

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

NO. ADAK CASE NO. 12 OF 2019

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

-versus-

LAZARUS TOO.....RESPONDENT

DECISION

Hearing: 19th September, 2019

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

Appearances: Mr. Bildad Rogoncho and Ms. Damaris Ogama
Counsel for Applicant (ADAK)
Mr. Lazarus Too (Athlete) representing himself

1. The Parties

- 1.1 The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016 whose address of service is **Anti-Doping of Kenya, Parklands Plaza, 2nd Floor, Muthithi Road/Chiromo Lane Junction, P.O. Box 66458-80100, Nairobi**. Represented in this matter by Counsel Mr. Bildad Rogoncho and Ms. Damaris Ogama.
- 1.2. The Respondent **Lazarus Too** is a male national and international level athlete. He represented himself.
- 1.3. The Sports Disputes Tribunal (**Hereinafter Tribunal**) is an independent Sports Arbitration Institution created under the provisions of the Sports Act 2013 Laws of Kenya. Members of the Tribunal are appointed in terms of Section 6 of the said Act.

2. Background

- 2.1. The proceedings have been commenced by the Applicant filing a notice to charge the Respondent Athlete dated 5th March, 2019 addressed to the chairman of the Sports Disputes Tribunal.

2.2. The Applicant brought charges against the Respondent Athlete vide a charge document filed at the Tribunal on 14th March, 2019 that on 23rd of September, 2019 during the Marathon Touraine Loire Valley in tours, France, the Respondent Athlete participated in the race despite being aware of serving a provisional suspension with effect from 7th July, 2017 and that he subsequently had been placed on a two year period of ineligibility imposed on him on 12th September, 2018.

2.3. The findings were communicated to the Respondent athlete by one Japhter K. Rugut, EBS the Chief Executive Officer of Anti-Doping Agency of Kenya (ADAK) vide a notice of charge and mandatory provisional suspension dated 15th February, 2019. In the said communication the Respondent Athlete was offered an opportunity to provide an adequate explanation for the same before 5.00 pm on 1st March, 2019.

2.4. The Respondent Athlete responded vide an email addressed to Bildad.rogoncho@adak.or.ke send on 27th February, 2019. He denied the charges and stated that he unknowingly participated in the race in question for he was not aware that

his period of suspension had taken effect. He further stated that his reason for attending the race was due to financial constraints and problems he was facing due to accumulated debts.

3. The Charges

3.1. Subsequently, the Anti-Doping Agency of Kenya (ADAK) preferred the following charges against the Respondent Athlete:-

Violation of the prohibition of participation during ineligibility.

3.2. The Applicant proffers 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 and as amended to hear and determine this case.

3.3. The Applicant prays that:

- a) All competitive results obtained by the Respondent Athlete Lazarus Too from and including 23rd September, 2018 until the date of determination of the matter herein

be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes), as per *Article 10.1 ADAK ADR*.

- b) The Respondent Athlete (Lazarus Too) be sanctioned to a two-year period of ineligibility as provided for in Article 10.12.3 of the ADAK Rules(ADR) to come into force after the expiry of the current period of ineligibility.
- c) Costs as per WADA *Article 10.10*.

4. Preliminary Matters

4.1. The matter was first brought to the Tribunal vide a notice to charge addressed to the Chairman of the Sports Disputes Tribunal dated 5th March, 2019 by Ms. Damaris Ogama for the Applicant (ADAK). The matter was filed on the same date at the Tribunal. The notice also requested the Tribunal to constitute a hearing panel whom the charge documents and other relevant materials should be served.

4.2. Upon reading the notice to charge dated 5th March, 2019 presented before the Tribunal by Ms. Damaris Ogama, on

behalf of the Applicant (ADAK), the Tribunal directed and ordered as follows;

- i. The Applicant to serve the mention notice, the notice to charge, the notice of the ADRV, the Doping Control Form and all relevant documents on the Respondent within 15 days of the date hereof.
 - ii. The Panel to hear the matter was constituted and comprised;
 - Mrs. Elynah Sifuna-Shiveka;
 - Ms. Mary Kimani
 - Mr. Peter Ochieng;
 - iii. The matter was scheduled to be mentioned on 28th March, 2019 to confirm compliance and for further directions.
- 4.3. The matter came up for mention on 28th March, 2019, as was directed by the Tribunal.
- Mr. Rogoncho was present for the Applicant and he confirmed filing the charge documents but was yet to serve the same to the Respondent Athlete.

He requested for three weeks in order to effect service.

His request was granted and the matter was slated for mention on 25th April, 2019.

- 4.4. The Tribunal was not in session in the months' of April and May, 2019. On resumption, on 27th of June, 2019 when the matter came up for mention. Mr. Rogoncho for ADAK confirmed serving the charge document on the Respondent Athlete and appealed for an early hearing date. The matter was listed for hearing on 25th July, 2019 and the Tribunal directed Mr. Rogoncho to issue a hearing notice to the Respondent Athlete.
- 4.5. On 25th July, 2019 when the matter was to be heard, it was stood over till the 29th of August, 2019. Mr. Rogoncho informed the Tribunal that, the Respondent Athlete had requested for facilitation in order to attend the hearing. Mr. Rogoncho reported that ADAK will ensure the Athlete attends the hearing scheduled for 29th August, 2019.
- 4.6. On 29th August, 2019 the hearing could not proceed because the Respondent Athlete did not make it on

time. Mr. Mwakio who was holding the fort for Mr. Rogoncho for the Applicant, requested for the hearing to be rescheduled once again to 18th of September, 2019.

5. Hearing

5.1. The hearing finally took place on 19th September, 2019.

ADAK the Applicant in this matter was represented by Mr. Bildad Rogoncho while the Respondent Athlete Lazarus Too was present and argued his case.

6. Parties Submissions/Arguments

Applicant/ADAK's Submissions

6.16. The Applicant's legal position is that their duty under Article 3 of ADAK ADR and WADC is to prove the charge to the comfortable satisfaction of the hearing panel.

6.17. The Applicant also relies on the presumptions under Article 3.2 of ADAK ADR that facts relating to anti-doping rule violation may be established by any reliable means including admissions

6.18. In the Applicant's submissions under Article 22.1 stipulates, the roles and responsibilities of an athlete include *inter alia*;

- a) *To be knowledgeable of and comply with the anti-doping rules.*
- b) *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.*
- c) *To cooperate with Anti-Doping organizations investigating Anti-Doping Rule Violation (ADR).*

6.19. The Applicant avers that the Respondent Athlete is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;

"The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including;

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- *Character and education*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for rules and laws*
- *Respect for self and other participants*

- *Courage*
- *Community and solidarity*”

6.20. The burden of proof expected to be discharged by the Anti-Doping Organization under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

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

a) He admitted to travelling to France to participate in the competition.

b) He admitted to being aware of his two-year sanction on him.

6.22. The Applicant posits that the Respondent is charged with *violation of prohibition of participation during ineligibility* which constitutes to a new period of ineligibility equal in length to the original period of ineligibility and shall be added to the end of the original period of ineligibility.

6.23. Similarly, Article 10.2.1 states that the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction.

- 6.23. The applicant asserts that for an ADRV to be committed non-intentionally, the athlete must prove that by a balance of probability, she/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 speculation.
- 6.24. From the above, to prove lack of intention, the Athlete must demonstrate that did not participate in the event during his period of ineligibility.
- 6.25. The Applicant submits that the Respondent Athlete in his oral submissions admitted to having participated in the event during his period of ineligibility, thus proving intention.
- 6.27. The Applicant contends that the Respondent is charged with the responsibility of being knowledgeable of and comply with the Anti-Doping rules. The Respondent hence failed to discharge his responsibilities under rules

22.1.1 and 22.1.3 of ADAK ADR.

6.28. The Applicant submits that the Respondent Athlete has a personal duty to ensure that they disclose to their International Federation and to the Agency any decision by a non-signatory finding that the Athlete committed an anti-doping rule violation within the previous ten years

22.1.5 To disclose to their International Federation and to the Agency any decision by a non-signatory finding that the Athlete committed an anti-doping rule violation within the previous ten years.

22.1.6 To cooperate with Anti-Doping Organizations investigating anti-doping rule violations.

6.28. The Applicant contends that the Respondent Athlete was grossly negligent because he ought to have known better the responsibilities bestowed upon him as an athlete before participating in the event.

6.29. The Applicant submits that the principle of strict liability is applied in situations where participation during period of ineligibility by an athlete has constituted an ADRV. It means that each athlete is strictly liable for his

or her own knowledge on Anti-Doping Rules Violations whether or not the athlete intentionally or unintentionally committed an ADRV or was negligent or otherwise at fault.

- 6.30. The Applicant proffers that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that his participation in events will not be in violation of the Code. Ignorance is no excuse.
- 6.31. According to the Applicant, for an ADRV under Article 10.12, Article 10.12.3 of the ADAK ADR provides for a new period of ineligibility equal in length to the original period of ineligibility shall be added to the end of the original period of ineligibility. The new period of ineligibility may be adjusted based on the Athlete or other person's degree of fault and other circumstances of the case.
- 6.32. In the circumstances, the Applicant submits that the Respondent has not adduced evidence in support of the intention to participate during the period of ineligibility. Bearing this in mind, the Applicant is convinced that the

respondent has not demonstrated no fault/negligence on his part as required by ADAK rules and the WADC to warrant sanction reduction.

6.33. The Applicant, therefore submitted that the following considerations will be ideal while imposing sanctions on the Respondent Athlete;

- i. The ADRV has been established against the Athlete.
- ii. The failure by the athlete to establish no intention to commit an ADRV.
- iii. Failure by the athlete to take caution by not participating in events while serving a period of ineligibility.
- iv. The knowledge and exposure of the athlete to anti-doping procedures and programmes and /or failure to take reasonable effort to acquaint themselves with anti-doping policies.
- v. The maximum sanction of 2 years ineligibility ought to be imposed as on plausible explanation has been advanced for the Anti-Doping Rule Violation of prohibition of participation during period of ineligibility.

6.34. From the foregoing, the Applicant urges the panel to consider the sanction provided for in Article 10.12.3 of the ADAK Rules and sanction the athlete to a 2 year period of ineligibility to be added at the end of his current period of ineligibility.

6.35. Conclusively, the Applicant submitted that it has made out a case against the Athlete and that there was indeed an ADRV committed by the Athlete and a sanction is inevitable.

Respondent's Pleadings

6.36. The Respondent Athlete who opted to represent himself, admitted that he participated in the Marathon Touraine Loire Valley in Tours in France.

6.37. He stated that he didn't know that he was serving a two year ban for an earlier ADRV, saying that his advocate had not communicated to him about the sanction.

6.38. In his response to the notice of charge he admitted that the financial problems that had bedevilled him pushed him to go and run in order to improve his situation.

6.39. He pleaded with the Tribunal to sympathize with his situation and forgive him.

7. Discussion

7.1. We have carefully considered the matter before us and arguments/pleadings of both parties and these are our observations;

7.2. Section 31 of the Anti-Doping Act states that;

“(1) The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organizations. (2) The Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency’s Anti-Doping Rules, amongst other legal sources.”

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

7.4. The Applicant has proved beyond any reasonable doubt that the Respondent Athlete is a repeat offender and should serve the requisite sanctions.

7.5. The Respondent Athlete is an elite athlete and very much exposed and therefore should face the consequences as stipulated in Article 10.12.3 of the ADAK ADR and WADC. Ignorance has no defence.

8. Decision

In the circumstances, the Tribunal imposes the following consequences;

- a) The period of ineligibility (non-participation in both local and international events) for the Respondent shall be 2 years to be added at the end of his current period of ineligibility pursuant to Article 10.12.3 of the ADAK ADR and WADC.
- b) The Respondent's results obtained at the Marathon Touraine Loire Valley Tours, France on 23rd September 2018 and thereafter, including any points gained and prizes, are disqualified pursuant to Articles 9 and 10 of the WADA Code;
- c) The parties shall bear their own costs (if any) sustained in connection with the case.
- d) Parties have a right of Appeal pursuant to Article 13 of the WADA and Part IV of the Anti-Doping Act No. 5 of 2016 as amended.
- e) Any other prayers or motions are dismissed.

Dated and Delivered at Nairobi this 4th day of March, 2020

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