

**REPUBLIC OF KENYA**



**THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**ANTI-DOPING CASE NO. 2 of 2018**

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

**-versus-**

**ISAAC KIBET CHEBUYO..... RESPONDENT**

**DECISION**

**Hearing:** 31<sup>st</sup> January, 2019

<b>Panel:</b>	Mr. John Morris Ohaga	Chairman
	Mrs. Elynah Sifuna-Shiveka	Dep. Chairperson
	Ms. Mary Kimani	Member

**Appearances:** Messrs Erick Omariba & Bildad Rogoncho for  
Applicant  
Ms. Rebecca Wanyama for Respondent



## **THE PARTIES**

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016 as amended.
2. The Respondent is a male athlete competing in national events, to whom the Anti-Doping Act No. 5 of 2016 as amended and the ADAK ADR apply as encompassed at Article 1.3 of the ADAK ADR.

## **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 at the Tribunal dated 26<sup>th</sup> March, 2018.
4. The Applicant brought charges against the Respondent that on 18<sup>th</sup> of November, 2017 the Applicant's Doping Control Officers in an in-competition testing at Baringo Half Marathon held in Baringo, collected a urine sample from the Respondent. Aided by the DCO, the Respondent split the Sample into two separate bottles, which were given reference numbers A4163552 ("A" sample) and B 4163552("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. Both Samples were transported to the WADA accredited laboratory in Doha, Qatar "the laboratory". The Laboratory analyzed the 'A Sample' in accordance with the procedures set out in WADA's International Standard for Laboratories for Laboratories (ISL). The analysis of the 'A Sample" returned an Adverse Analytical Finding(AAF) revealing *the presence of a prohibited substance Prednisolone* as captured in the test report dated 17<sup>th</sup> January, 2018 (marked as ICK 2 )
6. Prednisolone is listed as a prohibited substance

*Glucocorticoids/prednisolone and its metabolite* which are prohibited under S9 of the 2017 WADA prohibited list. Prednisolone is 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 a letter dated 5<sup>th</sup> February, 2018. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 12<sup>th</sup> February, 2018.
7. The same letter also informed the athlete of his right to request for the analysis of the B-Sample and other avenues for sanction reduction including prompt admission and requesting for a hearing and a deadline of 12<sup>th</sup> February, 2018 was given for the same.
8. The Respondent through a letter dated 12<sup>th</sup> February, 2018 stated that he was experiencing breathing problems and went to unnamed Pharmacy where he procured medication containing *prednisolone* following advice from the attendant.
9. According to the Applicant (Adak), the Athlete's explanation is not satisfactory and there was negligence on the part of the athlete as he ought to have explained to the Pharmacist of his situation and career. And/or would have sought a retrospective Therapeutic Use Exemption (TUE).
10. Additionally the Respondent did not request a Sample B analysis thus waiving his right to the same under rule 7.3.1 of ADAK ADR.
11. 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 Adverse Analytical Finding (AAF) as outlined in Article 3.2.3.

12. The Sports Dispute tribunal has jurisdiction under section 55, 58, and 59 of the Sports Act No. 25 of 2013 and section 31 and 32 of the Anti-Doping Act No. 5 of 2019 as amended, to hear and determine this case.

## **CHARGES**

13. Subsequently, ADAK preferred the following charges against the Respondent:

**Presence                  of                  prohibited                  substance  
Glucocorticoids/prednisolone and its metabolite in the  
athlete's sample.**

14. 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.

15. ADAK also contends that no possible explanation can be given on fault or negligence by the athlete or a third party.

16. ADAK prayed for:

- a) All competitive results obtained by Isaac Kibet Chebuyo from and including 18<sup>th</sup> November, 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) Isaak Kibet Chebuyo be sanctioned to a four year period of ineligibility as provided by as per Article 10 of ADAK Rules

and WADC.

c) Costs as per Article 10.10.

## **PRELIMINARY MATTERS**

17. The matter was first brought to the Tribunal vide a notice to charge addressed to the chairman of the Sports Disputes Tribunal dated 22<sup>nd</sup> February, 2018 by Ms. Damaris Ogama for the Applicant (ADAK). The matter was filed on the 26<sup>th</sup> of February, 2018 at the Tribunal. The notice also requested the Tribunal to constitute a hearing panel to whom the charge documents and other relevant materials were to be served.
18. Upon reading the notice to charge dated 22<sup>nd</sup> February, 2018 filed at the Tribunal, the Tribunal directed and ordered that the Applicant should serve the mention notice, the notice to charge, the notice of ADRV, the Doping Control Form and all other relevant documents on the Respondent within 15 days of the date hereof, a Panel was constituted comprising Mrs. Elynah Shiveka, Ms. Mary Kimani and Mr. Robert Asembo and the matter was to be mentioned on 21<sup>st</sup> March, 2018 to confirm compliance and for further directions.
19. On 21<sup>st</sup> March, 2018 when the matter came up for mention Mr. Omariba was present for the Applicant while the Respondent Athlete Isaac Kibet Chebuyo attended in person. He asked the

Tribunal to appoint a pro-bono lawyer to represent him in the matter. Mr. Omariba was directed to serve the relevant documents pertaining to the matter to the appointed lawyer and the Tribunal within 7 days. The matter was to be mentioned on 11<sup>th</sup> April, 2018.

20. The firm of Wanyaga & Njaramba Advocates was appointed to represent the Respondent Athlete in the matter. The appointment notice was filed at the Tribunal on 10<sup>th</sup> April, 2018. When the matter came up the following day for mention as earlier scheduled Ms. Rebecca Wanyama was present on behalf on the Respondent Athlete. She requested for 3 weeks to file a statement of response. Mr. Omariba for the Applicant did not object to the request. This was granted and a further mention was slated for 2<sup>nd</sup> May, 2018 the purpose of the same was to pick a hearing date for the matter.
21. On 2<sup>nd</sup> May, 2018 Ms. Wanyama reported to the Tribunal that she needed more time to trace the Respondent Athlete to be able to file the statement of response. The Tribunal ordered Mr. Bildad Rogoncho for the Applicant (ADAK) to assist in tracing the Athlete. A further mention was scheduled for 6<sup>th</sup> June, 2018.
22. On 13<sup>th</sup> June, 2018 both parties did not turn up for the mention and therefore the matter was adjourned.
23. On 14<sup>th</sup> June, 2018 Messrs Omariba and Rogoncho requested the Tribunal for leave to serve the Respondent Athlete who resided in

Iten though it was hard to trace him. They asked for two weeks to be able to serve the Respondent Athlete and 5<sup>th</sup> July, 2018 was scheduled for hearing of the matter.

24. The hearing did not proceed as earlier scheduled on 5<sup>th</sup> July, 2018 but was adjourned to 12<sup>th</sup> July, 2018. On 12<sup>th</sup> July, 2018 when the matter was listed for hearing Ms. Wanyama for the Respondent reported light at the end of the tunnel since the whereabouts of the Athlete had been ascertained. He was at the time at the Kenya Defence Forces recruits' training camp in Eldoret for a period of 9 months and serving him would not be possible till completion of the training. Both counsel agreed to mention the matter on 5<sup>th</sup> September, 2018.
25. On 5<sup>th</sup> September, 2018 status quo on the matter still stood. The matter was to be mentioned on 5<sup>th</sup> December, 2018 for further directions. The Applicant was represented by Mr. Rogoncho while the Respondent Athlete was represented by Ms. Wanyama.
26. 13<sup>th</sup> December, 2018 when the matter was listed for mention Ms. Kyalo holding brief for Ms. Wanyama on behalf of the Respondent Athlete informed the Tribunal that the Respondent was still in training and thereafter unavailable. She requested the Tribunal for more time to enable them to find him and take instructions. The Tribunal ordered for the matter to be mentioned on 24<sup>th</sup> January, 2019 for further directions.

27. On 31<sup>st</sup> January, 2019 when the matter was scheduled for hearing the counsel for parties Mr. Rogoncho for the Applicant and Ms. Wanyama for the Respondent by consent asked the Tribunal to issue its decision based on the material already on record.

### **Response**

28. The Respondent represented by the firm of Wanyaga & Njaramba Advocates filed his statement of defence dated 24<sup>th</sup> January, 2019 admitting what was contained in the Charge Document with mitigating factors. He also relied on his prompt response letter dated 12/2/2018 and witness statement dated on 21/01/2019 which captures the same information without any contradiction.

29. Ms. Wanyama the counsel for the Respondent Athlete in her response to the charge averred that there was no intention to enhance performance by the Athlete. The Athlete did not take intentionally take, nor was he aware of having any prohibited substances within his body until he tested positive after his sample had been collected.

30. The Counsel posited that on 15<sup>th</sup> November, 2017, the Respondent Athlete went to a Pharmacy after experiencing breathing problems and explained his ailment to the attendant. The attendant gave him a number of options but advised that prednisolone would be the best medication to treat his condition.

31. The Respondent Athlete avers that he chose to take prednisolone based on the explanations given by the Pharmacy attendant. He was in oblivion that the medicine he took was a prohibited substance.
32. The Respondent Athlete was at all material times seeking medical treatment for his breathing problems and had no intention of taking the medicine to enhance his performance during the race.
33. The Athlete reiterates that he was not negligent when seeking medical attention and that such treatment was for credible non-doping use.
34. The counsel submitted that the criteria for "No Fault or Negligence" is that the athlete must establish "that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution" that they had committed an ADRV.
35. Ms. Wanyama stated that the medication prescribed by the Pharmacy attendant on 15<sup>th</sup> November, 2017 is the most likely cause of how the prohibited substance, *prednisolone*, entered his body. The window of detection for *Prednisolone* if taken orally can be up to several days depending on the dosage.
36. She submitted that the Respondent Athlete is a promising athlete with a bright future but obviously hampered by his lack of awareness which makes it hard to comprehend complex matters.
37. In the Arbitration cases of *CAS 2013/A/3327 Marin Cilic v.*

***International Tennis Federation (ITF) & CAS 2013/A/3335***  
***International Tennis Federation (ITF)v. Marin Cilic***, the CAS Panel highlighted matters which can be taken into account in determining the level of subjective fault of an athlete, for instance;

*"an athlete's youth and/or inexperience; language or environmental problems encountered by the athlete; the extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete); any other "personal impairment" such as those suffered by (i) an athlete who has taken a certain product over a long period of time without incident; (ii) an athlete who has previously checked the product's ingredients; (iii) an athlete who is suffering from a high degree of stress; (iv) an athlete whose level of awareness has been reduced by a careless but understandable mistake."*

38. The counsel avers that the subjective element brings into consideration what could have been expected from that particular athlete, in light of his personal incapacities.
39. The Respondent Athlete has never encountered ADAK officials before and has never participated in any international competitions and as such, he lacks exposure regarding Anti-Doping testing, rules and regulations.
40. The Athlete has only participated in one other race,

Kapsekwony Cross country held in October 2017 in which he was not tested for doping. The counsel asserts that this is the Athlete's first doping charge and he regrets.

41. As pertains to timely admission by the Athlete his counsel Ms. Wanyama 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.*"
42. In this case the Respondent Athlete admitted in his prompt response that the prohibited substances entered his body through prescribed medication to treat his condition.
43. The Respondent Athlete ingested the medicine between 15<sup>th</sup> and 17<sup>th</sup> November, 2017 solely for medical reasons and not to enhance his performance.
44. The counsel proffers that the Respondent athlete received the notice to charge and provisional suspension on 5<sup>th</sup> February 2018 and was given a deadline of 12<sup>th</sup> February, 2018 by which he should respond. The respondent athlete complied with the deadline and responded vide a letter addressed to

the Applicant. (**Marked "IKC 1"**)

45. Ms. Wanyama counsel for the Respondent athlete elucidated that on the day of the race, the athlete took a painkiller, panadol, and energy drinks which he disclosed on the Doping Control Form (**Marked IKC 2**). The counsel added that the only reason that the Respondent athlete did not disclose that he had been taking *prednisolone* is because he mistakenly thought that he was only required to reveal substances taken on the day of the race. He had taken his last dose of *prednisolone* a day before a race.
46. Ms. Wanyama supplicates that according to Article 10.2 of the WADA Code, an elimination or reduction of the period of ineligibility for specified substances under specified circumstances can be granted where; "*The Participant can establish how a specified substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such Specified Substance was not intended to enhance the player's sport performance or to mask the use of a performance enhancing substance, the period of ineligibility established shall be replaced (assuming it is the Participant's first anti-doping offence) with, at a minimum, a reprimand and no period of ineligibility, and at a*

*maximum, a period of ineligibility of two years. To qualify for any elimination or reduction, the participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Tribunal, the absence of intent to enhance sport performance or mask the use of a performance-enhancing substance. Where the conditions set out are satisfied, the participant's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."*

47. The Arbitration case *CAS 2015/A/4129 & 10 others v. International Weightlifting Federation (IWF)*, is instructive as

the panel stated that;

*"Under the applicable anti-doping rules, in order to benefit from an eliminated or reduced sanction, the burden of proof is placed on the athlete to establish that the violation of the anti-doping rules was not intentional and/or that he/she bears no fault or negligence or no significant fault or negligence. The standard of proof is the balance of probabilities." i.e. that it is more likely than not, that the prohibited substance was for a credible non-doping explanation."*

48. The counsel disclosed that the Respondent athlete is the second born in a family of 8 children, with both parents and the elder brothers being peasant farmers with a low income. She adjures that as such, his family depends on him for their daily needs and hence athleticism is his main source of income and

therefore, being sanctioned from the same would add onto the hardship that his family already experiences.

49. The Respondent Athlete entreats to be absolved from any severe penalty as this is his first Anti-Doping Rule Violation and that the prohibited substance in question (*Prednisolone*), which is the subject of the Athlete's Adverse Analytical Finding(AAF) is a specified substance under the WADA prohibited list 2017 and as such the athlete is entitled to consideration of reduction of the standard sanction.
50. According to the counsel, the Respondent athlete has made an effort of familiarizing himself with the Anti-Doping Rules and Regulations and promises to be more careful going forward. He is only 22 years of age and hence a young man with a promising athletics career.
51. Ms. Wanyama implores that the Respondent Athlete is a recruit with the Kenya Defence Forces and is currently undergoing training. He was recruited because of his athletic abilities, therefore, his continued stay in the Defence Forces depends on his continued participation in the sport.
52. The counsel for the Respondent athlete concluded her pleadings by requesting the Tribunal to grant the following prayers;
  - i. A substantial reduction from the maximum penalty to be allowed to the Athlete.

- ii. Any other relief that the Tribunal deems just and fair.

## DISCUSSION

- 53. We have carefully considered the matter before us and also the supporting documents therein and these are our observations;
- 54. Section 31 of the Anti-Doping Act 2016 as amended 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 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."**
- 55. Consequently, our decision will be guided by the Anti-Doping Act 2016 as amended, the WADA Code and other legal sources.
- 56. *Prednisolone* which is prohibited under S9 of the 2017 WADA prohibited list is alleged to have been found in the Respondent Athlete's urine sample collected on 18<sup>th</sup> November, 2017 at the Baringo Half Marathon held in Baringo County, Kenya.
- 57. 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"*

58. 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.*

59. 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 waives analysis of the B sample and the B sample is not analyzed or....."*

60. 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.

61. 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.

62. Despite the fact that the athlete admitted to using the prohibited substances in his statements of response and pleadings, he did not reveal the medication namely *prednisolone* that were prescribed to him

on the doping control form. He only disclosed that he had ingested Panadol, Iso drink, Reginer, Feroglobin, Airtal and Omega H3.

63. 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.

64. 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.

65. 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.

66. On the limb of "no significant fault" the Respondent's Counsel referred us 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.

67. 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."*

68. We note that the Respondent has no known previous charge (s) or ADRV. He also did admit the ADRV instantly in his statements and pleadings.

## **DECISION**

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

- a. The period of ineligibility for the Respondent shall be for 2 years from 12<sup>th</sup> February, 2018 the date of the Provisional suspension pursuant to Article 10.2.2 of the WADC;
- b. The disqualification of the Baringo Half Marathon results of 18<sup>th</sup> November, 2017 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- c. Each party to bear it's on costs;
- d. Parties have a right to Appeal pursuant to Article 13 of the WADC and ADAK ADR.
- e. Any other prayers and motions are dismissed.

70. 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 21<sup>st</sup> day of March, 2019.**

Signed:

**Mr. John Morris Ohaga**



**Chairman, Sports Disputes Tribunal**

Signed:

**Mrs. Elynah Sifuna-Shiveka**



**Deputy Chairperson, Sports Disputes Tribunal**

Signed:

**Ms. Mary Kimani**



**Member, Sports Disputes Tribunal**

