REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASES NO. 17 & 28 OF 2017

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

-versus-

EDWIN KIPROP KIBET..... RESPONDENT

DECISION

Hearing: 10th & 17th May, 2018

Panel:	Mrs. Elynah Sifuna-Shiveka	Chairperson
	Mr. Peter Ochieng	Member
	Ms. Mary Kimani	Member

Appearances: Mr. Erick Omariba for Applicant.

Ms. Sarah Ochwada 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 International 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 5th September, 2017.
4. The Applicant brought charges against the Respondent that on 4th and 25th December, 2016 the Athlete participated in the "Chongqing International Half Marathon in Chongqing China and Shantou Marathon in Shantou, China respectively when Doping Control Officers in an in-competition testing collected a urine sample from the Respondent. Assisted by the DCO, the Respondent split the sample into two bottles, which were given reference numbers **A 6164401 (**the**'A' Sample)** and **B 4010158 (** the **'B' Sample),** under the prescribed WADA procedures.
5. Both Samples were transported to the WADA accredited laboratory in Seibersdorf, Austria. The Laboratory analyzed the **'A Sample'** in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The analysis of the **'A Sample'** returned an Adverse Analytical Finding(AAF) revealing ***the presence of prohibited substance 19-Norandrosterone*** as captured in the test report received on 29th December, 2016.
6. *Norandrosterone* is listed as a prohibited substance

under S1 of the 2016 WADA prohibited list (Anabolic Steroids).

7. 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 7th July, 2017. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 14th July, 2017.

8. 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 14th July, 2017 was given for the same.

9. The Respondent Athlete in his response to the letter dated 7th July, 2017 vide an email dated 10th July 2017, stated that he has never been involved in the use of performance enhancing substances and is ready to comply with ADAK. He further indicated that owing to an ankle injury, he sought medication from a chemist where he was given painkillers, the same persisted for a long time then he received an injection which he suspects could have contained the prohibited substance. However, this information was not disclosed in his 'Doping Control Forms' dated 4th December, 2016 or 25th December, 2016, neither did he also state which medication was administered on him or by whom.

10. The Respondent Athlete failed to explain the presence of ***19 Norandrosterone*** in his sample.

11. The Respondent Athlete did not request a sample B analysis thus waiving his right to the same under rule 7.3.1 of ADAK ADR.

12. The Applicant argues that there was no departure from the International Standards for Laboratories(ISL) that could reasonably have caused the AAF Article 3.2.2 of ADAK ADR and furthermore that there is no departure from the International Standards for Testing and Investigations (ISTI) that could have caused the AAF,

Article 3.2.3 hence the responsibilities, obligations and presumptions of Article 3 of ADAK ADR apply herein.

CHARGES

13. Subsequently, ADAK is preferring the following charges against the Respondent Athlete:-

Presence of a prohibited substance Norandrosterone in the** athlete's **sample.

14. The Respondent Athlete's AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at ADAK for the substances in question and there is no apparent departure from IAAF Anti-Doping Regulations or from WADA International standards for Laboratories, which may have caused the Adverse Analytical Findings.
15. ADAK contends that the athlete herein has a personal duty to ensure that whatever enters his body is not prohibited and further even on prescription they have the duty to be diligent.
16. The Applicant also states that, under Article 22.1 of the ADAK ADR the Athlete is responsible to be knowledgeable of and comply with the Anti-Doping rules.
17. No plausible explanation has been advanced for the Adverse Analytical Finding.

JURISDICTION

18. 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 2016 as amended to hear and determine this case.

19. The Applicant therefore prays for:

    a) All competitive results obtained by Edwin Kiprop Kibet from and including 4th December, 2016 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 ADAK ADR
    b) Edwin Kiprop Kibet be sanctioned to a Four (4) year period of ineligibility as provided by Article 10 of ADAK Rules and WADC.
    c) Costs as per Article 10.10.

RESPONDENT'S SUBMISSIONS/ARGUMENTS

Athlete's Explanation & Oral Testimony

20. The Respondent Athlete provided oral testimony under oath on 10th of May 2018 during the hearing.

21. The Respondent testified that to the best of his knowledge he has never knowingly taken any substance with the intention of enhancing his performance. Therefore, given his medical history, the most likely cause of the presence of *Norandrosterone* may be the injection he received at a chemist on or about October 2016.

22. The Respondent admits to the presence of *Norandrosterone* in his

sample collected on 4th and 25th December, 2016, during an in-competition testing at the Chongqing International Half Marathon, and Shantou Marathon, respectively. This ADRV is the basis of case number 17 of 2017.

23. The Respondent also admits to the presence of **Norandrosterone** in his sample collected on 16th April, 2017, during an in-competition testing at the Huaian Marathon, China. This ADRV is basis for case number 28 of 2017.
24. The Respondent opines that the substance entered his body through an injection administered to him by a doctor on or about the month of October 2016. He explained that he was suffering from ankle pain. He visited a doctor who prescribed and administered the medication.
25. The Respondent did not intentionally use **Norandrosterone** for purposes of performance enhancement. He was not aware of having any prohibited substances within his body until he received notification that his sample had tested positive for **Norandrosterone.**
26. The Respondent is not a habitual user of performance enhancing substances as alleged under Paragraph 15 of the Charge Document (case 28 of 2017). He explained that he did not take any other medication containing *Norandrosterone* after October 2016.
27. The Respondent testified that he had suffered from an injury on his right ankle tendon while training on or about the month of September 2016. He had taken pain-killers, applied ointments and underwent

physiotherapy to aid in healing the injury but despite the aforementioned efforts the pain and swelling on his ankle persisted.

28. The Respondent Athlete submitted that he then stopped training and decided to visit a chemist on Barng'etuny Plaza on or about the month of October, 2016 where he was treated with an injection which was administered on his right butt cheek. Since he is not a medical practitioner he did not know what was contained in the injection and neither did he ask what it contained. He trusted in the expertise of the medical personnel that was treating him. He did not retain any receipts
or prescriptions from that visit.
29. The Respondent Athlete recalled the name of the facility as Manna chemist. He confirmed that he was not referred to that particular chemist by anyone. He chose to get treatment from there as he was simply looking for any nearby medical facility. He submitted that after about three weeks his swelling and pain went down and he was able to resume training and competing.
30. He admitted that he knew very little about anti-doping rules and was not familiar with WADA's Prohibited List or Therapeutic Use Exemption until after he was notified about his Adverse Analytical Finding (AAF).

31. The Respondent Athlete admitted that he did not disclose the injection on his doping control forms, even out of abundant caution. Given the complexities of anti-doping regulations, an Athlete is only required to declare medication he had taken 7 days prior to doping control.

32. The Respondent Athlete was at all times seeking treatment for his injury and his intention was to first and foremost heal before resuming training and competition. He did not know that it was necessary for him to disclose to the medic that he is a professional athlete, and in any case, such disclosure would be useless if a medical practitioner is unaware of anti-doping regulations and WADA's prohibited list.

33. The Respondent was unfortunately unaware that prescribed injection may contain prohibited substances. He was equally unaware of procedures of seeking Therapeutic Use Exemptions which may have assisted him at that material time. It was only after notification of his Adverse Analytical Finding that he found out pharmaceutical drugs, especially prescriptions fall under the Prohibited List.

ADAK's Expert Witness Explanation

34. The Applicant relied upon the expert testimony of Dr. Ogeto who is a holder of a Post Graduate Diploma in Sports Medicine, and has been practicing Sports Medicine for about 34 years. Dr. Ogeto gave oral testimony under oath on 17th May 2018.

35. Dr. Ogeto testified that Norandrosterone is an anabolic steroid that can be ingested either orally or via intra-muscular injection. He testified that some of the medicinal properties of Norandrosterone include fast recovery of injured muscles or tissue if there is delayed healing.

36. He also testified that aside from shortening of the recovery period it is likely for Norandrosterone to be detected within a urine sample up to 18 months after it is injected into an individual if the dosage contained more than 2.5 ng/ml.

37. Relatedly, according to the Bio-Medical Scientist, Dan Chaiet in his article titled Steroid Detection Times "... *(Nandrolone) in particular is a very notorious anabolic steroid for a high rate and chance of detection, as one of the reasons is due to the fact that Nandrolone's metabolites in urine tend to remain for an excessively long period of time in the body in comparison to many other anabolic steroids. Deca (Nandrolone) is perhaps regarded as the worst offender when it comes to steroid detection times, and is an anabolic*

steroid that is recommended for tested athletes to avoid at all costs as a result."

38. Dr. Ogeto stated that the acceptable levels of Norandrosterone for purposes of anti-doping regulations are upto 2 ng/ml but it is possible to prescribe more than 15 ng/ml to a patient. For instance dosages of 5mg/body weight may give a result of more than 2 ng/ml.
39. Based on the Respondent's lab results Dr. Ogeto noted that the results for samples taken on 4th December 2016 and 25th December 2016 showed Norandrosterone levels greater than 15 ng/ml whereas results for samples taken on 16th April 2017 showed levels of 4 ng/ml indicating that there was possibility of reduction in levels.
40. Dr. Ogeto then concluded that a single injection would be a comfortable assumption for the reducing levels of Norandrosterone shown in the lab results.
41. It is therefore likely that the Norandrosterone detected in the Respondent's urine sample was detected long after it was introduced into the body, and that it was introduced through intra-muscular injection as explained by the Respondent Athlete.

MATTERS IN DISPUTE

A. Intention to Dope

42. The Respondent denies that he intentionally used the prohibited substance **Norandrosterone** for purposes of performance enhancement as the drug was administered to him for therapeutic purposes.

43. The use of Norandosterone occurred entirely outside the context of sport performance, and there is no evidence that he did, or could have possibly, enhanced performance or could have distorted sporting competition. There was no intention to cheat.

44. The Respondent's counsel avers that an athlete cannot of his/her own volition decide or predict when he/she will fall ill. Nor can he invent symptoms of an illness. It is not enough to simply claim that proximity to date of competition as a valid justification of intention to dope. The Applicants must prove to the **comfortable satisfaction** of the Panel that the Respondent not only knew that the substance he was taking was prohibited, but that he also took the substance willfully in order to enhance his performance. The **comfortable satisfaction standard is higher than that of a balance of probabilities but lower than beyond reasonable doubt**.

45. The Applicants have not contested that the Respondent was not ill and

that he did not require medication for his ankle injury. Furthermore, athletes are not schooled in medicine or pharmacy. Most drugs are packaged with inserts whose detailed explanation of pharmacokinetics may not be understood by an average athlete. In many cases, athletes have already said that they did not know how the prohibited substances entered their bodies.

46. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport.

47. Article 2 of the WADC, which provides that Athletes *"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"*, and Article 21.1.1 of the WADC, which provides that they must be *"knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code"*.

48. Appendix 1 of the WADC defines "Fault" as follows: *"Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other*

Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and

the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or otherPerson's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2".

49. The Cilic Award (***CAS 2013/A/3327, Cilic v. International Tennis Federation, Award of 11 April 2014***) highlights the roles of an Athlete"s objective and subjective level of fault, as well as the five preventive measures that if taken by an athlete would at least in theory avoid an anti-doping rule violation. According to the Cilic Award in para. 74., *"the athlete could always*

(i) read the label of the product used (or otherwise ascertain the ingredients),

(ii) cross-check all the ingredients on the label with the list of prohibited substances,

(iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product."

50. CAS awards have also repeatedly underscored that the most basic requirements in an Athlete fulfilling the duty of "utmost care" are i.) checking the product label and ii.) doing an internet search. At first sight, it is difficult to disagree with this statement. If every Athlete performed these basic tasks, this would undoubtedly have the beneficial effect of reducing the number of inadvertent anti-doping violations, which detract resources from the "true" purpose of fighting doping in sports, i.e. reducing or eliminating the use of substances either taken with the intention to cheat in sports or that seriously put the Athlete"s health at risk.

51. However, it is important to note that nowhere does the WADA Code state clearly that Athletes must, at a minimum, read the product label and perform an internet search to meet their duty of "utmost caution",

nor does it even say simply that Athletes must exercise "utmost caution". The phrase "utmost caution" is only mentioned in the definition of No Fault or Negligence, and to reach the conclusion that Athletes have a general duty of "utmost caution" from this definition requires a level of interpretation and background knowledge that would be - at best - questionable to expect from Athletes.

52. Nowhere in WADA"s "Athlete Reference Guide to the 2015 World Anti-Doping Code" is there an instruction that they are expected to check a product label or do an internet search of the ingredients on a product.

More broadly, the guide provides almost no information on what Athletes can do to avoid inadvertent anti-doping rule violations, beyond the risks of taking supplements, and what the consequences might be if they do not. Rather, the guide replicates the rather technical terminology used in the Code of "fault", and provides very little further details.

53. There are extensive references to past CAS awards in defining the nuances of an Athlete"s duty of care. While the importance and utility of ensuring a consistent approach in CAS case law to ensure equal

treatment surely cannot be understated excessive consultation of past awards may also present a risk of developing concepts unfamiliar to Athletes beyond those provided in the text of the WADA Code.

54. It is already difficult for those involved on a day-to-day basis in anti-doping regulation to point to the trends in CAS case law and distil from these concepts the basic actions that an Athlete should take to prevent an anti-doping rule violation. It is a completely different matter to hold an Athlete accountable to a standard that he was not necessarily aware existed.

55. One cannot reasonably expect that Athletes should stay updated with the latest CAS jurisprudence as such rules are not readily made available in a digestible form for Athletes. It cannot be enough to impose a sanction based on the sense that International- level Athletes are supposed to have known better.

56. The Panel must therefore assess the level of diligence required of the Respondent under his specific circumstances and in light of his personal capacities.

B. Notification of Anti-Doping Rule Violation & Provisional Suspension

57. The Respondent is deeply concerned about the manner of notification of the Adverse Analytical Finding from the Anti-Doping Authorities, and specifically miscommunication by the Chinese Authorities which have caused undue delays in result management not attributable to him.

58. We would like to bring to the Panel"s attention the various delays and confusion visited upon the Respondent as a result of poor result management by the Chinese Authorities who to date have not provided clear documentation or indication concerning the steps taken to notify the Respondent not only of the Adverse Analytical Finding but also a prompt Provisional Suspension. The duty to notify the Respondent was later on imposed on the Applicant who issued a fresh Notice on the Applicant first on 7th July 2017 and subsequently on 15th September 2017.

59. The Respondent asserts that the initial notification of the Adverse Analytical Findings given to him by the Chinese authorities on 13th February 2017 was not properly communicated to him in a language that he understood and that he was under the impression that the Chinese authorities had cleared him to compete as he was later invited

to race in China in April 2017.

60. The Respondent provided this explanation on 10th July 2017 in response to the Applicant's notification dated 7th July 2017:

> *"Dear Sir/Madam,*
>
> *I EDWIN KIPROP KIBET I hereby replay writing this latter to ADAK due to latter I received on 8/7/2017. I take this step according to explanation and direction of ADAK in (5.1) to provide adequate explanation for AAF before 5:00 14th July.*
>
> *I am very shocked to receive this kind of latter from ADAK in this reason, on 13th February I receive the same latter from CHINADA which indicates the same results of facts in (2.1), I am shocked because*
>
> *I had complied with CHINADA by explanation whereby they had already cleared me and recently I was invited there for some races in China. I now compiled with you ADAK to provide my explanation.*
>
> *During October last year I had an angle injury which took time to heal*
>
> *after doing massage with physiotherapy treatment but the pain continue to persist so i took a normal painkillers which i brought from*
>
> *the chemist as usual for some weeks but the pain persists whereby I was*
>
> *prescribe to have injection by pharmaceutical whereby I never thought*
>
> *could bring me to problem.*

According to my submission the treatment that I was given really assisted me to heal my injury because i recover in a short time and all over certain I was invited for some races in China. My admission I was given medicine to cure injury not to enhance my performance because have been a good athlete since i started running.

My results were the same with the same races. It_my request to be cleared as I was cleared to complete in their country."

61. The notification of the results of the analysis of the Respondent"s previous urine samples taken in December 2016 was not properly done. If the test results had been properly served on and explained to the Respondent he would not have been allowed to compete in the Huaian Marathon and all other inconveniences, of there-after testing positive for an out-of- competition test, and this present charge would have been avoided.

62. According to the translation obtained by this honorable Tribunal it is possible to conclude that there was a lot of confusion regarding notice and steps to be taken by both the Respondent and the Chinese Authorities. The translation seems to be a **"Notice of Antidoping inspection of Specimen A, male"** from CHINADA to the Chinese Athletics Association and not a notification of an Adverse Analytical

Finding to the Respondent.

63. The above-mentioned letter states as follows:

"

Antidoping 2017 No 64

ATHLETIC SPORTS ANTIDOPING CENTER REPORT REGARDING EDWIN KIPROP KIBET

Notice of Antidoping inspection of Specimen A, male

China Athletics Association On 25th December 2016 your association entrusted my in completion doping center with investigating the Kenyan male, Edwin Kiprop Kibet, (Passport number A069163). The specimen A urine sample test results were egg white assimilated with manufactured chemical (an excessive amount of nandrolone.) masculine.

According to the State general administration of sports ((sporting activities doping regulations)) (section number 168(2014) under (general rules).

1. *The sportsman has applied for the right to test sample B. The sportsman ought to upon receiving notify our center within 5 business days (before 13th February 2017) in writing to clarify to the results advanced through specimen B. If not raised within the prescribed time it shall be considered they forfeited the test results from sample B.*
2. *The sports man applied for the right to a hearing. If the application was for test results from the sample B test results, within 5 working days applied in writing to my center to raise*

the right to a hearing and also explained the grounds on which he wanted to apply for a hearing. If specimen B was not tested on reception he ought to have notified my center within 10 business days (before February 20) in writing to apply for a hearing explaining the grounds for the application. If before expiry of the prescribed period this was not done he is assumed to have forfeited the right to a hearing.

3. *The inspection of specimen B, and participating in a hearing were all up to the sportsman the sportsman Please note this matter is covered in the China Anti-doping Agency's website (www.chinada.cn) please consult it.*
4. *We would like to ask your association at this point to carry out a deep inquiry into this issue investigate the truth of the issue regarding the suspected violation of the regulations by the sportsman dependent on the evidence and in strict adherence to the law…*

Stamped by Anti-
Doping Center 6th
February 2017"

64. Therefore, proper notice was only issued to the Athlete on 7th July 2017 after the Applicant took over results management from the Chinese Authorities.

65. For this reason, such a delay may result in a harsh consequence on

the Respondent whereby any period following immediately after sample collection but before effective Notice of Adverse Analytical Finding and Provisional Suspension by the Applicant may not be calculated or credited as part of the period of ineligibility.

66. It then follows that discretion should be applied in an instance where there is a possibility that the period of ineligibility imposed by a Panel may surpass the 4 year standard sanction as provided for in the WADA Code depending on when the final decision is granted. The case of **CAS 2014/A/3485 World Anti-Doping Agency (WADA) v. Daria Goltsova and International Weightlifting Federation (IWF), award of 12 August 2014** is instructive of this.

The Panel held that;

> *"In any event, the Athlete is entitled to be credited with the six-month period of ineligibility already served, which ran from 4 July 2011 when she was provisionally suspended. However, in addition, by 2009 ADP Art. 10.9.1 (which is reproduced in 2012 ADP) where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the IWF or Anti-Doping Organization imposing the sanction may start the period of ineligibility at an earlier date commencing as early as*

the date of sample collection or the date on which another anti-doping rule violation last occurred.

51. In the present case, there was an unconscionable delay in the commencement of this appeal brought about by the apparent unexplained failure of the IWF to comply with its obligation under Art. 8.1.6 of the 2009 ADP to notify WADA of the result of the hearing before the DHP. The Athlete was entitled to believe that the matter had been closed and to get on with her career. It would be unconscionable for her now to be required to serve any further period of ineligibility. In these circumstances the appropriate course is to commence the period of one year's ineligibility from the date of her sample collection on 13 May 2011."

67. The WADA Code is clear on the principles that ought to be respected and the steps that ought to be taken in order to of Notify an Athlete about an Adverse Analytical Finding. The main principle is that of timeliness and being prompt in issuing a Notification of Provisional Suspension:

> ***7.9 Principles Applicable to Provisional Suspensions***
> ***7.9.1 Mandatory Provisional Suspension after an Adverse Analytical Finding.*** *The Signatories listed below shall adopt rules providing that <u>when an Adverse Analytical Finding is received for a Prohibited Substance or a Prohibited Method, other than a Specified Substance, a Provisional Suspension shall be imposed promptly</u>*

after the review and notification described in Article 7.2, 7.3 or 7.5: where the Signatory is the ruling body of an Event (for application to that Event); where the Signatory is responsible for team selection (for application to that team selection); where the Signatory is the applicable International Federation; or where the Signatory is another Anti-Doping Organization which has results management authority over the alleged anti-doping rule violation.

68. The WADA Code imposes a formulaic approach of notification that if derogated from has grave consequences for an athlete in light of the start of the period of ineligibility. Usually the period of ineligibility commences on the date of the final decision following a hearing in accordance with Article 10.11 of the WADA Code. However, such period of ineligibility can commence at an earlier date in certain circumstances:

> ***10.11 Commencement of Ineligibility Period***
> *Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*
>
> ***10.11.1 Delays Not Attributable to the Athlete or other Person***
> *Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to*

the Athlete or other Person, the body imposing the sanction may

start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

C. Proportionality of the Sanction

69. The Applicants have requested for a lifetime ban calculated as the greater of two violations committed with separate culpable intent to be punished as multiple violations.

70. The Respondent maintains that these present charges arise not out of two separate offences but from one offence originating from the same source.

71. Aside from the rules in the WADA Code, a **range of factors determines the period of ineligibility** that should be applied including: **the type of violation, the prohibited substance or method used, the nature of the athlete's conduct and the athlete's degree of fault.**

72. This is in inadvertent offence, a first for the Respondent, which he sincerely regrets and requests the Panel to assess the totality of

mitigating circumstances in order to reach a fair decision.

73. The Panel must assess the proportionality of sanctions in cases where the sanction appears especially harsh in light of the circumstances of the case. Based on the principle of proportionality there must be a reasonable balance between the kind of the misconduct and the sanction and the sanction must not exceed that which is reasonably required in the search of the justifiable aim.

74. The WADA Code sets forth an obligation on Signatories in Article 20 to "promote anti- doping education", which in Article 18 it emphasizes includes preventing both "intentional and unintentional" violations.

75. The system as a whole is still rooted in a model that assumes the overwhelming majority of Athletes who test positive will have committed some form of doping-relevant, reprehensible act (whether by intent or by their negligence). Athletes who inadvertently test positive for prohibited substances become 'collateral damage' of the system. A case such as this not only veers away from the real goals

of anti-doping, but also takes resources away from the core mission of anti-doping organisations.

76. In cases in which the circumstances of the case do not involve intentional doping the weight of the "legitimate aim" to deter doping is automatically diminished since the violation involved does not fit within the concept of "real doping".

77. The Panel is therefore responsible for assessing how heavy the interests of anti-doping weigh against the interests of the Respondent while evaluating his personal circumstances. While strict liability is a necessary function of the WADA Code in order to catch doping cheats, the expectation that standard period of ineligibility applies to all cases makes bad decisions inevitable.

D. Period of ineligibility

78. The Respondent requests that the Panel consider these present charges, not as two separate offences but as one offence originating from the same source.

79. The Respondent requests that the Panel consider the present charges cumulatively as his first offence and reduce his sanction to the lowest possible as provided by anti-doping regulations.

80. The Respondent is entitled to consideration of reduction of the standard sanction based on evidence proving credible non-doping reasons for its use and absence of intent to enhance performance.

E. Prayers

81. For the above reasons we hereby request that the Tribunal grant the following Prayers:

i. The charges under both case number 17 of 2017 and 28 of 2017, not to be considered as two separate offences but as a single offence originating from the same source;

ii. A substantial reduction from the standard penalty should be allowed to the Respondent;

iii. Recognize and credit the period within which the Respondent has not been participating in athletics events as being the period of ineligibility starting from the date of his first sample collection;

iv. All costs of the suit to be borne by ADAK (the Applicant in this matter);

v. Any other relief that the Tribunal deems just and fair.

APPLICANT'S SUBMISSIONS/ARGUMENTS

82. The applicant submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

83. It further provided at Article 3.2 that facts relating to anti-doping rule violation may be established by **any reliable means** including **admissions** and the methods of establishing facts and sets out the presumptions. Which include;

a) ***Analytical methods or decision limits*** .....

b) *WADA accredited Laboratories and other Laboratories approved by WADA are* ***presumed to have conducted Sample analysis*** *and custodial procedures in accordance with the International Standard for Laboratories*

c) *Departures from any other International Standard or other anti-doping rule or policy set forth in the code or these Anti-Doping* ***Rules which did not cause an Adverse Analytical Finding*** *or other anti-doping rule violation shall* ***not invalidate*** *such evidence or results.*

d) *The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of a pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other person establishes that the decision violated principles of natural justice.*

e) *The hearing panel in a hearing on an anti-doping rule violation on 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 or other persons refusal, after a request has been 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 agency.*

84. That under Article 22.1 the Athlete has the following Roles and responsibilities

a) To be knowledgeable of and comply with the anti- doping rules.

b) To be available for *Sample* collection at all times

c) To take responsibility, in the context of anti-doping, for what they ingest and U*se*

d) 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 these Anti- doping rules

e) To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed an Anti- Doping rule violation within the previous 10 years.

f) To cooperate with Anti-doping Organisations investigating Anti-doping rule violations.

85. The burden of proof expected to be discharged by the Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by the prosecution. In that the presence has been admitted.

86.In his defence, the Respondent made a number of admissions and a few general denials. In his **evidence in chief** the respondent made the following admissions;

a) He admitted the results of "Sample A" and he

waived his right to "Sample B" analysis. Thereby accepting the "Sample A" results Under Article 7.3.1.

b) By accepting the "Sample A" results under Article 7.3.1, the Athlete thus admitted to the presence of a prohibited substance in his sample. (Article 3.2 of ADAK ADR).

c) The athlete admitted that he has been an active participant in athletics events in previous occasions and has provided samples for testing on those occasions.

87. The respondent athlete having admitted the presence of a prohibited substance Article 2.1.1 provides for *"strict liability"* on the part of the athlete. Similarly Article 10.2.1 the burden shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction.

88. The athlete herein has the burden of demonstrating how the prohibited substance entered his body.

Reduction of sanction

89. The Athlete was charged with the presence of 19-*Norandrosterone* in his sample a violation of Article 2.1 of the ADAK ADR, and has admitted to the presence of the prohibited substance.

90. Rule 10.2.3 of the ADAK Rules sets out that the term intentional is meant to "identify 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 a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk"

91. For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, **he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV. According to established case-law of **CAS 2014/A/3820, par. 77** the proof by a balance of probability requires that one explanation is more probable than the other possible explanation. For that purpose, an athlete must provide actual evidence as opposed to mere speculation.

92. A failure to explain the concrete origin of the prohibited substance only means that an athlete cannot prove the lack of intent. **In the matter of Canadian Weightlifting Federation and Taylor Findlay, the CAS Arbitrator Yves Frontier stated that:**

> **77. „It appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says, contained Clenbuterol. With respect to the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body"**

93. We submit however that the athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance. It does not suffice to say that one did not know that the medication contained a banned substance. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that *„The athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that Oliveira should not be followed'*

94. The applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional. It follows then that she must necessarily establish how the substance entered her body.

95. It is the Applicant's submission that the Respondent has failed to prove lack of intention to cheat based on his knowledge on the overall fight against doping as premised by his participation in international events. The Respondent also demonstrated his ability by his knowledge of cities and area where he

participated races in Kenya , Rwanda, South Africa, and Brazil. And his ability to conduct research on doping matters as evidenced in his letter addressed to the Applicant detailing the performance enhancement mechanism of PES.

Origin

96. From the explanation given by the athlete, it is alleged that the athlete likely ingested the prohibited substance through an injection given at a known chemist in Eldoret.
97. It is our submission that the athlete is required to prove the origin of the prohibited substance on a "balance of probability". The Balance of Probability standard entails that the athlete has the burden of convincing the panel that the occurrence of the prevailing circumstances is more probable than their non- occurrence.

98. In **Arbitration CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)** states that in order to establish the origin of a Prohibited Substance by the required balance of probability, the Athlete must adduce actual evidence as opposed to mere speculation. More is required by way of proof

given the Athlete's basic personal duty to ensure that no prohibited substance enters her body.

99. It is clear from the above mentioned CAS case law that it is not sufficient for an athlete to merely suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine or other product the athlete was taking at the relevant time.

Rather, an athlete must adduce concrete evidence to demonstrate that the medication the athlete took contained the particular substance.

100. The athlete in this case supposes that the substance may have entered his body through the clear injection. His omission casts a shadow of doubt on his explanation as he has failed to adduce concrete evidence as dictated by CAS Jurisprudence.

101. The above is made clear by the observations of the panel in **CAS 99/A/234 and CAS 99/A/235 Meca-Medina v. FINA** „The raising of unverified hypothesis is not the same as clearly establishing the facts"

102. Further in **CAS 2006/A/1067 IRB V. KEYTER** the panel held as follows:

"The Respondent has 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 the cocaine occurred"

103. In that regard, we do submit that the origin of the prohibited substance has not actually been established.

Fault/Negligence

104. The athlete contends that he was under medication and he did not know the medication he was given contained the prohibited substance,

105. In **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26** *the panel observed that „the athlete"s fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance*. The applicant contends that the athlete in this case fell short of this requirement as he failed to explain to the doctor examining him that he is an athlete.

106. 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 soon before the competition.

107. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest

and use. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

108. Further, the athlete failed to inform the doctor that he is an athlete subject to the Anti-doing rules and was due for competition on November 20, 2016. In this regard we submit that the athlete acted negligent and reckless as required under Article 22.1.4. of the ADAK ADR.

109. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body

> ***2.1.1*** *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 Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the athlete"s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1*

110. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before consuming meat of unknown origin. He was thus grossly negligent.

Knowledge.

111. The Applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or

markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

112. Further the applicant contends that the Athlete being an elite athlete has had a long career in athletics and it is only questionable that he has had no exposure to the crusade against doping in sports.

113. The Applicant holds that an athlete competing at national and international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited substances.

114. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a product will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the medications.

115. The applicant further submits that in the unlikely event that the substance was ingested by way of medication, and his explanation being in tandem with the Doctor's evidence as to the use of the substance, the he ought to have applied for a TUE with

the agency.

116. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that „"an Athlete"s lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of the Athlete"s intent to enhance sport performance.

117. The athlete herein had participated in numerous races in various places in brazil and probably due to burnout and injury he changed destinations in pursuit of money and the ingestion must have been intentional.

Sanctions

118. For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a non-Specified. If Article 10. 2. 1 does not apply, the period of ineligibility shall be two years.

119. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. The athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance performance. If, but only if, those two conditions are satisfied can the athlete adduce evidence as to his degree of culpability with a view to eliminating or reducing

his period of suspension.

120. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance and has pleaded ignorance for the substance being a banned substance. We submit that ignorance is no excuse and cannot be used to feign lack of intent to enhance performance.

121. Bearing this in mind, we are convinced that the Respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADC.

122. **In CAS 2011/A/2384 UCI V Alberto Contador Velasco & RFEC and 2011/A/2386 WADA V Alberto Contador Velasco & RFEC the** panel stated that

> *'The athlete can only succeed in discharging his burden of proof by proving that (i) in his particular case meat contamination was possible and that (ii) other sources from which the prohibited substance may have entered his body either do not exist or is least likely....Thus it is only if the theory put forward by the athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario that the athlete shall be considered to have established on a balance of probability how the substance entered his system...'*

123. In considering sanction on the athlete in **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel further observed that *'When considering the appropriate sanction, it*

is necessary to bear in mind the words in the comment in the WADC to Article 10.4 which are reproduced in the comment to Rule 154. It is a relevant factor in the exercise of the discretion to consider the extent to which there was an attempt to verify that none of the constituent ingredients in the supplements to be consumed were on the prohibited list. The evidence establishes that whilst it was not on the ASADA website, had more exhaustive inquiries been made the athlete may have been able to locate information about the product which would have alerted him to the risk of violation if he used it."

124. With regards to reduction of sanction, we rely on the decision held by the ITF Anti-Doping Tribunal in the matter of **ITF V. BECK,**

> *'...ensures that mere protestations of innocence and disavowal of motive or opportunity, by a player, however, persuasively asserted, will not serve to engage this provisions {to reduce sanctions} if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases.'*

Conclusion

125. Article (ADAK ADR 2.1.1) emphasizes that it is an athlete's personal duty to ensure that no prohibited substance enters his or her body and that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation. There is sufficient proof of the anti-doping rule violation by the analysis of

the athlete's sample which confirms the presence of the prohibited substance.

126. The Applicant finds that ideal considerations while sanctioning the athlete are:

A. The ADRV has been established as against the athlete.

B. The admission made by the athlete concerning "Sample A".

C. The failure by the athlete to establish the origin of the prohibited substance.

D. Failure by the athlete to take caution when receiving medicine unknown to him.

E. The knowledge and exposure of the athlete to anti-doping procedures and programmes.

F. The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was as a result of his negligent acts.

127. ADAK prays for the maximum sanction of 4 years of ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

128. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.2.1 of the ADAK Rules and sanction the athlete to 4 years of ineligibility.

129. It is our submission that ADAK has made out a case against the Respondent Athlete and that there was indeed an Anti-Doping Rule Violation by the Athlete and a sanction should ensue.

DECISION

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

a. The period of ineligibility for the Respondent Edwin Kiprop Kibet shall be for 4 years pursuant to Article 10 of WADC and ADAK ADR;
b. The period of ineligibility shall be from 7th July, 2017 being the date when the Athlete was provisionally suspended;
c. Disqualification of the Chongqing International Marathon and Shantou Marathon results obtained on 4th December 2016 and on 25th December 2016 respectively and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
d. Each party to bear it's on costs;
e. Parties have a right to Appeal pursuant to Article 13 of the WADC and ADAK ADR.
f. Any other prayers and motions are dismissed.

131. 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 **4th** day of **October, 2018**.

Signed:
Mrs. Elynah Sifuna-Shiveka

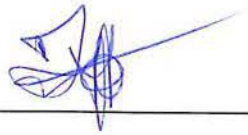
Deputy Chairperson, Sports Disputes Tribunal

Signed:
Ms. Mary Kimani

Member, Sports Disputes Tribunal

Signed:

Mr. Peter Ochieng



Member, Sports Disputes Tribunal