REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 34 OF 2018

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

-versus-

PHILEMON KIPRUTO KOSKEI.....RESPONDENT

DECISION

Hearing:	27th November 2018	
Panel:	John M Ohaga	Chairman
	Peter Ochieng	Member
	Mary Kimani	Member
Appearances:	Mr. Bildad Rogoncho for the Applicant	
	Respondent in Person	

The Parties

1. The Applicant, the Anti-Doping Agency of Kenya (ADAK) is a State Corporation established under section 5 of the Anti-Doping Act No.5 of 2016. It is the body corporate charged with inter alia implementing the Prohibited List as published by the World Anti-Doping Agency from time to time, prosecuting anti-doping offences before this Tribunal and enforcing ethical parts of Anti-doping.

2. The Respondent, Philemon Kipruto Koskei is a male adult of sound mind, who participates and competes in Athletics as an international elite level athlete to whom the Anti-doping Act No. 5 of 2016 and the ADAK Anti-doping rules apply to.

3. The Sports Dispute Tribunal (hereinafter "the Tribunal") is an independent Sports Arbitration institution created under Section 55 of the Sports Act 2013 Laws of Kenya. Members of the Tribunal are appointed in terms of section 56 of the said Act. It has jurisdiction to hear and determine all anti- doping rule violations by dint of Section 31 of the Anti-doping Act No. 5 of 2016.

Preliminary Proceedings

4. These proceedings were commenced by the Applicant herein filing a Notice to charge dated 13th November 2018 indicating their intention to file charges against the Respondent herein who knowingly ingested substances with the intention of enhancing his stamina while participating in various international marathons; and requested the Chairman to constitute a Panel to whom the charge documents and all other documents would be supplied for consideration.

5. The Vice Chairman on behalf of the Chairman gave directions on 15th November 2018 requiring the Applicant to serve the Mention Notice together with all relevant documents on the Respondent within 14 days. This panel was then constituted.

6. On 21st November 2018 The Applicant filed a formal charge dated 20th November 2018 together with a verifying affidavit sworn by Peninah Wahome, a list of documents, list of witnesses and other annexures thereto.

7. On 26th November 2018, this matter came up for mention to confirm

compliance with the directions and the Mr Rogoncho, for the Applicant indicated that they had identified the Respondent as Philemon Kipruto Koskey of Id 202540 And Born On 7th January 1978

Historical Background

8. As evidenced in its documents accompanying the Charge document, the Applicant issued a notice of charge and mandatory provisional suspension pursuant to ADAK rules on 29th October 2018 to the Respondent.

9. In the Notice, it was stated that on diverse dates between 30th December 2016 and 25th May 2018 the Respondent ingested EPO with the intention of enhancing his stamina while participating in international marathon races.

10. The notice also communicated to the Respondent that by 5pm on 12th November 2018 he was provisionally suspended from participating in any IAAF and AK sanctioned competition prior to the decision of this Tribunal. The Respondent was further informed that he may elect to avoid he application of the provisional suspension by providing the Applicant with an adequate explanation for the use of EPO by 5.00pm on 12th November 2018; failure of which the suspension would take effect.

11. A copy of the said notice was sent to other agencies including IAAF, AK, this Tribunal, the WADA Results Management and the Africa Zone V RADO.

12. In response to the Notice of charge and provisional suspension, the Respondent addressed a letter dated 8th November 2018 to the Applicant 's CEO apologizing for the malpractice associated with him and his athletics career.

13. The Respondent indicated that it was not his intention to enhance his performance as he thought the drug was for pain relief. He further stated that he was no longer an athlete though he runs for personal fitness. He accepted the charges with remorse.

Charges

14. In the charge document, the Applicant therefore, prefers the following charge against the Respondent Athlete:

Use of attempted use by an athlete of a Prohibited substance or a prohibited method
The presence of a prohibited substance or its metabolites or markers in the athlete's sample or use of a prohibited substance constitute an anti- doping rule violation under Article 2.1 of WADC and rule 32.2 (a) and rule 32.2 (b) of the IAAF rules.

15. The Applicant restates the contents of the Notice of Charge and mandatory provisional suspension dated 29th October 2018 with respect to the Respondent having ingested EPO with the intention of enhancing his stamina during international marathon races.

16. The Applicant restates the historical background as captured above.

17. 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.

18. The Applicant prays that:

a) All competitive results obtained by the Respondent Athlete from and including 30th December 2016 to 25th May 2018 until the date of determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals, points and medals), as per **Article 10.1 of ADAK ADR.**

b) The Respondent Athlete, be sanctioned to a four-year period of ineligibility as provided by **Article 10 of WADC and ADAK ADR**

c) Costs, as per **WADA Article 10.10.**

Applicant 's accompaniments

19. The Applicant attached a Verifying Affidavit sworn by Penninah Wahome- the Manager Compliance and Testing at the Applicant agency, confirming the contents of the charge document to be true and correct.

20. The Applicant further lodged a list of documents, and a list of witnesses; both dated 20th November 2018.

21. The Applicant also placed before this Tribunal the following documents and authorities to support its case:

I. Letter dated 29th May 2018
II. ADRV Notice dated 29th October 2018
III. Letter dated 8th November 2018
IV. Test report dated 12th June 2018
V. The WADA Code
VI. The IAAF Rules
VII. The ADAK Anti- Doping Rules

22. This Tribunal notes that unlike other conventional proceedings of this nature, the Applicant did not supply this Tribunal with any Doping Control Form or a Test Report.

23. The Charges herein appear to this Tribunal to be premised on the respondent's own admission.

Respondent's case

24. The Respondent's case is built on his statement on 29th May 2018; letter dated 8th November 2018- both provided to this Tribunal by the Applicant together with his sworn testimony before this Tribunal on 27th November 2018, all of which this Tribunal has considered.

25. In his statement made on 29th May 2018, the Respondent indicated that he worked at Majaliwa theatre as an assistant anesthesia. He stated that, in March 2018, he went to Memorial Clinic and persuaded the attendant to give him EPO drugs since he was to go for a marathon race in Surat, India though he did not disclose this. He further concedes to taking the drugs knowing that they are illegal, but he was innocent. He requested therein that the staff of the said health facility be relieved of any blame and that he be forgiven as he was remorseful.

26. In his letter dated 8th November 2018 addressed to the Applicant herein, the Respondent athlete apologized for the malpractice associated with his running career. He stated that it was not his intention to enhance

performance as he thought the drugs were for relieving pains due to injuries and to reduce chances of muscle pulls. He also stated that he is no longer an active athlete though he runs for personal fitness.

27. On 27th November 2018, the Respondent made a sworn testimony before this Tribunal.

Respondent's Testimony of 27th November 2018

28. The Respondent stated that he works as a subordinate staff at MTRH, where he had worked since 2009. He gave a brief historical account of his employment at the said health facility; until 2018 when he was transferred back to Public health department as a subordinate staff.

29. The Respondent acknowledges that he is an athlete who was running from the year 2000 and taking part in various races. He further stated that he no longer ran due to his provisional suspension. He acknowledged travelling abroad in March 2018.

30. The Respondent conceded the use of EPO when he had an injury in November 2017.

31. He stated that he found the drug at the outpatient facility at MTRH where he worked.

32. He further stated that in October 2017 he went for training in Chepkoilel where the heard other athletes stating that EPO is used for treating hamstring and other muscular injuries since he had an injury on his hamstring and tendons; and was in pain on the left leg.

33. The Respondent stated that he explained to the doctor that he had earlier met friends who used the drug and recommended it to him. He explained to the doctor who prescribed for him and he collected the same from the pharmacy. He was injected the same by the nurse at the hospital. He however didn't know the said doctor and pharmacist.

34. He explained that after about 7 days, the pain went away and his injuries healed. He therefore felt that EPO was indeed a good drug; and resumed his trainings.

35. He stated that he traveled to India in March 2018 and participated in the Surat Marathon on 6th March, but he was not tested.

36. He states that he was served with a letter in June 2018 at the MTRH Registry; but he didn't know how it came to be known that he had used the drug.

37. He stated that the letter was from his employer's security office, and he was suspended from employment for 2 months.

38. He further stated that the letter of 29th May 2018 was written by somebody who explained its contents to him.

39. The Respondent stated that the said medication was paid for by his Medical Insurance and he was thus not given a receipt.

40. The Respondent stated that the contents of the said letter were not true and that it was only for the purpose of saving his employment.

41. He stated that he did not participate in any athletic event between October and March 2018.

42. He further stated that he had searched in the internet and discovered that EPO enhances stamina; which information he did not have previously.

43. He stated that in his letter of 8th November 2018, he was trying to explain that he had only been trying to relieve the injury.

44. He asserted that while in India, he ran at 2 hours 44 minutes which he would not have, had he used performance- enhancing drugs as the time is too slow.

45. He disowned his letter of 25th May 2018 and stated that his letter of 8th November 2018 is the truthful one.

46. Finally, the Respondent stated that he accepted the charges and asked for forgiveness.

Applicant 's Response

47. Mr Rogoncho for the Applicant stated that he would rely wholly on the Athlete's testimony.

Analysis

48. We have carefully considered the matter before us and gone through the documents presented before the Tribunal by both parties, we do make the following observations.

49. 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 2013, and the Agency's Anti-Doping Rules, amongst other legal sources."**

50. Consequently, our decision will be guided by the Anti-Doping Act 2016, the WADA Code, and other legal sources.

51. We do note that the Respondent athlete has two conflicting positions with respect to his admission of his intentions when using of the drug; admitting that he used EPO for purposes of enhancing his stamina on one hand; and on the other hand, asserting that he innocently used EPO as a pain reliever.

52. The Respondent attributes his previous admission of the intentional use of EPO to saving his employment. The Applicant did not nonetheless contest this change of stance.

53. This Tribunal also notes that the drug in question herein is Erythropoietin (EPO). The Respondent did not refer this Tribunal to the provisions of its prohibition.

54. We do nonetheless find that Erythropoietins (EPO) and agents affecting erythropoiesis are prohibited substances classified under Peptide

Hormones, Growth Factors, Related Substances, And Mimetics in Section 2 of the WADA Prohibited List of 2018. It is without question that EPO is a prohibited substance.

55. We also note that no tests or results thereof were presented by the Applicant. The basis of this matter is therefore the respondent's own admission.

Issues for Determination

56. Since both the jurisdiction of this Tribunal and the use of the said substance is not contested by the Respondent, we do set out the following issues for determination:

    i. ***Whether the Applicant discharged its burden of proof against the Respondent athlete***

    ii. ***Whether the respondent's use of EPO was intentional.***

    iii. ***Whether the Applicant is entitled to the prayers sought herein.***

a) ***Whether the Applicant discharged its burden of proof against the Respondent athlete.***

57. Article 3.1 of the WADC, 2015 states thus'

> ***The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred...*** similar provisions are made in the Anti-Doping Rules of 2016.

58. It is trite law that the burden of proof in establishing violation of anti-doping rules is borne by the Applicant. This position was restated by the Court of Arbitration for sports in the cases of ***Vadim Devyatovskiy vs IOC CAS 2009/A/175*** and ***Ivan Tsikhan vs IOC CAS 2009/A/1753*** where the Court for Arbitration for Sports at paragraph 4.30 placed upon the Anti- doping organization the duty to show, on the balance of probability, the violation.

59. Clearly, the Applicant herein bears the burden to prove violation.

60. As noted in this decision, the Applicant neither brought to this Tribunal evidence of laboratory tests on the Applicant, pointing to the use of EPO.

61. The Respondent's response to the charge document and his appearance before this Tribunal to testify was needful in saving him of any adverse finding that we may have made. Article 3.2.5 permits this Tribunal to draw an adverse inference out of the athlete's refusal. It states thus,'...

> ***The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.***

62. We do find that even though the Applicant failed to present laboratory tests and results thereof, they have nonetheless discharged their burden by presenting before this Tribunal evidence of the Respondent's own admission; which is further corroborated by the testimony before this Tribunal.

63. Article 3.2 of WADC states with respect to methods of establishing facts and presumptions, ***'...Facts related to anti-doping rule violations may be established by any reliable means, including admissions...'.*** Based on this, this Tribunal finds that there is a sound basis for the Applicant having established the violation of the anti- doping rule.

64. The standard of proof therefore as was stated in the case of ***Ivan Tsikhan vs IOC*** (supra) is greater than a mere balance of probability but less than proof beyond a reasonable doubt. We find no need to analyze the standard of proof as the same is not contested.

b) Whether the Respondent's use of EPO was intentional.

65. The Applicant has urged this Tribunal to disqualify the Respondent with all resulting consequences under Article 10.1 of the ADAK ADR.

66. The Applicant has invited this Tribunal to disqualify the Respondent for a period of 4 years. Article 10.2.1 requires the establishment of intention for the grant of such a prayer.

67. Article 10.2.3 of the WADA Code defines "intentional" to mean:

> ***...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. 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 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 sports performance.***

68. Further, Article 10.1 of the WADC restated in ADAK ADR lays the basis of any disqualification thus,

> ***An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1. Factors to be included in considering whether to Disqualify other results in an Event might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Competitions.***

69. Article 10.1.1 thereof further states to the effect that if the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

70. We do note that the Applicant did not mention the specific competitions for

which it sought the disqualification of the Respondent athlete. The Applicant on the other hand admitted to the use of EPO before the Surat marathon.

71. Intentional use of EPO is, as submitted by the Applicant, based on the Respondent's letter/ statement made on the 25th May 2018 at his employer; where he stated that he used EPO to enhance his stamina. This position was however disowned during his sworn testimony before this Tribunal.

72. On the basis of this change in position and the explanation given by the respondent, we do find that the Applicant has failed to establish the intentional violation of EPO. The respondent's position that he used the drug as a pain reliever is therefore satisfactory. However, we hold that the use thereof is still in violation of the anti- doping rule due to the absence of any Therapeutic Use Exemption from the Applicant herein.

73. Further, we restate the burden of the Respondent in making a disclosure to the clinical officer who prescribed to him EPO. The Respondent ought to have disclosed to the said medic that he was indeed an athlete, and any prescriptions that may have been preferred ought to have been considerate of the ADAK ADR. It was held in the arbitration before the CAS between ***Australian Olympic Committee (AOC) and Australian Handball Federation (AHF)*** on this respect that, any medication ***'...should be considered and authorized by a medical practitioner who is familiar with the anti-doping regulations...'***

74. The application for Therapeutic Use Exemption, however, requires the Respondent to know that the use of the said drug was indeed a violation.

Whether the Applicant is entitled to the prayers sought herein.

75. We have considered the reliefs sought by the Applicant and the plea by the Respondent to this Tribunal.

76. Article 10.2.1 of the WADA Code states that the period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a **Specified Substance,** *unless the* **athlete** *or other* **Person** *can establish that the anti-doping rule violation was not intentional.*

10.2.1.2 The anti-doping rule violation involves a **Specified Substance** *and the* **anti-doping organization** *can establish that the anti-doping rule violation was intentional.*

77. Having found that the Applicant herein has not established that the violation was intentional, we restate the provisions of the WADA Code to the effect that if Article 10.2.1 of the Code does not apply, the period of Ineligibility shall be two years

78. The critical components used to assess the degree of fault on the part of an Athlete are: 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.

79. WADA Code Article 10.5.1.1. states thus,

Where the anti-doping rule violation involves a Specified Substance, and the athlete or other Person can establish no Significant fault or negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the athlete's or other Person's degree of fault.

80. We find that the provisions of Article 10.5.1.1 as stated above applies to this case.

81. This Tribunal has also noted the Respondent's assertion that he is no longer an athlete and only does athletics for his own fitness. We do find that this is not a valid reason to evade any decision that this Tribunal may pass, for the reason that the charges before this Tribunal relate to the period when the Respondent was still an active athlete.

Decision

82. In these circumstances, the following orders commend themselves to the Tribunal:

a) The period of ineligibility for the Respondent shall be two (2) years from the date of provisional suspension pursuant to Article 10.2.2 of the WADA Code and the ADAK rules;

b) The Respondent's results obtained from and including 30th December 2016 until the date of determination of this matter be disqualified, with all resulting consequences including forfeiture of medals, points and prizes pursuant to *Article 10.1* of the WADA Code and the ADAK rules;

c) Each party to bear its own costs;

d) Parties have a right of Appeal pursuant to *Article 13* of the WADA Code and Part IV of the Anti-Doping Act, No. 5 of 2016.

Dated at **Nairobi** this _____ day of _____*August,* _____**2019**

John M. Ohaga, Panel Chairperson

Ms. Mary N. Kimani, Member

Peter Ochieng', Member