

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ADAK CASE NO. 26 OF 2017

ANTI-DOPING AGENCY OF KENYA (ADAK).....APPLICANT

-versus-

MATHEW KIPCHIRCHIR KOSGEI.....RESPONDENT

DECISION

Hearing: 14th December, 2017

Panel: John M Ohaga - Chairman
GMT Otieno - Member
Ms. Njeri Onyango - Member

Applicant: Mr. Erick Omariba Advocate for ADAK ('the Agency')

Respondent: Not in Attendance.

Abbreviations and definitions

ADAK – Anti-doping Agency of Kenya
ADR – Anti-doping Rule
ADRV- Anti-doping Rule Violation
AK- Athletics Kenya
IAAF- International Association of Athletics Federation
S.D.T- Sports Disputes Tribunal
WADA – World Anti-doping Agency

Applicable Laws

The Constitution of Kenya 2010, The Sports Act No. 25 Of 2013, The Anti-Doping Act No. 5 Of 2016, World Anti-Doping Code 2015, World Anti-Doping Code 2015, Anti-Doping Rules, and International Athletics Federation Rules (hereinafter “the Constitution”, “the Act”, “the Rules” “the Statute”, and “the Code” respectively).

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No. 5 of 2016 (hereinafter ‘the Applicants’).
2. The Respondent is a male Athlete of presumed sound mind (hereinafter ‘the Athlete’).

Jurisdiction

3. The Sports Disputes Tribunal has Jurisdiction under *Sections 55, 58 and 59* of the *Sports Act No. 25 of 2013* to hear and determine this case.

Preliminaries

4. The background giving rise to the current proceedings is consequential of several documents filed with the Tribunal by the Applicant, which includes the Notice of Charge filed by the Applicant with the Tribunal on the 14th October 2017, the Letter by the Applicant directed to the Respondent dated 15th September 2017 informing the Respondent of the intended charge to be brought against him by the Applicant and the Charge Document filed by the Applicant with the Tribunal dated 15th

November 2017 setting out the charge against the Respondent and all the accompanying documentation setting out the Applicant's case against the Respondent.

5. The proceedings before this Tribunal were commenced by the Applicant filing a Notice to Charge against the Athlete dated 4th October 2017 addressed to the Chairman of the Sports Disputes Tribunal.
6. Consequently, directions were issued on 5th October 2017 that service should be done by 11th October 2017 and a panel constituted to hear the matter and the same scheduled for mention before the Tribunal on 18th October 2017.

Hearing

7. The appeal was heard on 14th December 2017.

Historical Background

8. The Applicant issued a formal notice of charge and mandatory provisional suspension pursuant to ADAK rules on 15th September 2017 to the Respondent.
9. In the Notice, it was stated that on 25th December 2016 during the Fuz Hau Marathon held China, CHINADA Doping Control Officers (DCO) collected a Urine sample from the respondent and split the sample into two samples A6209186 (the "A Sample") and B 6209186 (the "B sample"). Assisted by the DCO.
10. The samples were transported to the WADA accredited Laboratory in Austria "the laboratory". The Laboratory analysed 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 AAF presence⁴ of a prohibited substance recombinant erythropoietin (r-EPO).
11. The notice also communicated to the respondent that on 15th September 2017 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 14th July 2017; failure of which the suspension would take effect.

12. **ADAK has preferred the following charge against the Athlete: -**

“Presence of a prohibited substance Recombinant Erythropoietin in the Athlete’s sample in violation of Article 2.1 of ADAK ADR.”

13. The Applicants sought for the following result;

- a. Mathew Kosgei be sanctioned for a four (4) years period as provided by the ADAK Anti-Doping Code, Article 10 of ADAK and WADC Rules;
- b. The Respondent’s results obtained from and including 25th 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. Costs, Article 10.10

Applicant’s accompaniments

14. The Applicant attached a Verifying Affidavit sworn by Eric Omariba, Counsel for the Applicant confirming the contents of the charge document to be true and correct.
15. The Applicant further lodged a list of documents, and a list of witnesses; both dated 20th November 2018.
16. The Applicant also placed before this Tribunal the following documents and authorities to support its case:
 - I. Doping control Form dated December 25, 2016
 - II. Test report dated 29th December 2016
 - III. Google search on EPO
 - IV. Letter dated September 15, 2017
 - V. Email response of 17th October 2017

- VI. World Anti – Doping Code
- VII. The IAAF Rules
- VIII. The ADAK Anti- Doping Rules
- IX. The WADA Prohibited list 2017

Ex parte Hearing

17. The hearing did not proceed on 14th October 2017 as the Athlete did not appear. The Tribunal consented to the Applicant's request to decide the matter based on the papers.

Submissions

18. Below is a summary of the main relevant facts and allegations based on Ex parte submissions.

A. *Summary of Applicant's Submissions*

Applicable Law

Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

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.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the A Sample and the B Sample is not analysed;

19. The Applicants referring to article 4.2.2 of WADC, provided the definition of an EPO substance stating that it enhances red blood cells production and is a prohibited substance under section 2 of the 2017 WADA

prohibited list (Peptide Hormones, Growth Factors, related Substances and Mimetics and is not a specified substance.

20. The findings were communicated to the Athlete by Japther K. Rugut EBS, The ADAK Chief Executive Officer through a Notice of Charge and Provision Suspension dated September 15th 2017. In the said communication the Athlete was offered an opportunity to provide an explanation for the same.
21. The Athlete declined to request for analysis of the B-sample despite being given an opportunity to do so, thus waiving his right to the same subject to rule 7.3.1 of ADAK ADR.
22. The Athlete in his response dated October 17, 2017 admitted the ADRV and stated that he had been injected by one Mr. Philemon Limo on 20th December before the said race who told him that it was a strong multi vitamin.
23. The Applicants further stated that there was no departure from International Standard for Testing 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.

Analysis and Determination of the Tribunal

24. The Tribunal has considered and weighed the charge document, the submissions by both counsels for the Applicant and the Respondent and the oral testimony of the Respondent, and it is our analysis that the issues for determination are as follows;
 - a. Whether the Respondent Athlete was properly enjoined in this matter;*
 - b. Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*
 - c. Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
 - d. The Standard Sanction and what sanction to impose in the circumstance.*

The Law

25. The Tribunal referred to the following regulations in arriving at its decision.

Section 31 of the Anti-Doping Act, provides;

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 organisations.

2) The Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency's Anti-Doping Rules, amongst other legal sources

26. Further, *Article 10.12.1* of the *WADA ADR*, which are adopted by the same Clause of the *ADAK ADR* it is provided:

Prohibition Against Participation During Ineligibility:

No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international or national level Event organization or any elite or national-level sporting activity funded by a governmental agency.

a) Whether the Athlete was properly enjoined in the matter;

27. The Applicant through Mr. Omariba addressed the Athlete on the ADRV Notice, in a copy of an email dated 13th October 2017. The email alluded to a telephone conversation its Counsel had held with the Athlete in October 2017. From the subjects of the email correspondence, the Applicant had telephonically interacted with the Athlete.

28. At the first mention on 18th October 2017, the Applicant filed an Affidavit of Service with the Tribunal on 18th October 2017 sworn by Eric Omariba which stated he (Omariba) received from ADAK a Charge Document and a Provisional suspension dated 15th September 2017 with instructions to serve Athlete Mathew Kipchirchir Kosgei. Mr. Omariba stated that he proceeded to Iten town where he managed to locate the respondent's

residence. Further, he got the respondent's mobile phone number being 0700325831 on which he called the Athlete. Mr. Omariba further stated to the Tribunal that he had served a notice of ADRV and Provisional suspension to the Athlete in person at 7pm on 15th September 2017 after a brief meeting with the respondent. This was signed and dated, and the original copy sent to the Tribunal as duly served (attached and marked 'EGO 1').

29. Further, on 5th October, Mr. Omariba stated that he received a copy of Notice to Charge and directions from the Tribunal for mention on 18th October 2017. He then proceeded to Iten on 6th October 2017 where he tried to reach the Athlete on phone as his line was off at 11:59pm the same day. He received a text message from the Athlete on the 7th October 2017 stating that he had accepted suspension and that he had relocated to his rural home for other engagements. The respondent requested that the documents be sent to him by email, *see page 15* of the Charge Document.
30. At the initial mention on 18th October 2017 Further, Counsel stated that he wanted the actions of the Athlete of non-appearance to be treated as an admission and requested additional time to procedurally serve him.
31. During the mention on 30th October 2017 Counsel expressed the difficulties he was encountering trying to locate the Athlete since his telephone had been switched off since 17th November 2017. Further Counsel indicated that the Athlete had relocated to his rural home.
32. The Panel satisfied itself before proceeding to set a hearing date that the mobile phone number and email address stated in the copies attached to the said Applicant's Affidavit – produced as evidence by the Applicant were the Athletes contacts.
33. It was the Panel's assessment that the matter had dragged on and it became apparent that notwithstanding several efforts by the Applicant to correspond with the Athlete to appear at his own proceeding, the Athlete omitted countering. The Panel proceeded to entertain the matter in the absence of the Athlete after satisfying itself that the Applicant had exhausted all reasonable attempts to have the Athlete participate in his own proceedings in any manner. Article 8.3 of the WADA Code states:

Waiver of Hearing: The right to a hearing may be waived either expressly or by the Athlete or other Person's failure to challenge an Anti-Doping Organization's assertion that an anti-doping rule violation has occurred within the specific time period provided in the Anti-Doping Organization's rules.

b) Whether there was an occurrence of an ADVR, the Burden and Standard of proof;

34. It was the Applicant's submissions that the Respondent bears the burden of proof.

35. Article 3.1 of the WADC's provides that:

The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

36. As has been noted above, and which position has become trite, the Applicant bears the burden of proving the existence of the alleged facts, and this burden cannot be allowed to shift to the Respondent apart from under the circumstances provided by the Code.

37. The provision profound and has found notoriety from the jurisprudence emanating from CAS. In *CAS 2002/A/432 D. / Fédération Internationale de Natation (FINA)* the Panel observed thus:

The CAS has held in numerous awards that this legal presumption and the allocation of the burden of proof is legally valid and enforceable, notwithstanding the fact that disciplinary sanctions in doping cases are similar to penalties in criminal proceedings in which the prosecutor normally

bears the burden of proving not only the factual elements of an offence, but also the presence and degree of guilt on the part of the accused. On many occasions, the CAS has had the opportunity to confirm this strict liability rule in athletic competition (F. v/ FINA 1996/156, p.42; C. v/ FINA 1995/141, published in Digest of CAS Awards 1986- 1998, Stämpfli Editions, Berne, p. 215 ff; G. v/ FEI 1992/63 published in Digest of CAS Awards 1986-1998, Stämpfli Editions, Berne, p 115 ff, confirmed by the Swiss Supreme Court ATF March 15, 1993 published in Digest of CAS Awards 1986-1998, Stämpfli Editions, Berne, p. 561 ff; FCLP v/ IWF 1999/A/252, in addition to other decisions).

38. The principle has further been expanded in the case, CAS 2010/A/2266 N. & V. v. UEFA to the effect that:

“With respect to the standard of evidence, it is the Panel’s opinion that the party bearing the burden of evidence, in order to satisfy it, does not need to establish “beyond any reasonable doubts” the facts that it alleges to have occurred; it needs to convince the Panel that an allegation is true by a “balance of probability” [Emphasis added], i.e. that the occurrence of the circumstances on which it relies is more probable than their non-occurrence (see CAS 2008/A/1370 & 1376, § 127; CAS 2004/A/602, § 5.15; TAS 2007/A/1411, § 59).”

39. The Applicant relied on Article 3.2.1 that provides on the “Analytical methods or decision limits approved by WADA “and the Panel was convinced that the ADRV was proven on account of the following facts:

- i. The samples provided by the Athlete on 25th December 2016 that had been transported to a WADA laboratory in Seibersdorf, Austria for the analysis of the A Sample resulted in the Adverse Analytical Finding (“AAF”) for presence in the Athlete’s body of *Recombinant Erythropoietin* which is listed as a peptide Hormones, growth factors, related substance and Mimetics under s2 of WADA’s 2016 Prohibited list.
- ii. Additionally, according to the records provided by the Respondent, he had not offered a Therapeutic Use Exemption (“TUE”) to justify the presence of *Recombinant Erythropoietin* in his system.
- iii. The available documentation indicated the Athlete after Notification as under WADC’s Article 7.3 (c) [*the athlete’s right to*

promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived;] did not request for a test of his B Sample and failing such request the B Sample analysis was deemed waived thereby confirming the A Sample results.

40. The Code provides that where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the Athlete's part be demonstrated in order to establish an ADRV.

c) Whether the Athlete's ADRV was intentional;

41. The Applicant in its Charge Document implored for the Athlete to be sanctioned to a four-year period of ineligibility as provided by ADAK Anti-Doping Code *Article 10* of ADAK and WADC Rules. **Article 10.2.1** of WADC provides the period of Ineligibility requires the Panel to examine the subject of intentionality.

"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."

42. The question of the threshold of discharging such burden of proof placed on the Athlete is on a balance of probability as is provided under Article 3.1 of the WADA Code which provides:

"[...]. Where the Code places the burden upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."

43. As a result of the email correspondence between Counsel for the Applicant and the respondent the question of intention thus arises. The Respondent claimed that a person by the name Philemon Limo introduced to his body by injection an unknown substance that he referred to as 'strong multi vitamins' that would assist him in the race in China. He claimed that upon receipt of the letter of suspension months

later, he was not able to trace him as the man had fled his previous residence.

44. The provision emphasises that where the ADVR involves a non-specified substance as was the case presently, then the period of ineligibility for the Athlete shall be four (4) years unless the Athlete such violation was not intentional. In the present case, the Athlete bears the burden of proof that the ADRV was not intentional and further establish how the substance entered his body.
45. The main relevant rule in question in the present case is Article 10.2.3 of the ADAK ADR, which reads as follows:

“As used in Articles 10.2 and 10.3, 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 or result in 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 violation 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 unrelated to sport performance.”

46. *Article 10.2* is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional.
47. The **WADA 2015** World Anti-Doping Code, Anti-Doping Organizations Reference Guide (*section 10.1* "What does 'intentional' mean?", p. 24) provides the following guidance:

'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.

48. The Applicant provided in its evidence that the Athlete was uncooperative in attending the hearing by evading calls and not providing proper or timely communication as required. Further, the Applicant relied on *Article 3.2.5 of ADAK ADR*:

The hearing panel 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 reasonable time in advance of the hearing, to appear at the hearing [either in person or telephonically as directed by the hearing panel] to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.

49. The Panel recognized the application of this article by relying on the case of **CAS 2008/A/1488 P. v. International Tennis Federation (ITF)** where the award stated that;

"to allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules."

d) The Standard sanction and what sanction to impose in the circumstance;

50. The Panel considers that at the centre of the present case is the issue of intention and whether the actions of the Athlete were intentional.
51. Consequently, the Tribunal finds that the Athlete had the intention to violate the anti-doping rule for he has failed, on a balance of probabilities, to demonstrate the lack of intention;
52. Accordingly, the Tribunal finds that the Athlete has not met his burden of proof.

53. Regarding No Fault/Negligence – No Significant Fault/Negligence, since as already concluded above, the Athlete, being responsible for his anti-doping rule violation under *Article 2.1* of the WADC, did not discharge the burden of establishing a lack of intention, the Tribunal does not deem it necessary to assess whether the Athlete may have had no fault or negligence in committing the anti-doping rule violation: see Bisluke ‘para. 81. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had no fault or negligence in committing an anti-doping rule violation.’

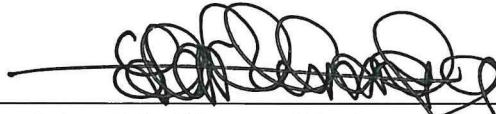
Sanctions

54. With respect to the appropriate period of ineligibility, Article 10.2 of the ADAK ADR provides that:
“The period of ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:
10.2.1 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”

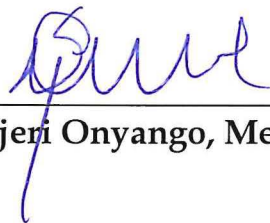
Conclusion

55. As a result of the above analysis, the Tribunal commends the following Orders:
- a. The period of ineligibility for the Respondent shall be four (4) years commencing from 15th September, 2017;
 - b. The Respondent’s results obtained from and including 15th September, 2017 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 shall 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 29th day of January 2020



John M. Ohaga, Chairperson



Ms. J Njeri Onyango, Member



Gilbert M T Ottieno, Member