

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO.18 OF 2018

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

-versus-

VICTOR WACHIRA MIANO..... RESPONDENT

**DECISION**

**Hearing:** 28<sup>th</sup> November, 2018

**Panel:** Elynah Sifuna Vice-Chairperson  
Peter Ochieng Member  
Gichuru Kiplagat Member

**Appearances:** Mr.Rogoncho for the Applicant  
No Appearance by 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 an elite male international level athlete.

## **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 03/10/2018.
4. The Applicant brought charges against the Respondent that on 05/11/17 the Respondent was at Qingdao Marathon, China when China Doping Control Officers collected a Urine Sample from the Respondent and split the sample into two separate bottles which were given reference numbers A6280726 (A Sample) and B6280726 (B Sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. Both samples were taken to WADA accredited laboratory in Beijing, China (hereinafter referred to as "the laboratory"). The Laboratory analysed the A Sample as per the WADA International Standard for Laboratories and an Adverse Analytical Finding revealed the presence of prohibited substance erythropoietin (EPO).
6. EPO is listed as a peptide hormones growth factor under S2 of the 2017 WADA Prohibited List.
7. The findings were communicated to the Respondent by Mr. Japheth K Rugut, ADAK Chief Executive Officer vide Notice of Charge and Provisional Suspension dated 20/06/18 for the Respondent to offer an explanation.

8. The letter also informed the athlete of his right to request for Sample B analysis and other avenues for sanction reduction including prompt admission and requesting for a hearing.
9. The Respondent responded via three letters dated 02/07/18, 03/07/18 and 23/10/18. He denied the charges and stated that he did not know how the EPO entered his body.
10. The Respondent did not request a sample B analysis thus waiving his right to the same under rule 7.3.1 of ADR. The Applicant contends that there is no departure from the international standards for laboratories that could reasonably have caused the AFF outlined in Article 3.2.2 of ADAK ADR. Similarly, they claim that there is no departure from the International Standards for Testing and Investigations that could reasonably have caused the AAF outlined in Article 3.2.3 hence the responsibilities, obligations and presumptions of Article 3 of ADAK ADR apply herein.
11. Subsequently, ADAK preferred the following charges against the Respondent:  

**Presence of a prohibited substance Erythropoietin (EPO) in the athlete's sample.**
12. 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 the adverse analytical finding.
13. Furthermore, the Applicant states that there is no plausible explanation by the Respondent to explain the adverse analytical finding and the ingestion of the prohibited substance was intentional.

14. The Applicant also notes that the Respondent has a personal duty to ensure that whatever enters his body is not prohibited and that under Article 22.1 of the ADAK ADR the athlete is responsible for knowledge of and comply with anti-doping rules which includes informing medical personnel of their obligation not to prescribe any medication with prohibited substances.
15. 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.
16. The Applicant prays that:
- a) All competitive results obtained by the Respondent from 05/11/17 until the determination of the matter be disqualified with all resulting consequences including forfeiture of medals and prizes as per Article 10.1 of the WADC Code.
  - b) The Respondent be sanctioned to a 4 year period of ineligibility as provided by ADAK Anti-Doping Code as provided by WADC Code Article 10.
  - c) Costs, as per WADA Article 10.10

### **The Response**

17. The Respondent did not file any formal response but relied on his letters dated 02/07/18, 03/07/18 and 23/10/18 as noted above.

### **Hearing**

18. On 28/11/18 the matter was heard. The Applicant relied on the charge document. The Applicant further noted that Article 2.1.1 of the WADA Code imposes a duty to the athlete to ensure that no prohibited substance enters his body.

19. The Applicant submitted an article titled "The Benefits of Spirulina" from the URL website address <https://www.algorigin.com/en/algae/spirulina/> where under subtitle, "Spirulina and Athletic Performance" it states:

**"...spirulina boosts athlete's performance and recovery as a result of its capacity to release erythropoietin (EPO) which naturally aids in the formation of red blood cells."**

20. The Applicant also noted that as per Article 4.4 of the WADA Code, the Athlete did not obtain a TUE from the National Federation or any Anti-Doping Organization and that failure to do so removes the athlete from the defence of "no fault".

21. The Applicant prayers were in terms of paragraph 12 of the charge document but in addition return of prize money and or medal and ineligibility for four years in terms of Article 10 of the WADA Code.

22. The Respondent waived his right to attend the hearing vide his letter dated 23/10/18. In his reply he sought to rely on the contents of his letters dated 02/07/18, 03/07/2018 and 23/10/18. He argued that he has never used EPO at any one time. He further noted that during the Qingdao Marathon he only used a food supplement called "Spirulina", vitamins, pain killers and some eye medicines.

23. Moreover, in his letter of 02/07/18 he noted that the pain killers he used were *brufen*, *declofenac*, eye medicines and *venova*. He stated that he had a leg injury and sought the aforementioned medical interventions.

24. In mitigation he prayed for leniency given that athletics is his lifeline and secondly that he has a young family and lastly that he is a first time offender.

## **Discussion**

25. We wish to make our findings based on the matter before us and the submissions by both parties.

26. Section 31 of the Anti-Doping Act states that:

**“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 organisations. (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.”**

27. Consequently, our decision will be guided by the Anti-Doping Act, the WADA Code, the IAAF Competition Rules and other legal sources.

28. EPO is a non specified substance and is listed as a *peptide hormone*, growth factors related substances and *mimetic/erythropoietin* under S.2 WADA's 2017 prohibited list.

29. The Respondent indicated that he had a leg injury and was taken to hospital but he cannot recall the treatment that he was given owing to language barrier. In his Doping Control Form though he stated that he had used Declofenac, Vitamin C, Brufen, Piriton and eye medicine. However, he did not state that he had used the food supplement spirulina.

30. The Respondent being an elite athlete cannot be said to have no knowledge on what doping entails. He knew or ought to have known that anything he ingests may have adverse effects on his career and take precaution or better still seek a TUE.

31. A recent report titled, “Doping in Kenya; Stakeholder Project Report” by the Intelligence and Investigations Department of WADA launched in 2018 in Nairobi made a finding that EPO is the third

most prevalent prohibited substance detected in Kenyan athletes and accounts for 12% (16 out of 138) of all AAFs.

32. The report noted that EPO is prohibited at all times as it stimulates red blood cells production and improves cardiovascular endurance and that it is administered intravenously or by injection.
33. Even though the report concluded that Kenyan athletes most commonly use Nandrolone and EPO the report also noted that athletes in Kenya are insufficiently educated on doping and/or wilfully blind as to the consequences of doping.
34. We take cognizance of this important report and invite the Applicant to carefully study it and identify the critical issues of implementation. Indeed, there is much that can be done especially on advocacy and awareness creation on doping to the sporting and athletic fraternity.
35. Coming back to the instant case we however, note that the Applicant needed to establish if the ADRV by the Respondent was intentional as outlined by Article 10.2.3 thus as:

**“...those athletes who cheat. 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 significant risk that the conduct might constitute or result an anti-doping rule violation and manifestly disregarded that risk.”**

36. Undoubtedly, the Respondent cannot absolve himself from blame for the ADRV. He has not explained to our comfortable satisfaction how the prohibited substance entered his body. We can only come to the inescapable conclusion that this was intentional as he engaged in conduct that he knew constituted an ADRV.
37. The next issue of consideration is the question of “no significant fault”. In the case of **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** the court stated that:

**“The issue whether an athlete’s fault or negligence is ‘significant’ are very ‘fact specific’ and that no doctrine of binding precedent applies to the CAS**

jurisprudence. CAS stresses the importance to establish it 'in view of the totality of the circumstances' and therefore paying crucial attention to their specifics" (Emphasis Ours).

38. In our assessment of the degree of fault on the part of an Respondent we have looked at these tests: the Respondent'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. We have also looked at the pertinent legal provisions, WADA Code Article 10.5.1.1.
39. The Respondent neither disclosed the food supplement Spirulina that contained the prohibited substance on the Doping Control Form nor did he admit the ADRV in a timely manner. In fact the Respondent only admitted to the use of spirulina in his third response vide the letter dated 23/10/2018 and not in his first two correspondences. This to us looks like an afterthought. Looking at the totality of circumstances the Respondent warrants no reduction for the period of ineligibility.
40. We also note that the use of EPO has garnered currency in the Kenyan athletic world. As a Tribunal we will not countenance this unbecoming conduct at all.

## CONCLUSION

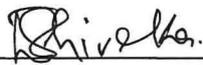
41. In these circumstances, the following orders commend themselves to the Tribunal:
- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 4 years from 03/07/2018 pursuant to Article 10.2.2 of the WADA Code;

- b. The disqualification of the Qingdao China Marathon results of 05/11/2017 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- c. Each party to bear its on costs;
- d. Orders accordingly.

2. 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 27<sup>th</sup> day of February, 2019.**

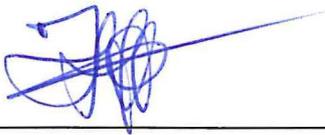
Signed:  
**Elynah Shiveka**



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Vice-Chairperson, Sports Disputes Tribunal

Signed:  
**Peter Ochieng**



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Member, Sports Disputes Tribunal

Signed:  
**Gichuru Kiplagat**

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Member, Sports Disputes Tribunal