the Shengzhou Yanhuang Marathon, Jieyang International Half Marathon, and the Xhinhua Fairy Lake Marathon.

6. The Respondent testified that he left Kenya in November 2017 to travel to China. On the date of departure, he was feeling unwell and went to a laboratory in Eldoret whereupon testing, it was established that he had some amoeba. He says that the lab assistant gave him a chit and advised him to go to a chemist. However, as he was travelling, he decided to go to a chemist to buy the drugs in Nairobi. He did not inform either the lab assistant or the pharmacist at the chemist that he was an Athlete. He left for China through Jomo Kenyatta International Airport on 23rd November and arrived in China on 24th November. He was in the company of three other athletes. He says that on 25th November, whilst in China he developed stomach pains and a running stomach but he was told that he could not take any medication otherwise he would have to cancel the race that he had been entered for.

7. Despite his condition, he participated in the race and after 5 kilometres, he vomited at the first water station and felt better after visiting the washroom. Nonetheless, he finished the race at position 10.

8. The following week, he participated in the next race where he came in second with a time of 73 minutes. He says that this was his best time ever. He then participated in the third race on 8th December, 2017 where he once again felt unwell and finished at position 10. He was only tested after the second race, presumably because of his position.

9. The Respondent clarified that at the end of the Jieyang International Half Marathon, the Respondent had been taken to the medical tent where he was injected with some substance which he was unable to identify. He says that this was a result of the language barrier because he tried to explain that he had some amoeba but the Chinese medical personnel seemed to think that he had a problem with his appendix. He suspects that this injection was the cause of the AAF.

10. Counsel for the Athlete, Ms. Eunice Olembo had undertaken to speak with the student translator who was assigned to the Athlete whilst in China and was able to confirm the narrative given by the Athlete to the effect that the race doctor had administered an injection to the Athlete whose contents she could not establish.

11. It is instructive that in the Doping Control Form, the Athlete has identified or disclosed that he was taking a painkiller V102 Max and Feroglobin supplement. He says that he got the supplement from a chemist in Eldoret and that this supplement was commonly used by many athletes.

The Law

12. 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.

13. 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."**

14. Consequently, the Tribunals 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

15. 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.*

16. 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***.

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

18. 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.

19. 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.

20. In view of the nature of the substance, the Athlete has the burden of establishing that the ADRV was not intentional. The standard of proof here is greater than a mere balance of probability but less than proof beyond reasonable doubt.

21. 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 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.

22. The Applicant in this case has narrated how he was feeling unwell and took medication which was prescribed by a laboratory assistant at a laboratory. He has not demonstrated that he attended before a recognized medical practitioner and exactly what was diagnosed. But even this would not have been sufficient to discharge the onus placed on him.

23. We of course have to give consideration to the medication that he was given after the race in China. Other than his testimony and the email from his counsel, we do not have any other material upon which we can consider the effect of this intervening medical treatment. And even then, he was already ingesting a substance that he says was prescribed by a laboratory assistant.

24. 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.''

25. 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.

26. All things considered, the Athlete was clearly negligent when taking the medication and we are not 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

27. 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 during the Jieyang International Half Marathon on 3rd 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 31st day of _____*January*, _____2019

John M. Ohaga, Panel Chairperson

Gilbert M T Ottieno, Member **Peter Ochieng, Member**