

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ADAK CASE NO. 29 OF 2018

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

-versus-

ROBERT KIMUTAI KORIR..... RESPONDENT

DECISION

Hearing: 28th November, 2018

Panel: Mrs. Elynah Sifuna- Shiveka Panel Chair
Ms. Mary Kimani Member
Mr. GMT Ottieno Member

Appearances: Mr. Bildad Rogoncho for Applicant (ADAK)
Mr. Robert Kimutai Korir Respondent representing himself.

1. The Parties

- 1.1 The Applicant Anti-Doping Agency of Kenya (hereinafter 'ADAK'), is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016 as amended. It is the body charged with managing Anti-Doping activities in Kenya including Result Management.
- 1.2. The Respondent Robert Kimutai Korir, is a male adult athlete competing in national events.
- 1.3. Athletics Kenya (hereinafter 'AK'), is the national federation governing and managing Athletics in the country. It is an affiliate of the International Association of Athletic Federations (hereinafter 'IAAF').
- 1.4. The Sports Disputes Tribunal (hereinafter 'Tribunal'), is an independent Sports Arbitration Institution created under the provisions of the Sports Act 2013 Laws of Kenya. Members of the Tribunal are appointed in terms of Section 6 of the said Act.

2. Background

- 2.1. The proceedings have been commenced vide a charge document against the Respondent by the Applicant dated 31st August, 2018 and filed on 4th September, 2018 at the Tribunal together with other supporting documents.
- 2.2. The Applicant brought charges against the Respondent that

on 23rd April, 2018 in Kenya, during an out-of-competition testing, Doping Control Officers collected a urine Sample from the Respondent athlete. Aided by the DCO, the Respondent split the Sample into two separate bottles, which were given reference numbers **A 4162827** (the 'A Sample') and **B 4162827** (the "B Sample") in accordance the prescribed WADA procedures. This is in tandem with the Doping Control Form dated 23rd April, 2018.

2.3 The sample was subsequently analysed at the WADA accredited laboratory in Doha, Qatar and an Adverse Analytical Finding (AAF) resulted, that disclosed the **presence of a prohibited substance Norandrosterone** as per the test report dated 11th June, 2018 and availed at the Tribunal. **Norandrosterone** is listed as an endogenous AAS under **S1 Anabolic Agents** of WADA's 2018 prohibited list. ADAK stated that the Laboratory analyzed the "A Sample" in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL).

2.4. The findings were communicated to the Respondent Athlete by one Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 20th July, 2018. In the said communication the Respondent Athlete was offered an

opportunity to provide an explanation for the same by 3rd August, 2018.

- 2.5. The same letter also informed the athlete of his right to request for the analysis of B-sample; and other avenues for sanction reduction including prompt admission and requesting for a hearing and gave a deadline of 2rd August 2018 for the same.
- 2.6. The Athlete responded vide a letter dated 3rd August 2018. He accepted the charges and stated that he was advised and influenced by his fellow athletes to use '*Creatine*' medication to which he believed did not contain any prohibited substance and is used for body recovery after undergoing exercises. He further stated that he had used '*Flugon*' medication for treatment of his tonsils.

3. Charges

- 3.1. Subsequently, ADAK preferred the following charges against the Athlete Respondent:

Use of Norandrosterone a non-specified Substance Under Class S1 - Anabolic Agents, of the 2018 WADA Prohibited List.

Under Article 4.1 of ADAK Anti-Doping Rules, as read together with IAAF Rules 32.2(a) and Rule 32.2(b) the presence and use of prohibited substances or its metabolites or markers in an athlete's sample, constitutes an Anti-Doping

Rule Violation (ADRV).

- 3.2. The Respondent Athlete had no Therapeutic Use Exemption (TUE) recorded at the IAAF to justify the 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.
- 3.3. Furthermore, the Applicant stated that there is no plausible explanation by the Respondent to explain the adverse analytical finding.
- 3.4. It is the Applicant's case that there was no departure from the International Standards for Laboratories (ISL) that could reasonably have caused the AAF as envisioned in Article 3.2.2 of the WADA Code and further that there is no departure from the International Standards for Testing and Investigations (ISTI) that could reasonably have caused the AAF according to Article 3.2.3 of WADC hence the responsibilities, obligations and presumptions of Article 3 of WADC apply herein.
- 3.5. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports

Act No. 25 of 2013 and sections 31 and 32 of the Anti-Doping Act No. 5 of 2016 as amended to hear and determine this case.

3.6. The Applicant prays that:

- a) All competitive results obtained by the Respondent Athlete from and including 23rd April, 2018 until the date of determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes), as per **Article 10.1** of the WADA Code and ADAK ADR.
- b) Robert Kimutai Korir be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code, **Article 10 of WADC and ADAK Rules.**
- c) Costs, as per WADA **Article 10.10.**

4. Preliminary Matters

4.1. The matter was brought to the Tribunal vide a notice to Charge dated 31st August, 2018 and filed on 4th September, 2018 together with other supporting documents by Ms. Damaris Ogama representing the Applicant (ADAK).

4.2. Upon reading the notice to charge, the Tribunal directed and ordered as follows;

- (i) The Applicant was to serve the Mention Notice, the

Notice to Charge, the Notice of ADRV, the Doping Control Form and all relevant documents on the Respondent within 15 days of the date hereof;

(ii) The Panel to hear the matter was to comprise Mr. John Ohaga as the Panel Chair, Ms. Mary Kimani (Member) and Mr. GMT Ottieno (Member).

(iii) The matter was to be mentioned on Wednesday, 3rd October, 2018 to confirm compliance and for further directions.

4.3. On 3rd October, 2018 when the matter came up for mention Mr. Bildad Rogoncho representing the Applicant confirmed having served the Respondent Athlete and presented him before the Tribunal. The Respondent Athlete Robert Kimutai Korir informed the Tribunal that he will represent himself in the matter although he admitted the charges. Mr. Rogoncho requested for more time to engage the Respondent Athlete with a view to obtaining substantial assistance. He asked the Tribunal to grant him 45 days to facilitate the same and thereafter mention the matter. The Tribunal granted him, his wish and the matter was to be mentioned on 21st November, 2018 for further directions.

4.4. The matter came up for mention on 22nd November, 2019 and ADAK was represented by Mr. Rogoncho. Mr.

Rogoncho reported that they had been in discussions with the Respondent Athlete. He requested for a hearing date for the following week in Eldoret since the Tribunal had planned to hear all ADAK cases there and the fact that it will be convenient to the Respondent Athlete who resides in the neighbourhood. The hearing was scheduled for 28th November, 2018 in Eldoret and Mr. Rogoncho was directed to inform the Respondent Athlete of the date.

- 4.5. The hearing took place as scheduled on the 28th November, 2018 with both parties present. The panel changed abit with Mrs. Elynah Sifuna-Shiveka as the Panel Chair replacing Mr. John Ohaga. The rest of the Panel members remained the same thus Ms. Mary Kimani and Mr. GMT Ottieno heard the matter.

5. Applicant's Brief Statement & Submissions

- 5.1. The Applicant's Counsel Mr. Bildad Rogoncho gave his opening statement by averring that the Respondent Athlete before the Tribunal Robert Kimutai Korir in an out of competition testing that took place on 23rd April, 2018, in Ngong, Kajiado County, Kenya, his sample returned an Adverse Analytical finding (AAF) for the **presence of a prohibited substance Norandrosterone.**
- 5.2. Mr. Rogoncho further stated that the Respondent Athlete was served with an ADRV on 30th July, 2018 and in his

response admitted to the charge and proceeded to provide ADAK with substantial assistance pursuant to Article 10.6 of the WADC and ADAK ADR.

5.3. Mr. Rogoncho was as brief as that and then presented the Respondent Athlete to give his evidence pertaining to the charges that were brought against him as contained in the Charge document and other supporting documents that were served to the Respondent Athlete and filed at the Tribunal.

6. Respondent's Submissions

- 6.1. The Respondent Athlete Robert Kimutai Korir took oath before giving his testimony on the charges filed by the Applicant against him since he was representing himself in the matter.
- 6.2. He commenced by giving us a brief background of himself. He disclosed that he was 25 years of age working for the Kenya Defence Forces based at Embakasi. He resides in Kapsabet, married and he is blessed with boy aged 2 years.
- 6.3. The Respondent Athlete informed us that he is a KCSE graduate having attained a C plus. Apart from working for Kenya Defence Forces, he is an Athlete.
- 6.4. He stated that he started running in 2015/2016 though he didn't participate in any races. However, come 2017 he took part in the Kenya Defence Forces championships that

were held at the Nyayo National Stadium participating in the 800 metres but was eliminated in the semi-finals. The same year in December, he also took part in the Athletics Kenya weekend meeting in Machakos participating in the 1500 metres and was again knocked out in the semi-finals.

- 6.5. In the first quarter of 2018 the Respondent Athlete participated in the Athletics Kenya weekend meeting in Thika and Inter Army championships respectively featuring in the 800metres posting a time of 1minute and 52 seconds. An average for any athlete in that race.
- 6.6. In June, 2018 he also participated in the Kenya Defence Forces athletics championships held in Kasarani and was a finalist in the 800metres. Later on, he represented the Coast region in the Athletics Kenya National championships cum trials and lost in the heats of the 800 metres. Since then he never ran in any other race and has never participated outside the country.
- 6.7. Regarding the ADRV, the Respondent Athlete narrated that on 23rd April, 2018 he was in Ngong Training Camp where KDF has a training base at Kibiku for all its athletes. He had just completed his training at around noon and he had gone to take tea, and saw four people brought to him by a fellow athlete by the name Benjamin Kigen he features in the 3000 metres Steeplechase.

- 6.8. The Respondent Athlete was in the company of another athlete by the name Kirong from the Navy and the four people introduced themselves and said they were from ADAK and wanted to take their samples for testing. Both athletes willingly gave their samples without any problem.
- 6.9. On the morning of 28th July, 2018 at around 6.00am when the Respondent Athlete was preparing to go for his morning training, he received a call from Mr. Omariba informing him to check his whatsApp message. The message was a shocking one to him since it was a notice to charge and mandatory provisional suspension since his sample that was taken on 23rd April, 2018 had returned an Adverse Analytical Finding (AAF).
- 6.10. The Respondent Athlete avers that he didn't understand and decided to call Omariba for an explanation and interpretation. It was on a Saturday morning and Mr. Omariba informed him that he was away in Eldoret. He asked him to go to ADAK offices on Monday which was 30th July, 2018 and he gave him directions of how to access the ADAK offices. The Respondent Athlete obliged and went to the ADAK offices on Monday as he had been instructed where he found Mr. Omariba and a lady. It was there and then that he was served with the Notice to Charge and Mandatory Provisional Suspension

dated 20th July, 2018. He received the document and acknowledged by writing his name, telephone number, and appended his signature.

- 6.11. The Respondent Athlete was asked to explain how the prohibited substance Norandrosterone would have entered his body/system. The Athlete stated that he has never taken any medication and was not a fan of such. He narrated that in March, 2018 he was called by one of his colleagues by the name Cornelius Kiprotich who also lives in Kapsabet helped educate him and secure a job at Kenya Defence Forces where he is currently employed. Cornelius informed him, that there were some white people from Japan who wanted some athletes from Kenya to join their Athletics club but who can participate in 600 metres time trial events. The Respondent Athlete told Cornelius that he was in poor form therefore cannot make it. Cornelius proposed to the Respondent Athlete that he can give him two weeks to be in form since he (Respondent Athlete) was Cornelius's priority in ensuring that he goes to Japan.
- 6.12. The Respondent Athlete continued training and just two days before end of the fortnight deadline, he chose to call his friend and neighbour and informed him that he was not ready since his form was still off the mark. The Athlete according to Cornelius was supposed to be clocking 1minute and 16 seconds to run the 600 metres time trial

while he was doing 1minute and 22 seconds way out of the mark.

6.13. According to the Respondent Athlete Cornelius would not take no for an answer and suggested to him that there is medicine for recovery which he (Cornelius) can avail to him. The Respondent Athlete asserted that he didn't like taking any medicines. However, Cornelius insisted that he will be coming to Nairobi and once he arrives he will get in touch. True to his word, Cornelius travelled to Nairobi, and it was on a Friday at around 3pm, he called him and asked him to meet him at the Hilton Hotel building. When they met, he told him there is a drug called "*Creatine*" it is good for recovery and you don't feel tired or fatigued. The Respondent Athlete also confirmed having taken some "*Panadol*".

6.14. Cornelius then asked him to wait for him a bit and shortly returned with a parcel in his hands and asked him if he knew of any doctor around there who could inject him with the drug. The Respondent Athlete responded in the negative. Cornelius then directed him to look around the Hilton Hotel building where he found a Chemist and asked the person on the counter if he could inject him with the medicine in his possession. The Respondent Athlete was instructed to go behind within the Chemist, inside he found

a table, a chair and a laptop, no bed. He found a lady who asked whether he had 200 Kenya Shillings for the injection. The Respondent Athlete told the lady that, the medicine was for recovery and that he was an athlete. The medicine was in a small bottle and colourless once the lady opened the medicine, she asked whether the Respondent Athlete knew where he was to be injected and since he wasn't aware he called Cornelius to be sure but it seems the lady knew and he was injected on the buttocks. After administering the injection the lady asked if the Respondent Athlete was willing to go and dispose of the container but he asked her just to do it at the Chemist.

6.15. When all these was done, the Respondent Athlete found Cornelius waiting for him and he was to return to Kapsabet and asked him to give him a feedback on how his body would be responding after the injection. The Respondent Athlete then parted ways and he proceeded at the CID headquarters, Kiambu Road to join his wife since it was a Friday for the weekend.

6.16. The Respondent Athlete trained the Saturday morning at Karura Forest for an hour but there was no difference. On Monday he returned to his training base, did his training in the morning but there was still no difference in regards to recovery and tiredness. On that same Monday at lunch time, that is when the ADAK people came to take his

sample for testing. They took both urine and blood samples. He immediately called Cornelius to inform him that the ADAK people had come. Cornelius never got in touch with the Respondent Athlete since he informed him about the ADAK people coming for testing.

6.17. The Respondent Athlete also submitted that he didn't read the contents of the drug he was injected with. He however, had written on the Doping Control Form that he had taken a drug called "Lobak", which he claimed he sometimes uses.

6.18. The communication between the Respondent Athlete and Cornelius subsided, till in May 2018 when the Respondent Athlete had travelled upcountry and met Cornelius and asked him about the drug he had been injected with. Cornelius was very casual and just affirmed that it was "Creatine" and it is not a bad drug.

6.19. The Respondent Athlete further submitted that later in May 2018, Cornelius called him and asked him to go and purchase some supplement for him found at the Yaya Centre ground Floor in Nairobi. The supplements were costing Kshs.4,300 and Korir was to buy and sent them to Cornelius in Kapsabet using the Classic Sacco Shuttle. Since they are friends, he went purchased the supplement which Cornelius had sent him a container of the type of supplement on Whatsapp that was required and dispatched

it to him.

- 6.20. The Respondent Athlete narrated that the relationship between Cornelius and him strained after receiving the bad news that his sample had returned an Adverse Analytical Finding and subsequently he would be likely facing sanctions.
- 6.21. He posited that Cornelius would have set him up, since he was insisting that he wanted to take him to Japan and would help him deal with fatigue and recovery. He suspected that it could not have been a coincidence that just after he had given him a drug to be administered with an injection, three days later the ADAK people went to the KDF training camp in Kibiku, Ngong Kajiado County to take his sample. The test by ADAK people was not at random but specific to him (Respondent Athlete Korir).
- 6.22. The Respondent Athlete Korir, revealed that Cornelius Kiprotich is husband to Nelly Jepkosgey who is currently banned from running for an ADRV commission in 2017.
- 6.23. The Respondent Athlete during the hearing was honest and remorseful and requested to be forgiven. At the same time asked ADAK to use the information he has provided to help deal with those tarnishing the good name of Kenya.

7. Discussion

7.1. We have carefully considered the matter before us and the Counsel's and Respondent Athlete's submissions and these are our observations;

7.2. Section 31 of the Anti-Doping Act states 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."

7.3. Consequently, our decision will be guided by the Anti-Doping Act 2016 as amended, the WADA Code, the IAAF Competition Rules and other legal sources.

7.4. Norandrosterone is a non specified substance which falls under Class S1-Anabolic Agents, of the 2018 WADA prohibited list. The Respondent's urine sample is alleged to have contained this prohibited substance during an out-of-competition testing in Kenya by ADAK Doping Control Officers.

- 7.5. It is not in dispute that this type of Anti-doping Rule Violation attracts a sanction of Ineligibility period of 4 years, a sanction that has been prayed for by the Applicant in this case.
- 7.6. However, during the hearing, the Applicant's Counsel Mr. Bildad Rogoncho submitted that the Respondent Athlete cooperated with ADAK by providing substantial assistance pursuant to Article 10.6 of the WADC and ADAK Anti-Doping Rules.
- 7.7. The Panel also notes that the Respondent Athlete is a national level athlete and a first time offender.
- 7.8. The Panel requested to get some information about if there was communication between the ADAK people and Mr. Cornelius Kiprotich who is suspected to have set up the Respondent Athlete, the prosecution was reluctant to follow up on that school of thought and directed that the Panel proceeds with giving a decision based on the hearing and the substantial assistance provided by the Respondent Athlete.
- 7.9. Therefore, as a panel we shall put into consideration the submissions presented by both parties in arriving at a reasoned and fair decision under the circumstances.

8. Decision

- 8.1. The Tribunal therefore sanctions the Respondent Athlete Robert Kimutai Korir to a period of ineligibility of two (2) years as a reduction from the full ineligibility period of four (4) years pursuant to Article 10.6 of the WADC and ADAK ADR for provision of substantial assistance.
- 8.2. The period of ineligibility shall commence from 3rd August, 2018 when the Respondent Athlete was Provisionally Suspended.
- 8.3. All competitive results obtained by the Respondent Athlete Robert Kimutai Korir from and including 23rd April, 2018 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes) pursuant to Article 10.1 of the WADA Code and as read together with ADAK ADR.
- 8.4. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and ADAK ADR, and Rule 42 of the IAAF Competition Rules.
- 8.6. Each party to bear its own costs.
- 8.7. Any other prayers or motions are dismissed.

Dated and delivered at Nairobi this day of 29th August, 2019.

Signed:
Mrs. Elynah Sifuna-Shiveka



Deputy Chairperson, Sports Disputes Tribunal

Signed:
Ms. Mary Kimani



Member, Sports Disputes Tribunal

Signed:
Mr. GMT Ottieno



Member, Sports Disputes Tribunal