REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NUMBER 53 OF 2016

ANTI-DOPING AGENCY OF KENYA (ADAK)..... APPLICANT

-versus-

BISLUKE KIPKORIR KIPLAGAT ..... RESPONDENT

DECISION

Hearing:

Panel:	John M. Ohaga	Chair
	Mary Kimani	Member
	Gabriel Ouko	Member

Appearances: Eric Omariba for the Applicant

Sarah Ochwada for the Respondent

Parties

1. The Applicant is the Anti-Doing Agency of Kenya (hereinafter 'ADAK') a State Corporation established under Section 5 of the Antidoping Act, No. 5 of 2016 represented by the firm of Omariba & Company Advocates, hereinafter the Applicant's Advocate.

2. The Respondent is a male adult of presumed sound mind, a national and international-level Athlete who is represented by the Center of Sports Law, hereinafter the Respondent's Advocate.

The Charge

3. The Anti - Doping Agency of Kenya charged the Respondent as an athlete with the charge of: -

   Presence of a prohibited substance *Norandrosterone* in the athlete's sample in violation of Article 2.1 of ADAK Anti-Doping Rules, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2(b) of the IAAF rules.

Uncontested Factual Background

4. On 23rd October 2016, NADO Colombia Doping Control Officers in an in-competition testing at the $^{1}/_{4}$ de Marathon Ciudad de Bucaramanga collected a urine sample from the Respondent where he was participating as an athlete.

5. Assisted by the Doping Control Officer(DCO), the Respondent split the sample into two separate bottles which were given reference numbers **A 4074331** (hereinafter A Sample) and **B 4074331** (hereinafter B Sample) under the prescribed procedures provided by WADA.

6. Both samples were transported to the WADA accredited Laboratory in Bogota, Colombia where A Sample was analyzed procedurally and returned an Adverse Analytical Finding (AAF) with the presence of a prohibited substance 19- Norandrosterone or its metabolites or markers in the A Sample.

7. In making this finding both parties presumed that the Doping Control process was carried out by competent personnel and the right procedures were used in accordance with the WADA International Standards for Testing and Investigations.

8. The findings were communicated to the Respondent by Japhter K. Rugut, the Chief Executive Officer of the Applicant through a Notice of Charge and Provisional Suspension dated 2nd of December 2016. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 9th December 2016.

9. Through an email dated 9th December 2016 the Respondent responded to the Notice of Charge which the Applicant carefully analyzed before making any further step.

10. During the hearing, the Respondent did not request a B Sample analysis thus waiving his right to the same under ADAK Anti-Doping Rules rule 7.3.1 and confirmed that the results would be the same with those of A Sample in any event.

11. The response and conduct of the Respondent was evaluated by ADAK and it was deemed to constitute an anti-doping rule violation thus the matter was referred to this Tribunal for determination.

12. By the Respondent own admission there was presence of prohibited substance in his A sample and he was well aware of what doping was and the anti-doping rules which he had violation.

13. However, a dispute arose as to whether the Respondent had intention, exercised no fault or negligence or in having the prohibited substance found in his body thus the Tribunal was ceased to determine this matter.

The Applicant's Case

14. From the very onset the Applicant argued that under Article 3 of the ADAK Rules and the World Anti-Doping Code, the Applicant had demonstrated to the hearing panel on a comfortable satisfaction standard that the Respondent ought to be penalized in accordance to the rules having been tested and found guilty of taking a prohibited substance and admitting to the same fact.

15. The Applicant submitted that the Respondent, as an athlete, could not just wish away penalties not to be imposed on him. He had to demonstrate that there was no fault, negligence or intention to entitle him to reduction of sanction on a balance of probability where the athlete must provide actual evidence as opposed to mere speculation.

16. However, according to the applicant, the Respondent in this case did not meet the said threshold to warrant reduction of sanction based on the following grounds.

17. Firstly, it was the Applicant's averment that the Respondent failed to adduce concrete evidence to demonstrate the origin of the prohibited substance. The Applicant thus submitted that the Respondent's claim

that the injection and the drugs prescribed to him by Dr. Henry occasioned the adverse analytic finding could not stand because no evidence had been adduced before the Tribunal to support the Claim.

18. In support of its averment that the Respondent's claim was a mere and unverified hypothesis which lacked actual evidence amounting to an intentional violation of the anti-doping rules, the Applicant relied on the panel's decision in **CAS 2015/A/3615 WADA vs. Dalders & FIM and CAS 2006/A/1067 IRB vs Keyter**.

19. Secondly, Applicant submitted that the Respondent failed to meet his obligations as an athlete of both national and international recognition.

20. The Applicant averred that the Respondent had various duties as an athlete chief among them; to take responsibility, in the context of anti-doping, for what they ingest and use; to inform medical personnel of their obligation not to use prohibited substances and prohibited methods; and to take responsibility to make sure that any medical treatment received does not violate the anti-doping rules.

21. However, in the present scenario the Applicant averred that the Respondent was at fault for negligently and knowingly allowing medication which contained a prohibited substance to be administered to his body.

22. In bolstering its argument, the Applicant pointed that minimal or no efforts were made to avoid ingestion of the said prohibited substance. In any event, the athlete did not disclose the said medication in his Doping Control Form even though he had taken the medication four days before the competition.

23. It was therefore the Applicant's contention that the Respondent had the onus of doing due diligence in making inquiries of the ingredients of the medication administered in order to avoid any prohibited substance.

24. Thus, in the Applicant's eyes the Respondent's actions were grossly negligent and violated the very core duties an athlete has in respect to the doping arena.

25. In its final argument, the Applicant averred that the Respondent was an athlete of vast experience competing at both the national and international level and who had admitted being a crusader against doping in sports thus had a vast understanding of the doping and prohibited substances.

26. Thus, the Applicant's argued that the Respondent should not feign ignorance as an excuse and the Tribunal should find that the Respondent failed to give a plausible explanation for the adverse analytic finding and the maximum 4 years of ineligibility should be imposed.

The Respondent's Case

27. The Respondent on its part commenced by admitting presence of a prohibited substance 19- Norandrosterone or its metabolites or markers in his A Sample. However, the Respondent went forth to submit that the 4-year period of ineligibility should not be imposed on the following grounds.

28. Firstly, the Respondent submitted that he did not intend to use the prohibited substance 19- Norandrosterone or its metabolites or markers to enhance its performance. The Respondent had fallen sick

and when examined by the Doctor at Calle 100 he was diagnosed with low hemoglobin.

29. According to the Respondent it is on this basis that the said Doctor injected him with a medication and also supplied him with other oral ones. However, this was after the Respondent had forewarned the Doctor that he was an athlete in addition to which he supplied the Doctor with the WADA Prohibited List.

30. As per the Respondent's account of events the Doctor assured him of that he had previously worked with IAAF and he would prescribe medications which would not contain any prohibited substances.

31. On this ground the Respondent submitted that the charge against him was an inadvertent offence which the Tribunal should assess in the totality of its circumstances.

32. Secondly, the Respondent averred that the Applicant had not brought any alternative credible evidence to counter the argument that the Respondent was not ill and that the prohibited substance did not enter the Respondent through the intramuscular injection prescribed by the Doctor. Therefore, the Respondent submitted that the Applicant had not discharged its burden of comfortable satisfaction.

33. Thirdly, the Respondent begun by recognizing that each athlete has a personal duty of care in ensuring compliance with anti-doping obligations as articulated by Article 2 of the WADC as well as numerous CAS Panels' decisions such as the ***Cilic Award***.

34. However, the Respondent averred that as an athlete he had exercised its utmost diligence in the present scenario given the standard set by the Athlete Reference Guide to the 2015 World Anti-Doping Code as

well as CAS Awards. Thus, could not be faulted for failure to fulfil his obligations as an athlete in the present specific circumstances.

35. Hence the Respondent submitted that no fault or negligence could be attributed to him for he had exercised diligence in explaining his profession and showing the Doctor a copy of the prohibited List and the Doctor had admitted being conversant with the Anti-Doping Rules. As the result, the Respondent requested the Tribunal should consider reducing the ineligibility period from 4 years to 12-24 months as adduced by the case awards in **CAS 2013/A/3327, Cilic vs. International Tennis Federation** and **CAS 2017/A/5110 Johaug Award**.

36. On a final note, the Respondent submitted that the Tribunal should exercise its proportionality power and avoid handing a harsh sanction in light of the circumstances present. For a reasonable balance has to be struck between the kind of misconduct occasioned and the justifiable aim.

Issues for Determination

37. Flowing from the above the Tribunal finds the following issues at the crux of the matter and ought to be determined accordingly: -

I. Whether the Tribunal has the requisite jurisdiction?
II. Whether the Respondent intentionally violated the anti-doping rules?
III. Whether the Tribunal can reduce or reduce the penalties for violation of the specified anti-doping rules due to no (significant) fault or negligence?
IV. When will the ineligibility period begin?

Determination

I. Whether the Tribunal has the requisite jurisdiction?

38. It is a rule of thumb that any tribunal, court or panel in exercising judicial or quasi-judicial duties must be clothed with the appropriate jurisdiction in order to act. As echoed by Nyaragi J in the classic case of **Owner of Motor Vessel "Lilian S"**, jurisdiction is everything and without it, a tribunal, a court or a panel has no power to make one more step.

39. To determine whether a tribunal, a court or a panel has the requisite jurisdiction, legislation or a regulation or the Constitution has to donate the appropriate power for the tribunal or -court or panel to act. At no time can either of the bodies exercising quasi-judicial or judicial powers can assume jurisdiction in any given circumstance.

40. In the present proceedings, the Sports Disputes Tribunal is accorded is its jurisdiction under Sections 58(b) of the Sports Act No. 25 of 2013, to determine, *"other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear."*

41. Moreover, under Section 31(1) (b) of the Anti- Doping Act, No. 5 of 2016 the Tribunal is accorded the Jurisdiction to hear and determine any anti-doping case touching on;

(i) National-level athletes or athletes who compete at the county level;
(ii) Athlete support personnel,
(iii) Sports federations or sports organisations; or
(iv) Professional athletes and professional sports persons

42. Therefore, following the two legal provisions cited above, the Tribunal can only exercise its jurisdiction in two main instances that is either:
- the parties are covered by the Anti-Doping Act which *expressly* provides for matters in dispute to be referred to the Tribunal, or

- the Parties enter into a *specific* arbitration agreement referring the matter in dispute to Tribunal.

43. Presently, the matter touches on a question of doping and determination of the proper penalty to a professional athlete who has an adverse analytic finding to his A sample, a question which falls within the purview of the Tribunal's under Section 31(1) (b) of the Anti- Doping Act 2016.

44. Furthermore, neither the Respondent nor the Applicant contested the jurisdiction of the Tribunal. Both Parties have confirmed the Tribunal's jurisdiction to hear this case by agreeing to submit their cases to the Tribunal as per Sections 58(b) of the Sports Act.

45. Thus, the Tribunal has the requisite jurisdiction to determine the dispute herein.

II. Whether the Respondent intentionally violated the anti-doping rules?

46. It is trite law that he who alleges must prove and that mantra spreads across to the doping arena as well. In the present scenario it is the responsibility of the ADAK the Applicant herein, to establish on a comfortable standard of proof that the Respondent violated the doping rules. However once that standard is met, the burden shifts to the Athlete to prove the case to the contrary on a balance of probabilities standard.

47. Firstly, the comfortable standard has been reiterated by both parties in their well written submissions in consonance to the already settled principle of law; that the Anti-Doping Organization has to establish an anti-doping rule violation to the comfortable satisfaction of the hearing body, bearing in mind the seriousness of the allegation which is made.

This is well alluded in a plethora of panel decisions made by the Court of Arbitration for Sports (CAS).

48. Simply put, the responsibility to proof to a comfortable standard implores that the Applicant has to only demonstrate that there is a violation of the doping rules and the process to getting to that conclusion was reached in a clear and transparent manner.

49. Additionally, in making its decision, the Tribunal is thus not bound by the rules of evidence, it is required to examine and apply the standard and presumptions it has latitude to use in reaching its determination. Thus, a doping offence where there is presence of adverse analytic finding, it can be proved by a variety of means including admissions as recognised in **CAS 2004/O/649 United States Anti-Doping Agency (USADA) v. G.**

50. However, by the mere fact that there is an admission this is not a foregone conclusion that a Tribunal should not take into consideration other evidence placed before it in support of or against the doping claim being advanced.

51. Therefore, flowing from the above stated principles, the current proceedings, in respect to the standard of proof, can be analyzed as follows.

52. From the very onset the Respondent herein has already admitted to the presence of prohibited non-specified substance, ***19-Norandrosterone*** within his body during an in-competition at the $^{1}/_{4}$ de Marathon Ciudad de Bucaramanga.

53. This is a fact that has been conceded by both parties in the present proceedings.

54. Thus, by dint of this said admission, that testimony is more than merely adverse to the Respondent it is fatal to his case. In the circumstances, faced with uncontroverted evidence of such a direct and compelling nature, there is simply no need for any additional inference to be drawn from the Applicant as the required comfortable standard of proof has been satisfied by the Applicant.

55. Therefore, the responsibility to proof that the Respondent was ill and needed medication for his condition is the sole onus of the Respondent and not the Applicant has pleaded by the Respondent.

56. At this point the evidence alone is sufficient to warrant ineligibility period of four years as provided under article 10.2.1.2. of the ADAK Rules. However, such a conclusion would be unfair and unjust.

57. That is why the Respondent was granted an opportunity to prove his case on a balance of probability basis and establish whether the violation of the doping case was an intentional act. Where the Respondent is able to prove absence of intention, (significant) fault or negligence on the balance of probabilities then the Tribunal has to reduce the ineligibility period from the mandatory term of 4 years ineligibility.

58. The scope of what the term intention means in the present circumstance can be interpreted to either direct or indirect both of which are well captured under Article 10.2.3 of the ADAK Rules:-

> *The term, therefore, requires that the Athlete or other Person engaged in conduct which* ***he or she knew constituted an anti-doping rule violation*** ***or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*** *An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified*

Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition.
An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance. (emphasis ours)

59. Additionally, the CAS has considerably set that intent can also be indirect intent or what is termed as *"dolus eventualis"*. In **CAS 2011/A/2677 Dmitry Lapikov vs. International Weightlifting Federation (IWF)**, para. 64 the CAS pronounced itself as follows:

"[...] *the term "intent" should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent"* (CAS 2012/A/2822, para. 8.14).

"[...] *the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per "dolus eventualis", the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance.*

60. The Tribunal does observe that neither the Applicant nor the Respondent focused on one specific form of intention as both parties proceeded to give blanket arguments to the aspect of intent.

61. The tribunal posits that the failure to address one form of intention is not fatal to the hearing itself. As the CAS pointed out in CAS 2013/A/3435 Tomasz Stepien v. Polish Rugby Union while quoting the cases of **Oliveira decision (CAS 2010/A/2107)** and **CAS 2012/A/2804 Dimitry Kutrosky v. ITF;**

> *"The differences as to the consequences of the different views are - contrary to what may appear at first sight - not tremendous"*

62. To determine the question of intention the Tribunal firstly looks at whether the Respondent knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation.

63. In the present proceedings, the Respondent has vehemently denied knowing the injection he received from his Doctor, prior to the marathon in question, even after communicating to the said doctor that he was an athlete and giving the doctor the prohibited list, was a prohibited substance.

64. However, the Tribunal finds that the Respondent's allegation that he informed the Doctor his status as an athlete and that he handed him a list of prohibited substance not very convincing as it is not corroborated by any evidence besides the Respondent's own testimony. Particularly, a confirmation from the said Doctor would have been sufficient to qualify the allegation made by the Respondent.

65. As stated under paragraph 14 of **CAS 2006/A/1067 IRB v Keyter**:-

> *The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred.* ***The***

Panel, therefore, finds that the Respondent's explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test.

66. Additionally, if the Doctor had experience of working with the IAAF and the Respondent had informed him that he was an athlete in addition to handing him a prohibited list, unless proved otherwise the Tribunal finds it hard to be convinced since the same doctor had experience in dealing with doping cases he would knowingly violate the very rules he had worked to protect.

67. Secondly, the Tribunal questions whether the Respondent manifestly disregarded such risk. The Respondent cannot simply hide behind his contention that he asked the Doctor whether the medication prescribed contained any prohibited substances and relied on his assurance that it did not yet that assertion is not corroborated by any evidence except for his own testimony.

68. As postulated in **CAS 2016/A/4609 World Anti-Doping Agency (WADA) v. Indian National Anti-Doping Agency (Indian NADA) & Dane Pereira**, the Tribunal endorses the view that an athlete cannot simply rely on a doctor's advice, as is an established principle in CAS jurisprudence:

"[...] in consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances..."

69. Thus, if the Tribunal is going by the Respondent's assertion of the events nowhere is demonstrated in his averments that he asked the

Doctor what the injection contained, and counter checked with the list of prohibited substances the Respondent alleges he had.

70. What is demonstrated by the Respondent in the above stated scenario therefore is that he provides a carte blanche card to the doctor immediately he hands him the list of prohibited substances.

71. In his submissions, the Respondent avers that although athletes do have the duty of utmost care, that duty cannot be derived either from the WADA Code or the WADA's Athlete Reference Guide to the 2015 World Anti-Doping Code and it's a mere creation of different Tribunals especially the Court of Arbitration for Sports (CAS).

72. Tribunal kindly but firmly wishes to remind the Respondent that all forms of rules and regulations such as ADAK Rules, WADA Code or the WADA's Athlete Reference Guide to the 2015 World Anti-Doping Code or any other form of law are mere skeletons on themselves. Thus, it takes the interpretation of Tribunals or Panels such as the CAS or the Sports Dispute Tribunal to breath to life these rules and regulations.

73. The tribunal is clearly cognizant of the fact that these awards are not be binding in the common law sense. However as pointed out by the Australian Court of Arbitration for Sport Appeals Division in CAS 2008/A/1574 **D'Arcy v Australian Olympic Committee:-**

"...Arbitration awards are binding only by contractual force on the parties and do not create precedents. however, where those awards relate to the interpretation, scope or content of the WADA Code, ***consideration of certainty and consistency suggest that subsequent panels should not take a different approach to that adopted by earlier panels, unless satisfied that the approach or view of the earlier panel is an erroneous one or is inapplicable because of different circumstances or different contractual language****..."*

74. In the present proceedings, the Respondent has not demonstrated why this Tribunal should depart from the beaten path that at all time athletes are bound by the duty of utmost care. Moreover, it is quite ironic that the Respondent in his submissions abhors the usage of precedents to support athlete's duty of utmost care while on the other hand heavily relies on the decisions of ***Cilic*** and ***Johaug*** to persuade the Tribunal.

75. The Tribunal therefore maintains the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules. It is of little relevance to the determination of absence of intention or fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention".

76. As averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF):**

> *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.*
>
> *A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.*

77. In view of the above, the Tribunal finds that the Respondent had the intention to violate the anti-doping rule for he has failed, on a balance of probabilities, to demonstrate the lack of intention to so.

78. The Tribunal hence finds the Respondent's behaviour to be extremely negligent and failed to comply with his duties as an athlete subjected

to anti-doping testing. Thus, the Respondent neglected all stop signs and accepted the manifest risk that the medication that was injected would indeed contain a prohibited substance and result in an anti-doping rule violation. The Four-year period of ineligibility is therefore in principle warranted.

III. Whether the Tribunal can reduce or suspend the penalty for violation of the specified anti-doping rules due to no (significant) fault or negligence?

79. In light of the foregoing and as set out in Article 10.2 of the ADAK Rules, the period of ineligibility to be imposed on the Respondent is in principle four years, subject to potential reduction or suspension pursuant to Articles 10.4 (i.e. Elimination of the Period of Ineligibility where there is No Fault or Negligence), 10.5 (i.e. Reduction of the Period of Ineligibility based on No Significant Fault or Negligence) or 10.6 (i.e. Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault).

80. However, since it is already concluded above that the Respondent failed to establish that the anti-doping rule violation was not committed intentionally, the Tribunal does not deem it necessary to assess whether the Respondent may have had no fault or negligence in committing the anti-doping rule violation.

81. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had no fault or negligence in committing an anti-doping rule violation.

82. Additionally, the Tribunal finds that the above reasoning also applies to "no significant fault or negligence" (Article 10.5 of the ADAK Rules). The Tribunal observes that the comment to Article 10.5.2 of the ADAK Rules takes away any possible doubts in this respect:

"Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation [...] or an element of a particular sanction (e.g., Article 10.2.1) [...]".

83. As such, since the Respondent is found guilty of violating Article 10.2.1 of the ADAK Rules, it is impossible to establish that the violation was committed with no significant fault or negligence.

84. With the above analysis, the Tribunal as so far dealt with two provisions that is Article Articles 10.4 and Article 10.5 of the ADAK Rules that may lead to elimination, reduction or suspension of an otherwise applicable period of ineligibility. The Tribunal is thus left to assess whether Article 10.6 should be considered.

85. Under this limb the Respondent has pleaded for the application of the Principle of Proportionality in reducing the ineligibility period. This application as interpreted by the Tribunal falls squarely under Article 10.6 of the WADA Code.

86. Under this principle the Tribunal is invited to exercise outright discretion to impose the overarching principle of justice and proportionality on which all systems of law including the Sports Arena is sheltered in.

87. The rationale of imposing this principle is well articulated in **CAS 2008/A/1473 Joe Warren v. United States Anti-Doping Agency (USADA)** at paragraph 17 while quoting CAS 2006/A/1025 the Panel stated:

"... in all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the

particular circumstances of an individual case can be properly taken into account.

But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate...

Thus, where WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, ... That gap is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based."

88. In demonstrating what would occasion a very rare case where the principle of proportionality would apply, the Tribunal draws the parallel in **FA Regulatory Commission's decision in FA vs. Jake Livermore** on 8 September 2015. In the case, the FA under its Anti-Doping Regulations (reflecting the 2009 WADA Code) had brought a charge against Jake Livermore, the *Hull City* player, for an in-competition positive test in April 2015 for the prohibited substance, cocaine.

89. However, despite that Mr. Livermore could not bring himself within the definition of "no fault or negligence" under the regulations, the Commission went on to disapply the penalty and arrive at the outcome that no period of suspension would be given.

90. The in reaching its decision based on the principle of proportionality, the Commission had relied upon the evidence of a consultant forensic psychiatrist who testified that Mr. Livermore had the impairment to his thought processes and judgment at the time in question due to the death of his son.

91. Turning to the present proceedings, the Respondent has not demonstrated to this Tribunal in the first instance that his case ought to be categorized as a very rare case that falls outside the realm of WADA Code which the ADAK Rules are based on. Secondly, the Respondent has not gone a step further to produce sufficient evidence to be weighed on a balance of probability that would demonstrate the rareness of his case.

92. Thus, based on these circumstances the plea under the principle of proportionality fails to meet the required muster.

93. Consequently, the Tribunal finds that the Respondent did not have no (significant) fault or negligence in committing the anti-doping rule violation, nor shall the period of ineligibility of four years otherwise be reduced or suspended.

iv. <u>When shall the period of ineligibility start?</u>

94. The focus now shifts to the commencement date of the period of ineligibility, the Tribunal is well guided by Articles 10.11 and more specifically, 10.11.1 and 10.11.2 of the ADAK Rules.

95. Thus, the Tribunal is fully aware that the Panel in ***CAS 2012/A/2822 Erkand Qerimaj v. International Weightlifting Federation (IWF), award of 12 September 2012*** decided that an athlete's personal history or how severely the penalty would impact him or her given the particularities of his or her sport cannot be taken into account when fixing the penalty.

96. However, under the principles of proportionality and fairness as alluded in ***Football Association v Jake Livermore*** requires that the start date of the Respondent's ineligibility should be the date of his first sample collection, October 23, 2016. While not fully accepting the

testimony by the Respondent given due to lack of sufficient evidence to back up that testimony, the Tribunal appreciates the Athlete's admittance of violating the Anti-Doping rule. Additionally, it does appear from the IAAF records that the Respondent has not competed since the charges were brought up to date.

97. Therefore, the Tribunal has decided that the Respondent begins his four-year suspension on 23rd October 2016. One result of using this earlier date is that all of his competition results following that date must be considered void and eliminated.

Conclusion

98. Based on the foregoing, and after having taken into due consideration both the regulations applicable and all the evidence produced, and all arguments submitted, the Tribunal finds that:

i. The Respondent committed the anti-doping rule violation with intent. A four (4) year period of ineligibility is therefore in principle warranted.

ii. The Respondent did not have no (significant) fault or negligence in committing the anti-doping rule violation, nor shall the period of ineligibility of four (4) years otherwise be reduced or suspended.

iii. A four (4) year period of ineligibility is to be imposed on the Respondent, commencing as from 23rd October 2016.

All other and further motions or prayers for relief are dismissed.

Dated at Nairobi this 27th **day of** February **, 2019.**

Rhivelka.

PP John M. Ohaga, Panel Chairperson

PP

Ms. Mary N. Kimani, Member

Gabriel Ouko, Member