

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES  
OF THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS**

*Before:*

*Conny Jörneklint (Sole Arbitrator)*

**BETWEEN:**

**World Athletics**

***Anti-Doping Organisation***

**and**

**Mr Wilson Kipsang Kiprotich**

***Respondent***

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**DECISION OF THE DISCIPLINARY TRIBUNAL**

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**I. THE PARTIES**

1. The Claimant, World Athletics ("WA") formerly the International Association of Athletics Federations ("IAAF"), is the international federation governing the sport of Athletics worldwide. It has its registered seat in Monaco. In these proceedings the WA is represented by the Athletics Integrity Unit (the "AIU").

2. The Respondent, Mr Wilson Kipsang Kiprotich (the "Athlete" or "Mr Kipsang") is a 37-year old marathon runner from Kenya. He was the bronze medallist in the marathon at the 2012 London Olympic Games and is the former world record holder in the marathon with a time of 2:03:23, which he set at the 2013 Berlin Marathon.
3. The Appellant and the Respondent are each referred to individually as a "Party" and collectively as the "Parties".

## **II. NOTICE OF CHARGE AND INITIATION OF DISCIPLINARY PROCEEDINGS**

4. Pursuant to a Notice of Charge dated 10 January 2020, the Athlete was charged by the AIU with committing Anti-Doping Rule Violations ("ADRV") in connection with Whereabouts Failures within the meaning of Article 2.4 of the IAAF Anti-Doping Rules (the "IAAF Rules") and for Tampering or Attempted Tampering with any part of Doping Control pursuant to Article 2.5 of the IAAF Rules.
5. The Notice of Charge set out inter alia (i) the facts and supporting documentation and evidence upon which the AIU intended to rely in order to establish the ADRV against the Athlete and (ii) the Consequences that the AIU was seeking viz. a four-year period of Ineligibility and a Disqualification of the Athlete's competitive results between 12 April 2019 and 10 January 2020.
6. The Athlete was provisionally suspended from the date of the Notice of Charge, i.e. 10 January 2020.
7. By letter dated 17 January 2020, the Athlete requested that he be acquitted of all charges and requested a hearing before the Disciplinary Tribunal.

## **III. WORLD ATHLETICS'S CASE**

8. According to WA the Athlete has a total of four Whereabouts Failures pursuant to Article 2.4 of the IAAF Rules on his record, specifically:

- a) Missed Test dated 27 April 2018 (“the 2018 Whereabouts Failure”); and
- b) Filing Failure related to the Athlete’s whereabouts information provided for 18 January 2019 (effective 1 January 2019) (“the Filing Failure”);
- c) Missed Test dated 12 April 2019; and
- d) Missed Test dated 17 May 2019 (together “the 2019 Whereabouts Failures”).

- 9. The Athlete has also been charged with an ADRV pursuant to Article 2.5 of the 2019 IAAF Rules for providing deliberately misleading information and evidence to the AIU in his explanation for the Missed Tests dated 12 April 2019 and 17 May 2019 in an attempt to obstruct or delay the investigation into those Missed Tests and/or to prevent normal procedures from occurring.

#### **IV. THE TRIBUNAL’S PROCEEDINGS**

- 10. As said before, these proceedings started on 10 January 2020 when the Athlete was charged with committing ADRVs under Articles 2.4 and 2.5 of the IAAF Rules. The Sole Arbitrator shall later on decide which of the IAAF Rules that have been in force from time to time shall be applied. On 17 January 2020, the Athlete requested a hearing before the Disciplinary Tribunal.
- 11. Mr Conny Jörneklint, Sweden, Former Chief Judge of Kalmar District Court, was appointed on 13 February 2020, as Chairman of these proceedings.
- 12. On 14 February 2020 the Chairman held a preliminary meeting by conference call. In attendance for the AIU was Mr Tony Jackson and for the Athlete, Mr Michiel van Dijk. The Athlete maintained his request for a hearing. After the meeting, the Chairman issued Directions for the AIU to submit its Brief on 5 March 2020, for the Athlete to submit his Answer Brief on 27 March 2020 and for the AIU to submit a Reply Brief on 17 April 2020 if it wished to do so. A preliminary date for the hearing was set and it was decided that the case should be adjudicated by the

Chairman as a Sole Arbitrator, as agreed by the parties and in accordance with 8.7.2 (a) of the IAAF Rules.

13. After a short respite, the AIU provided its Brief on 6 March 2020. The Athlete was also given a respite and provided his Answer Brief on 3 April 2020.

14. On 29 April 2020, the AIU applied for an order from the Chair that the Athlete should make the following information in his possession available to the AIU on Wednesday 6 May 2020:

*"Copies of all WhatsApp messages (including all media, links and documents) between the Athlete and his driver, Mr Victor Kigen, sent/received between 22 August 2019 (the date of the Notice of Apparent Missed Test) and 30 August 2019."*

15. The AIU also applied for the time limit for the Reply to be stayed and the deadline for submission suspended pending the consideration and determination of this application and any order being executed.

16. The Athlete applied for the application of the AIU to be dismissed and stated the following:

*"Mr Kipsang has nothing to hide. We do not know if the requested proof is relevant and if there was any WhatsApp contact between Mr Kipsang and Mr Kigen in the relevant period besides the information that was already submitted. If the Chair orders Mr Kipsang to submit the copies of WhatsApp messages in the relevant period and there are no other WhatsApp messages, this may not lead to a shift of the burden of proof from the AIU to Mr Kipsang or lead to any other conclusion to the disadvantage of Mr Kipsang."*

17. On 30 April, the application of the AIU was granted. The deadline for submission of the AIU's Reply Brief was suspended until execution of the Order.

18. The Athlete submitted the requested documents to the Tribunal by e-mail on 6 May 2020. The deadline for the AIU's Reply was therefore suspended for the intervening 6 days, which meant that the deadline for the Reply was 14 May 2020.

19. The AIU submitted its Reply Brief on 14 May 2020.

20. On 18 May, the Athlete requested a postponement of the hearing - which was set to take place on 20 May 2020 – *“in order to guarantee a fair trial and to enable Mr. Kipsang to prepare himself properly for the hearing and to respond to the Reply, in which case we will ensure that the witnesses will be made available during the hearing”*.
21. The AIU supported the postponement in circumstances where there was a risk that the witnesses Ms Chemi, Mr Kipkemoi and Mr Kigen might not be available on the current hearing date of 20 May 2020. As to the request from the Athlete to have an opportunity to submit a reply and further documents before the hearing, the AIU noted that the process for exchange of submissions set out in the IAAF Rules does not permit any further written response or documents/evidence from an athlete following the filing of the Reply Brief in advance of the hearing. Nevertheless (and exceptionally), the AIU did not object to the Athlete being afforded further time to submit a written reply and additional documents in this matter, subject to the caveat that the AIU is afforded the right to file a sur-reply to any submissions/documents and/or evidence filed by the Athlete (if necessary), thereby preserving the typical procedural exchange of submissions as set out in the IAAF Rules in advance of the hearing.
22. On 18 May 2020, the hearing was postponed. The Parties were allowed to exchange one further reply each and supporting documents if any. The Chairman issued directions for the Athlete to give his written reply at the latest on 25 May 2020 and that the AIU was allowed to file a sur-reply on 28 May 2020.
23. A new date for the hearing was set to 8 June 2020.
24. On 25 May 2020, the Athlete filed a Reply and on 28 May the AIU filed a sur-reply.
25. A hearing was held via video conference on 8 June 2020, where eight witnesses were heard on request of the WA:
  - Ms Beryl Bor Chepchirchir, the DCO for the April 2019 Missed Test, to testify as to the circumstances of the April 2019 Missed Test and subsequent written report;

- Mr Isaac Lagat, the witnessing chaperone for the April 2019 Missed Test, to testify as to the circumstances of the April 2019 Missed Test;
- Mr Maurits Huijskens, Clearidium Area and Client Manager, to testify to his contact with the DCO for the April 2019 Missed Test;
- Ms Doreen Chebi, the Athlete's wife, to clarify, without limitation, her statement filed in support of the Athlete's explanation for the April 2019 Missed Test;
- Mr Cosmas Kipkemoi, the Athlete's security guard, to clarify, without limitation, his statement filed in support of the Athlete's explanation for the April 2019 Missed Test;
- Mr Victor Kigen, to clarify, without limitation, the nature of his interactions with the Athlete in August 2019 and his statement filed in support of the Athlete's explanation for the Missed Test on 17 May 2019;
- Mr Dennis Keitany, to speak to the contents of his witness statements as well as to any matters arising therefrom or connected thereto; and
- Mr Phillip Langat, to speak to the contents of his witness statements as well as to any matters arising therefrom or connected thereto.

## **V. THE PARTIES' SUBMISSIONS**

### **A. WORLD ATHLETICS**

26. On 6 March 2020, in its Brief WA made the following requests for relief. These requests were maintained at the hearing.

(i) to rule that the Tribunal has jurisdiction to decide on the subject matter of this dispute;

(ii) to find that the Athlete has committed anti-doping rule violations pursuant to Article 2.4 and Article 2.5 of the 2019 IAAF Rules;

(iii) to impose a period of ineligibility of four (4) years upon the Athlete for the anti-doping rule violations, commencing on the date of the Tribunal's Award;

(iv) to give credit for the period of Provisional Suspension imposed on the Athlete from 10 January 2020 until the date of the Tribunal's Award against the total period of ineligibility, provided that it has been effectively served by the Athlete;

(v) to order the disqualification of any results obtained by the Athlete between 12 April 2019 and 10 January 2020 with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Article 10.8 of the 2019 IAAF Rules; and

(vi) to award World Athletics a contribution to its legal costs.

27. The WA's general submissions in support of its request concerning the merits of the case can be summarized essentially as follows:

28. The Athlete is an International-Level Athlete and he is in the Registered Testing Pool ("the RTP").

29. The violation of Article 2.4 of the IAAF Rules has been asserted against the Athlete on the basis of the following:

- A total of three Whereabouts Failures in the twelve-month period beginning 27 April 2018, including (i) a Missed Test dated 27 April 2018 (the "April 2018 Missed Test"); (ii) a Filing Failure related to the Athlete's whereabouts information for 18 February 2019 (the "Filing Failure"); and (iii) a Missed Test dated 12 April 2019 (the "April 2019 Missed Test"); and
- A total of three Whereabouts Failures in the twelve-month period beginning 1 January 2019, including (i) the Filing Failure; (ii) the April 2019 Missed Test; and (iii) a Missed Test dated 17 May 2019 (the "May 2019 Missed Test").

30. The ADRV originally asserted against the Athlete pursuant to Article 2.5 of the IAAF Rules is based upon the Athlete's explanation for the fourth Whereabouts

Failure on his record, which is the Missed Test dated 17 May 2019, that the Athlete submitted to the AIU on 5 September 2019.

31. During the proceedings, the AIU also asserted that the Athlete has been engaged in Tampering pursuant to Article 2.5 of the IAAF Rules with respect to the 12 April 2019 Missed Test.
32. The WA's more specific submissions according each single Whereabouts Failure and each single Tampering is explained when dealing with each of these alleged violations.

## **B. THE ATHLETE**

33. On 3 April 2020, in his Answer Brief, the Athlete made the following requests for relief. These requests were maintained at the hearing:
  - (i) Acquittal from all charges made against Mr Kipsang.
  - (ii) contribution to costs of legal assistance and general damages consisting of emotional damage, damage to reputation, commercial damage and lost income (pro memorie) to be paid by World Athletics.
34. The Athlete does not dispute WA's role in governing the sport of athletics worldwide, nor is the authority delegated by it to the AIU to bring these proceedings or that the Disciplinary Tribunal has jurisdiction. The Athlete does not dispute his status as an International Level Athlete under the IAAF Rules and that he is in the RTP. He does not dispute the applicability of the 2018 or 2019 IAAF Rules, the 2019 IAAF Anti-Doping Regulations ("the Regulations") and he acknowledges that he is subject to the IAAF Rules.
35. The Athlete's submissions in support of his request concerning the merits of the case can be summarized essentially as follows.
36. Mr Kipsang has, as an elite international athlete and formal world record holder, been under intensive medical/sports medical supervision for years and there has never been any indication of the use of a prohibited substance and/or method during any of the medical examinations and/or over the course of those years. If



that had been the case, the IAAF and/or Athletics Kenya ("AK") would have intervened immediately and/or initiated doping proceedings.

37. The accusations of the AIU had and have an enormous impact on Mr Kipsang.
38. Mr Kipsang emphatically states that he has never used prohibited substances and/or prohibited methods in the meaning of the IAAF Rules (or any anti-doping regulations whatsoever, such as the World Anti-Doping Code ("WADC"), etc.).
39. Mr Kipsang emphasises that no prohibited substances were found in this case.
40. Since 2010, Mr Kipsang has undergone a large number of doping controls. All of these tests were negative and no abnormalities were found. As far as Mr Kipsang can tell, he is tested more often than other athletes, at least more than the athletes he has trained with.
41. Since Mr Kipsang has been managed by Volare Sports, there have been, in addition to the formal anti-doping programme of WADA/IAAF/AK, periodical blood tests and other medical/sports-medical tests at a recognised hospital in Ede in the Netherlands and he has been subject to intensive medical/sports-medical supervision. Nothing unusual has emerged from this in any case relating to doping.
42. With regard to the alleged Whereabouts Failures on 27 April 2018, 18 January 2019 and 12 April 2019, not all requirements of Appendix A.3.9 of the Regulations (regarding the alleged Filing Failure) and not all the requirements of Appendix A.4.3 (regarding the alleged Missed Tests) have been met. The explanations that were provided by Mr Kipsang in the Results Management Process regarding the alleged Whereabouts Failures were wrongly not accepted. Therefore, there have not been three (3) Whereabouts Failures in 12 months, so there is no violation of article 2.4 ADR.
43. The requirements for an ADRV against Article 2.5 IAAF Rules also have not been met.
44. Also, Mr Kipsang has already been punished in the Results Management Process of the Missed Test of 17 May 2019, so it would be in conflict with the regulations and basic legal principles to punish him again with such a severe sanction.

45. Furthermore, the AIU has made several procedural errors and has harmed several principles of due process. Also, in that regard, it is established that there cannot be a case of an ADRV.
46. The Athlete's more specific submissions regarding the alleged procedural errors in each single Whereabouts Failure and each single Tampering is explained when dealing with each of these alleged violations.

## **VI. THE HEARING**

47. On 8 June 2020, a hearing was held via video conference before Conny Jörneklint, Sole Arbitrator. The parties were represented as follows; for the WA Mr Ross Wenzel, Counsel, and Mr Tony Jackson, Case Manager of the AIU; for the Athlete Mr Michiel van Dijk, Counsel.
48. Mr van Dijk formally protested that Mr Wenzel had not been introduced to the Athlete and his Counsel before the hearing. Mr Wenzel introduced himself and the Sole Arbitrator found no reason not to continue with the hearing.
49. The Athlete gave evidence by videoconference from Kenya. For the WA, witnesses Ms Beryl Bor Chepchirchir, Mr Isaac Lagat, Mr Dennis Keitany and Mr Phillip Langat, were all heard via videoconference from Kenya, and Mr Maurits Huijskens, via videoconference from the Netherlands. For the Athlete, Ms Doreen Chebi, Mr Cosmas Kipkemoi, and Mr Victor Kigen also gave witness evidence by videoconference from Kenya.
50. The hearing logistics were efficiently arranged by Ms Anna Thomas, Sport Resolutions.
51. The parties had the opportunity to present their case, comment on the evidence, submit their arguments and answer the questions posed by the Tribunal. The parties stated that they did not have any objection in respect of their right to be heard.

## **A. *The Athlete's testimony***

52. In his testimony, on being examined by his counsel, counsel for WA and later, in answer to some questions by the Sole Arbitrator, the Athlete stated that (and I summarize):

He can confirm that everything in his written statement is correct. He did not get any help in formulating his statement. The wording "I do remember very well" is his own words. He has never been involved in doping.

### **In relation to the April 2019 Alleged Missed Test:**

He arrived home at 22:50 this evening. When he arrived the DCO told him that if it would take a long time for him to provide the urine sample she could not wait. The DCO was a lady and there was no male chaperone. The lady was the only person he saw. He also saw a driver but he cannot say whether the driver was male or female. He was unable to urinate so it took a very long time. Her boss told the DCO to postpone the sample collection because it could take 30 minutes or one hour to get the urine sample. The DCO could not wait any longer. They made an agreement that she should come back on 15 April which she did. Then he was tested without problems.

### **In relation to the May 2019 Alleged Missed Test:**

He had to travel with Mr Kigen from Nakuru to Nairobi and back on this day. He was in Nairobi on 14 and 15 May. He was alone in Nairobi on official duty as a police officer. On 15 May he went from Nairobi to Nakuru in his own car. It is a 1.5 - 2-hour journey. His intention was to go all the way to his home in Iten on 15 May. He updated his whereabouts information on 15 May in the evening when he had discovered that he couldn't make it all the way back to Iten so he decided to stay in Nakuru. He is aware that according to his whereabouts information he was in Nakuru between 07:00 and 08:00 on 16 May. On 17 May he had to go back to Nairobi to collect a visa on US Embassy. He was informed about this in a phone call on 16 May. He asked Mr Kigen to follow him as a driver in Mr Kipsang's car. Mr Kigen lives in Nakuru. They left Nakuru in the morning. He had to be on the US Embassy at 10am. He and Mr Kigen left Nairobi at about 15:00 on 17 May to go back to Iten. Mr Kipsang was sitting in the backseat. When they came 10km before Nakuru they encountered the traffic jam at about 6pm. He did not see the vehicles involved, and he wasn't told of the exact details. People they met informed that a trailer and a bus was involved.

When they got to the place of the accident the road was clear. The reason that he on 29 August 2019 asked Mr Kigen " (C)an you write a statement to support the one I wrote saying that I was with you from Nairobi to Nakuru" was that they encountered the jam before they came to Nakuru so this is why he wrote "from Nairobi to Nakuru" rather than to Iten. It is correct that he sent his own statement to Mr Kigen on 27 August and then asked "Can you write a statement to supporter on this" and that he reiterated his request on 29 August. It is also correct that he did not mention Mr Kigen in his own statement sent to AIU on 26 September. The reason why he asked Mr Kigen for photos and a statement was that the AIU asked for information. He did not have a photo himself so he asked Mr Kigen because he wanted to show any video or photo to AIU to prove the jam. He knew there was an accident and asked for evidence of the traffic jam. He never watched the video clip showing a traffic jam in August 2019 caused by construction work which he got from Mr Kigen on 27 August. And he did not know that the picture he got from Mr Kigen on 28 August was from an accident in August 2019. He just forwarded them to his manager who sent them to the AIU. Mr Kigen stayed at Mr Kipsang's house the night between 17 and 18 May and travelled back to Nakuru on public transport on 18 May.

#### In relation to the Filing Failure:

Normally when changing whereabouts filings, he informs his manager by sending a WhatsApp message and then the manager updates his whereabouts information. On 18 January 2019 his manager had a problem with the login for ADAMS so she had to write an email to WADA to inform about the update of the whereabouts. His message was sent at 8.36pm. He was in a meeting and the meeting was delayed because someone was late and delayed the start. He could not interrupt the meeting to send a message to his manager. When he discovered that the meeting took too long and that he couldn't make it back to Iten in time for his time slot that evening he informed his manager. It is correct that he changed his whereabouts to Narok with beginning on 15 January. He stayed in Narok for construction works for 8 days. He changed it every day because his intention was to go back to Iten every day. It is about 175km between Narok Town to Iten via Nakuru. It takes about 2,5 hours to go by car. It is wrong when it on Google Maps says that it is 300km and 5 hours and 39 minutes journey by car.

## **B. *The Witnesses' testimonies***

### **Ms Beryl Bor Chepchirchir**

53. She can confirm everything in her written statement. She doesn't want to correct or clarify anything in that statement. She had not experienced any previous problems in testing Mr Kipsang. The written statement was drafted by the AIU after exchanging e-mails with Mr Tony Jackson and the AIU also used her reports. She reviewed the draft, but she didn't change anything.

She had Mr Lagat as a driver and a chaperone. The form she used at that time "Unsuccessful Attempt Report Form" didn't have a box for the chaperone's name and signature. The new form has such a box. Clearidium is her employer. This was a normal test. At about 23:10 she called her boss in Denmark and asked what to do. He said that she should wait until 23:20. They normally give an allowance of 15 minutes. If Mr Kipsang arrived later than 23:20 she was not allowed to do the test. When they left, they met Mr Kipsang at about 23:30. She talked to him, but she didn't inform him that she had a male chaperone. Mr Lagat was sitting in the car. She didn't make an agreement with Mr Kipsang to come back on 15 April to conduct a new test. Mr Kipsang apologised for being late for the test and promised to be there next time. They didn't talk about a new date. She cannot remember if she has tested him again after 12 April.

### **Mr Isaac Lagat**

54. He can confirm everything in his written statement. He doesn't want to correct or clarify anything in that statement. He drafted the statement himself. He sent the draft to Clearidium and after that he had discussions with Mr Tony Jackson. He is employed by Clearidium as a chaperone. He and Ms Chepchirchir arrived to Mr Kipsang's address at 22:15. The DCO called her boss between 22:55 and 23:00, when the Athlete still had not arrived. She was told to wait another ten minutes. He saw Mr Kipsang when he himself was sitting in the car. Mr Kipsang arrived as they were leaving at around 23:25 – 23:30. Ms Chepchirchir talked to Mr Kipsang. There was no test. He and Ms Chepchirchir left and went home. He didn't sign the

Unsuccessful Form Report. After a successful test, he signs the Form after Sample Collection. He doesn't remember if he witnessed a test of Mr Kipsang on 15 April 2019.

### **Mr Maurits Huijskens**

55. He can confirm everything in his written statement. He doesn't want to correct or clarify anything in the statement. He prepared his statement with the AIU. They had several calls to each other. It was Ms Olympia Karavasili who drafted it.

He is working for Clearidium since 2016 and coordinates tests for other people as a back office. He has had a few missions with Mr Kipsang. On several occasions it was problems to reach him. He has been conducting such tests himself and he has also been in the back office. After the actual test everything went quite smoothly. He remembers that the DCO, Ms Chepchirchir, contacted him in the evening at 5 - 6 minutes past 10pm. He was located in the Netherlands, which means that the time is one hour later in Kenya. She told him that she couldn't reach Mr Kipsang. He hadn't arrived. He told her to wait for 15 extra minutes. This was a part of a program which they had for East Africa at this time for not getting as many missed tests and to let the athletes get used to the Whereabouts Filing requirements. They always waited 20 minutes after the time slot had run out if the athlete was absent. The DCOs organise their own travels for their missions and also their chaperones. They do it together with Clearidium. He knows that Ms Chepchirchir had a male chaperone and driver at this time. If Mr Kipsang was tested 16 times between 12 April 2018 and 17 May 2019, he doesn't think it is a really high number. He guesses that it represents an average for a top athlete. He cannot confirm that the testing of Mr Kipsang was only focused on his whereabouts. A few days after he learned that Ms Chepchirchir met Mr Kipsang on 12 April but that the test was cancelled.

### **Mr Dennis Keitany**

56. He can confirm everything in his written statement. He doesn't want to correct or clarify anything in the statement. He prepared his statement with assistance of the

AIU. He provided the information and after that the AIU prepared a draft and he corrected it and changed whatever had to be corrected. He was employed by Anti-Doping Agency of Kenya ("ADAK") in September 2018. ADAK was established in 2016. He works with different agencies in Kenya for intelligence gathering and investigations, also in cooperation with the Kenya Police and the Directorate of Criminal Investigations ("DCI"). The DCI can assist ADAK in intelligence gathering and investigations.

He is not aware of any dispute between Mr Kipsang and ADAK in 2014. ADAK was not formed by then.

Details of all traffic incidents in Nakuru are registered by the police and must be registered for the sake of insurance. If there is no insurance and no third party is harmed, no registration in the Occurrence Book is necessary. If there had been an accident on 17 May 2019 which involved a trailer and a bus or other big vehicles near Nakuru and which it took three hours to clear up for he would definitely expect this to be reported to the police and recorded in the Occurrence Book. No landslide was registered in the area for April 2018, although there was on 22 May 2018.

### **Mr Phillip Langat**

57. He can confirm everything in his written statement. He doesn't want to correct or clarify anything in the statement. He prepared his statement with assistance of the AIU. The traffic accident which occurred on 17 May 2019 in Mburuk involved a 14-seater Matatu. This accident was noted in the Occurrence Book and Mr Langat saw the note himself. It was a hit and run accident. This kind of accident cannot cause a big traffic jam. All accidents must be reported in the Occurrence Book whether small or big.

### **Ms Doreen Chebi**

58. She is the wife of Mr Kipsang. She can confirm everything in her written statement. She doesn't have anything to add. She wrote it herself in her own

words. She didn't ask for help from anyone. She also decided on the headline. It was Mr Kipsang who asked her to write the statement. She had not seen Mr Kipsang's statement or any other's statement before writing her own. She didn't discuss the facts with her husband.

She was sleeping but was awakened by her security guard that night at 22:30 and she went out and spoke with the lady DCO. The lady wanted her husband for a doping test. She only saw the lady and the driver in the car. She called her husband and he said that he was on his way back home. He told her he would be home in about 15 or 20 minutes. He arrived at 22:50, she is sure of that because she looked at her phone when he arrived. She was waiting outside the house and saw when he arrived. He met and talked for some length with the lady. Then the lady left without taking samples. She doesn't know what they discussed. She is telling the truth for sure.

### **Mr Cosmas Kipkemoi**

59. He is employed by Mr Kipsang as a security guard. He remembers his written statement. He can confirm everything in that statement. He doesn't have anything to add. He wrote his statement himself, without any assistance from anybody. He decided all the wording and the headline of the statement. He wrote it approximately 3 weeks after 12 April 2019. It was his employer who asked him. He did not discuss the events of 12 April with his employer before writing the statement. But he remembered that Mr Kipsang arrived at 22.50. He had not seen any other statement before he wrote his.

On 17 May 2019, the doping control officers came to Mr Kipsang's house and he was not there. He doesn't remember what time they arrived. He cannot remember the time for Mr Kipsang's arrival home on that date but he arrived together with his driver. It was at night.



## Mr Victor Kigen

60. He remembers the statement he has written. He can confirm everything in his statement. He doesn't have anything to add. He wrote his statement himself in his own words, without any help. He never discussed with Mr Kipsang before he wrote his statement. Mr Kipsang sent his own statement to him on 27 August which is before Mr Kigen wrote his. But he didn't read that statement before he wrote his own. He knows the term 'missed test' as he is a former athlete. He won gold medal for Kenya in the East African championships. He has run in US, in Europe and in Asia. He stopped competing in 2013 due to injuries.

Mr Kipsang is his past mentor, his friend, his colleague so when he needs someone, Mr Kigen is his driver.

On 14/15 May 2019 he was not in Nairobi with Mr Kipsang. Mr Kipsang asked him to drive to Nairobi on 17 May. He called him about 5am. He is up at that time as he is a businessman. Mr Kipsang did not contact him on 16 May. He drove Mr Kipsang from Nakuru to Nairobi arriving about 10am. Mr Kipsang completed his mission at the US Embassy. It didn't take long. They drove to another building in Nairobi. He doesn't know what Mr Kipsang was doing there. Mr Kipsang is a security officer so he does not ask him what he is doing. Mr Kipsang went in and Mr Kigen stayed in the car.

They left Nairobi at 3pm. From Nairobi to the outskirts of Nakuru took about 2 hours and 30 minutes. There they encountered a traffic jam. He knows about what caused the traffic jam by hearsay. Other drivers said there was an accident. They said there was an accident, but they didn't know what vehicles were involved. When he wrote his statement, Mr Kigen guessed that the accident was a fallen down lorry, which is usual in Kenya. Now he remembers that other drivers told him that the accident was caused by a fallen down lorry.

He didn't discuss the accident with Mr Kipsang before Mr Kipsang asked for photos. Mr Kigen didn't take any photos at that time; he didn't think he would need them. He sent a video to Mr Kipsang, but he didn't think it was from the jam that they

encountered on 17 May. He had no other photos, that is why he sent this video. Mr Kipsang only asked for a video.

On 28 August 2019, he sent the photo of the lorry that had fallen down. He found it on a Facebook account. But he didn't think it was a photo of the accident they encountered. The message "Gatehouse roundabout Nakuru" given to the photo when sent to Mr Kipsang was to inform that it was on the route from Nairobi to Iten. It is located 10km from where they encountered the traffic jam.

The lorry photo was sent to Mr Kipsang's management and Mr Kigen then wrote that it was correct that this photo was from the 17 May accident. He then assumed that this photo was from the accident that caused the traffic jam. He really believed that it was correct.

## **VII. LEGAL ANALYSIS**

61. The Sole Arbitrator confirms that he carefully took into account in this decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to specifically.

### **A. Jurisdiction and Applicable Rules**

#### Jurisdiction

62. Article 1.2 in the 2019 IAAF Rules states as follows:

In accordance with Article 16.1 of the IAAF Constitution, the IAAF has established an Athletics Integrity Unit ("Integrity Unit") with effect from 3 April 2017 whose role is to protect the Integrity of Athletics, including fulfilling the IAAF's obligations as a Signatory to the Code. The IAAF has delegated implementation of these Anti-Doping Rules to the Integrity Unit, including, but not limited to the following activities in respect of International-Level Athletes and Athlete Support Personnel: Education, Testing, Investigations, Results Management, Hearings, Sanction and Appeals. The references in these Anti-

Doping Rules to the IAAF shall, where applicable, be references to the Integrity Unit (or to the relevant person, body or functional area within the Unit).

63. The IAAF Rules, which were in force between 6 March 2018 and 1 January 2019 (the "2018 IAAF Rules"), had the same rule. The current IAAF Rules (the "2019 IAAF Rules"), were effective from 1 January 2019. According to the Rules of Procedure, it is competent to apply the Rules in force when the proceedings occur.

64. The application of the IAAF Rules to Athletes, Athlete Support Personnel and other Persons is set out in Article 1.6 of the 2019 IAAF Rules, including the following:

1.6 These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, by condition of his membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the Integrity Unit to enforce these Anti-Doping Rules:

a) all Athletes, Athlete Support Personnel and other Persons who are members of a National Federation or of any affiliate organisation of a National Federation (including any clubs, teams associations or leagues);

b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held;

c) all Athlete Support Personnel and other Persons working with, treating or assisting an Athlete participating in his sporting capacity; and

d) any other Athlete, Athlete Support Person or other Person who, by virtue of an accreditation, licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of the IAAF, of any National federation (or any member or affiliate organization of any National Federation, including any clubs, teams, associations or leagues) or of any Area Association, for purposes of anti-doping.

65. The applicable rules are the IAAF Rules, which apply to all athletes who are members of a National Federation and to all athletes participating in competitions organised, convened, authorised or recognised by the WA.
66. There is no dispute that the Athlete was bound by the IAAF Rules.
67. Article 7.2 in the 2018 IAAF Rules confers jurisdiction for results management on the AIU in certain circumstances, including:
- 7.2 The Integrity Unit shall have results management responsibility under these Anti-Doping Rules in the following circumstances:
- 
- 7.2.4 For potential violations arising in connection with any Testing conducted on an International-Level Athlete by a National Anti-Doping Organisation (or other relevant Testing authority).
68. This rule is the same in the 2019 IAAF Rules.
69. Article 1.9 of the 2018 IAAF Rules defines International-Level Athletes among others as an athlete who is in the RTP. This rule can also be found in Article 1.8 in the 2019 IAAF Rules.
70. The Athlete has been added to the RTP. The Athlete has accepted that he is an International-Level Athlete. The AIU therefore has jurisdiction for results management in this matter.
71. The IAAF has established the Disciplinary Tribunal in accordance with Article 1.5 of the 2017 IAAF Rules, which provides that the Tribunal shall determine Anti-Doping Rule Violations committed under the rules. The 2018 IAAF Rules had the same rule as do the 2019 IAAF Rules.
72. Article 8.1(a) of both the 2018 and 2019 IAAF Rules sets out that the Tribunal shall have jurisdiction – among others – over all matters in which:
- i. An Anti-Doping Rule Violation is asserted by the Integrity Unit against an International-Level Athlete or Athlete Support Person in accordance with these Anti-Doping Rules;

73. The Sole Arbitrator has already defined the Athlete as an International-Level Athlete. Therefore, the Disciplinary Tribunal has the jurisdiction to hear and determine the ADRV alleged against him, pursuant to Article 8.1(a) of the 2019 IAAF Rules.

#### Applicable Rules

74. WA submits that the Athlete has a total of four Whereabouts Failures on 27 April 2018, 1 January 2019, 12 April 2019 and 17 May 2019. The Athlete has also been charged with an ADRV pursuant to Article 2.5 of the 2019 IAAF Rules for providing deliberately misleading information and evidence to the AIU in his explanation for the Missed Tests dated 12 April 2019 and 17 May 2019. The relevant IAAF Rules in force at the time when these alleged wrongdoings took place were with respect to the Whereabouts Failure in April 2018 the 2018 IAAF Rules, which came into force on 6 March 2018 and with the respect to the other Whereabouts Failures the current 2019 IAAF Rules, effective from 1 January 2019.

75. The Sole Arbitrator has to apply both these Anti-Doping Rules, but, these rules are identical in all material respects.

#### **B. Alleged Procedural Errors**

76. The Athlete has argued that the AIU has made several procedural errors which has harmed several principles of a due process. According to the Athlete these errors should lead to the conclusion that the case is inadmissible.

77. The Sole Arbitrator will now deal with these alleged errors.

##### A) Late response

78. The first alleged Missed Test occurred on 27 April 2018. Mr Kipsang was informed of the Missed Test on 4 May 2018 in a confidential letter from the AIU. He was asked to respond at the latest on 18 May 2018. He answered on 16 May 2018. The AIU responded on 10 January 2019 and informed the Athlete that his explanation for the Missed Test was insufficient to show that his behaviour in relation to the

Missed Test was not negligent. According to the Athlete the long time to react is unreasonable and unnecessarily long. The Athlete was informed that if he wished to request an Administrative Review, he had to forward a written submission to the AIU no later than 24 January 2019. On 17 January 2019 the Athlete requested an Administrative Review. On 14 February 2019 the AIU informed the Athlete that the Administrative Review had determined that all the requirements of Article 4.3 of Appendix A of the Regulations were met.

79. The AIU has responded with respect to the timing of the confirmation of the April 2018 Missed Test: Article 8.3(d) of the Regulations sets out that an athlete shall be notified within 14 days of an apparent Whereabouts Failure. There is no prescribed deadline within which the AIU is required to confirm its decision to confirm or not confirm an apparent Whereabouts Failure following receipt of an explanation.

80. Article 8.3 (d) of the Regulations provides the following:

(d) If the IAAF concludes that all of the relevant requirements have been met, it shall notify the Athlete within 14 days of the date of the apparent Whereabouts Failure. The notice shall include sufficient details of the apparent Whereabouts Failure to enable the Athlete to respond meaningfully, and shall give the Athlete 14 days to respond, advising whether he admits the Whereabouts Failure and, if not, then why not. The notice should also advise the Athlete that three Whereabouts Failures in any 12-month period is an Article 2.4 anti-doping rule violation, and should note whether he has any other Whereabouts Failures recorded against him in the previous 12 months. In the case of a Filing Failure, the notice must also advise the Athlete that, in order to avoid a further Filing Failure, he must file the missing whereabouts information by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received).

81. If the Athlete responds within the deadline, the IAAF shall according to Article 8.3. e) consider whether his response changes its original decision that all of the requirements for recording a Whereabouts Failure have been met. If not, the IAAF shall so advise the Athlete (with reasons) and specify a 14-day deadline by which he may request an Administrative Review of its decision. The Unsuccessful Attempt

Report should be provided to the Athlete at this point if it has not been provided to him earlier in the process.

82. If the Athlete requests an Administrative Review before the deadline, such a review shall be carried out according to Article 8.3. f), based on the papers only, by one or more persons not previously involved in the assessment of the apparent Whereabouts Failure. The purpose of the Administrative Review shall be to determine anew whether or not all of the relevant requirements for recording a Whereabouts Failure are met.
83. In Article 8.3. g) it is stated that, if the conclusion is that all of the requirements for recording a Whereabouts Failure are met, the IAAF shall notify the Athlete and shall record the notified Whereabouts Failure against him.
84. It is apparent from the documents that the legal time frames set out in Article 8 of the Regulations have been met. The Sole Arbitrator's opinion is that the late answer from the AIU on the Athlete's explanation to the Missed Test naturally caused uncertainty on the part of the Athlete. The short timeframes set out in Article 8 of the Regulations indicates that not only the Athlete but also the AIU has to relate to the very short times stated there. But in the absence of legal support, the case cannot be declared inadmissible on the grounds that the AIU has responded too late. Nor can it be considered that the April 2018 Missed Test not should be taken into account on this basis.

B) Late information of the Filing Failure

85. The Athlete has pointed out that he was first informed regarding the alleged Filing Failure on 25 February 2019, instead of within 14 days of the date of the alleged Whereabouts Failure. The Athlete has argued as follows:
86. Besides the fact that the requirements of a Filing Failure have not been met, an essential procedural error has been made by the AIU in addition to this. On 21 January 2019 Mr Kipsang received notice of an alleged Missed Test against him on 18 January 2019. On 2 February 2019 Mr Kipsang provided an explanation for this alleged Missed Test. This explanation was accepted by the AIU and therefore no

Missed Test on 18 January 2019 was recorded. The AIU has sent Mr Kipsang a letter about this on 4 February 2019.

87. The Athlete has referred to the following rule in Article 4.2 in Appendix A of the Regulations:

To ensure fairness to the Athlete, where an unsuccessful attempt has been made to test an Athlete during one of the 60-minute time slots specified in his Whereabouts Filing, any subsequent unsuccessful attempt to test that Athlete (by the IAAF, a Member or another Anti-Doping Organisation) during one of the 60-minute time slots specified in his Whereabouts Filing may only be counted as a Missed Test (or, if the unsuccessful attempt was because the information filed was insufficient to find the Athlete during the time slot, as a Filing Failure) against that Athlete if that subsequent attempt takes place after the Athlete has received notice, in accordance with paragraph 8.3(c) of Chapter 8, of the original unsuccessful attempt.

88. Based on this article, the Athlete has argued that the Filing Failure does not count, since the Athlete was first informed about the earlier Missed Test on 21 January 2019. This was after the alleged Filing Failure. Therefore, according to the Athlete the Filing Failure should not be counted.

89. Chapter 4 in Appendix A deals with "*Availability for Testing*". The Sole Arbitrator wants to point out Article 3.9 in Appendix A of the Regulations which deals with the situation of a Filing Failure and states that an Athlete may only be declared to have committed a Filing Failure where the IAAF (or Member or other responsible Anti-Doping Organisation with results management responsibility), following the results management procedure set out in Chapter 8, establishes each of the following and then lists four different circumstances, including the following:

(c) in the case of a second or third Filing Failure in the same quarter, that he was given notice of the previous Filing Failure(s) in accordance with paragraph 8.3(c) of Chapter 8 and (if that Filing Failure revealed deficiencies in the Whereabouts Filing that would lead to further Filing Failures if not rectified) was advised in the notice that in order to avoid a further Filing Failure, he must file the required Whereabouts Filing (or update) by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is



received) and yet failed to rectify that Filing Failure by the deadline specified in that notice;

90. The Sole Arbitrator notes that the Article 3.9 in Appendix A of the Regulations deals with a situation with a second or third Filing Failure in the same quarter. This is not the situation here. The alleged Filing Failure is the first for the Athlete.
91. The situation can be summarized as follows: On 21 January 2019 The Athlete was informed of an apparent Missed Test on 18 January 2019 and he was informed that he had to respond no later than on 4 February 2019. The Athlete answered on 2 February 2019. On 4 February 2019 the AIU informed the Athlete that the AIU had decided not to record a Missed Test against him on 18 January 2019. On 25 February 2019 the AIU sent information to the Athlete about a Filing Failure for failing to update his whereabouts information as soon as his circumstances changed, specifically in relation to the period between 15 January and 25 January 2019, when he stayed at the Enkano Guesthouse in Narok, Kenya. The Athlete was informed that he had to respond no later than 11 March 2019. The Athlete responded on 9 March 2019. On 1 April 2019 the AIU confirmed a Filing Failure for the alleged period and also informed the Athlete that he could request an Administrative Review no later than 15 April 2019. On 15 April 2019 the Athlete requested an Administrative Review. On 6 August 2019 the AIU informed the Athlete that the Filing Failure remained for 18 January 2019 but not for the other dates. The Filing Failure declared against the Athlete in the letter dated 1 April 2019 was confirmed.
92. The rules about information to the Athlete about a Whereabouts Failure, regardless if it is a Missed Test or a Filing Failure, is in Chapter 8 of the Regulations. The beginning of Article 8.3 states the following:

8.3 When a Whereabouts Failure appears to have occurred, results management shall proceed as follows:

- (a) If the apparent Whereabouts Failure has been uncovered by an attempt to test the Athlete, the IAAF shall obtain an Unsuccessful Attempt Report from the DCO. If the IAAF is not the Testing Authority, the Testing Authority shall provide the Unsuccessful Attempt Report to the IAAF without delay, and thereafter it shall assist the IAAF as

necessary in obtaining information from the DCO in relation to the apparent Whereabouts Failure.

(b) The IAAF shall review the file (including any Unsuccessful Attempt Report filed by the DCO) to determine whether all of the Appendix A.3.9 requirements (in the case of a Filing Failure) or all of the Appendix A.4.3 requirements (in the case of a Missed Test) are met. It shall gather information as necessary from third parties (e.g., the DCO whose test attempt uncovered the Filing Failure or triggered the Missed Test) to assist it in this task.

(c) If the IAAF concludes that any of the relevant requirements have not been met (so that no Whereabouts Failure should be declared), it shall so advise WADA, the Member, the National Anti-Doping Organisation and the Anti-Doping Organisation that uncovered the Whereabouts Failure (as applicable), giving reasons for its decision. Each of them shall have a right of appeal against that decision in accordance with Article 13.

(d) If the IAAF concludes that all of the relevant requirements have been met, it shall notify the Athlete within 14 days of the date of the apparent Whereabouts Failure. The notice shall include sufficient details of the apparent Whereabouts Failure to enable the Athlete to respond meaningfully, and shall give the Athlete 14 days to respond, advising whether he admits the Whereabouts Failure and, if not, then why not. The notice should also advise the Athlete that three Whereabouts Failures in any 12-month period is an Article 2.4 anti-doping rule violation, and should note whether he has any other Whereabouts Failures recorded against him in the previous 12 months. In the case of a Filing Failure, the notice must also advise the Athlete that, in order to avoid a further Filing Failure, he must file the missing whereabouts information by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received).

93. In this case, everything started when an attempt to test the Athlete resulted in an alleged Missed Test on 18 January 2019. The AIU informed the Athlete about this Missed Test in due time on 21 January 2019. The review of the alleged Missed Test resulted in a decision by the AIU not to record a Missed Test against him on 18 January 2019, a decision of which the Athlete was informed on 4 February 2019. The information which the AIU got from the Athlete according the Missed Test resulted in a notification to the Athlete on 25 February 2019 about a Filing Failure for failing to update his whereabouts information as soon as his circumstances

changed, specifically in relation to the period between 15 January and 25 January 2019. The decision not to record a Missed Test was taken on 4 February 2019. The evaluation if a Filing Failure was committed must have started by the time of this decision and due to the information given by the Athlete in his correspondence according the Missed Test of 18 January. The Sole Arbitrator notes that this notification was not in accordance with the timeframe prescribed in 8.3 (d) of the Regulations for a Filing Failure discovered on 4 February 2019, it is in fact given three weeks after this decision instead of the prescribed two weeks.

94. The Sole Arbitrator has great understanding that time was needed to evaluate if the information provided by the Athlete about the Missed Test could lead to that he had committed a Filing Failure. In this situation, when an alleged Missed Test instead results in an alleged Filing Failure, it is difficult to find a strict time limit for when the prescribed 14-day deadline should start.
95. In summary, the Sole Arbitrator finds that there is no deviation from the Regulations. Thus, the AIU may be considered to have followed the rules for informing the Athlete in due time of an alleged Filing Failure.

C) The Athlete was informed on 22 August 2019 regarding the Missed Test on 17 May

96. The Athlete has referred to that he was first informed on 22 August 2019 regarding the Missed Test on 17 May, which is 97 days after the Missed Test, instead of the regulatory 14 days.
97. The AIU has responded the following: The notification of a Missed Test after 14 days clearly does not cause the Missed Test and therefore cannot invalidate it. The Regulations provide no consequence for the failure to comply with the 14-day deadline: more specifically, it does not stipulate that a Missed Test cannot be counted as such if an athlete is not notified within 14 days. Indeed, informing the Athlete within 14 days is not one of the requirements for confirming a Missed Test per article 4.3 of Annex A of the Regulations.
98. The AIU has referred to CAS 2011/A/2671 *UCI v. Rasmussen*, where the Panel specifically considered the issue of notification of a whereabouts failure (in that case, a Missed Test) outside of the 14-day deadline set by the WADA International

Standard for Testing (“ISTI”) and concluded that this did not prevent the recording of a Missed Test:

“69. [...] the Panel in fact finds that, even conceding that Article 11.6.3(b) IST had to be applied, the failure by UCI to send a notice to Rasmussen within fourteen days of the unsuccessful attempt of 28 April 2011 did not prevent UCI from recording it as a missed test. [...]”

99. According to the AIU the Panel in Rasmussen based this conclusion on several reasons, including:

(i) no weight is attached to the 14-day deadline in an assessment of the circumstances of the Whereabouts Failure following the explanation provided by an athlete or during the administrative review process that an athlete may also request;

(ii) the purpose of the notice can be considered satisfied even if given after the 14-day deadline has passed, in the event the athlete has had the actual possibility to give explanations – before a Missed Test is recorded, and indeed has exercised the right to state his/her case. In that situation, no breach of the athlete's right to be heard is committed; and

(iii) the departure from the 14-day timeline cannot reasonably have caused the Whereabouts Failure by an athlete.

100. The Sole Arbitrator has already cited the rules about information after a Missed Test in Article 8.3 (d). If the IAAF concludes that all of the relevant requirements have been met, it shall notify the Athlete within 14 days of the date of the apparent Whereabouts Failure.

101. The file confirms that the letter was sent on 22 August 2019, i.e. almost three months late. This constitutes a remarkable departure from the rules. The next question is whether this departure caused the Missed Test.

102. Article 1.10 of the Regulations is of interest in this context:

These Anti-Doping Regulations must be followed as far as is reasonably practicable. In accordance with Article 3.2.4 of the Anti-Doping Rules, departures from these Anti-Doping Regulations which did not cause an Adverse Analytical Finding or the factual

basis for another anti-doping rule violation shall not invalidate such evidence or results.

103. Article 3.2.4 of 2019 IAAF Rules reads as follows:

Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse Analytical Finding) shall not invalidate such facts or evidence. If the Athlete or other Person establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that could reasonably have caused the Adverse Analytical Finding or other facts alleged to constitute an Anti-Doping Rule Violation, then the IAAF or other Anti-Doping Organisation shall have the burden to establish that such departure did not cause such Adverse Analytical Finding or the factual basis for the Anti-Doping Rule Violation.

104. The Sole Arbitrator cannot find that the actual deviation from the rules involving a late notification to the Athlete did cause the facts alleged or evidence cited in support of the charge. According to Article 3.2.4 of 2019 IAAF Rules and Article 1.10 of the Regulations, the departure from the rules shall therefore not invalidate the facts or evidence of the Missed Test.

D) The AIU failed to bring the proceedings against the Athlete within the regulatory deadline of 30 days

105. The Athlete has referred to Article 8.5 of the Regulations which provides that:

Where three Whereabouts Failures are recorded against an Athlete within any 12-month period, the IAAF shall bring proceedings against the Athlete alleging violation of Article 2.4. If the IAAF fails to bring such proceedings against an Athlete within 30 days of WADA receiving notice of the recording of that Athlete's third Whereabouts Failure in any 12-month period, then the IAAF shall be deemed to have decided that no anti-doping rule violation was committed, for purposes of triggering the appeal rights set out at Article 13.

106. The Athlete has argued as follows. Article 8.5 of the Regulations clearly states that where three Whereabouts Failures are recorded against an Athlete within any 12-month period, WA shall bring proceedings against the Athlete alleging violation of

Article 2.4 IAAF Rules. If WA fails to bring such proceedings against an Athlete within 30 days of WADA receiving notice of the recording of that Athlete's third Whereabouts Failure in any 12-month period, then WA shall be deemed to have decided that no ADRV was committed. In other words: the AIU should send the Notice of Charge ultimately within 30 days after WADA has been informed about the third Whereabouts Failure in the 12-month-period. WADA was informed about the third alleged Whereabouts Failure on 6 August 2019. Therefore, the Notice of Charge should have been issued ultimately on 5 September 2019. The AIU failed to do this.

107. The Athlete has continued: With regard to the Missed Test on 17 May 2019, the Athlete provided an explanation on 5 September 2019 and requested an Administrative Review on 12 November 2019. By letter dated 29 November 2019, the AIU informed the Athlete that the Missed Test of 17 May 2019 was recorded against him. According to the AIU, this also constituted a third Whereabouts Failure in a 12-month period. Based on article 8.5 of the Regulations, the AIU should have issued a Notice of Charge ultimately on 29 December 2019. Again, the AIU failed to do this. On 10 January 2020, the Athlete received the Notice of Charge issued by the AIU.
108. The AIU has responded: Article 8.5 of the Regulations (which reflects Article I.5.4 of Annex I of the ISTI) merely states that, after the expiry of the 30-day period, WA will be deemed to have rendered a decision that no ADRV was committed for the limited purpose of triggering third party appeal rights under Article 13. There is no suggestion that such a decision is "deemed" to have taken place for another purpose, such as preventing the AIU from proceeding with the charge after the 30-day period.
109. According to the Sole Arbitrator Article 8.5 of the Regulations and Article I.5.4 of Annex I of the ISTI obviously have a different purpose than that the Athlete has assumed. The Sole Arbitrator agrees that these rules have the limited purpose that the AIU has proposed. Therefore, the Sole Arbitrator can't find that there is a departure from the rules.

E) The alleged chaperone did not sign the Unsuccessful Attempt Report Form

110. The Athlete has pointed out that the alleged chaperone did not sign the Unsuccessful Attempt Report Form on 12 April 2019 even though the AIU claims that he was present. The Athlete has argued that according to Article 4.22 of the Regulations, the chaperone has to sign Doping Control Forms as well and according to the definitions of the Regulations any other relevant details of the attempt also should be indicated on the form.

111. The definition of a Chaperone according to the Regulations is like this: an official who is trained and authorised by the Sample Collection Authority to carry out specific duties including one or more of the following (at the election of the Sample Collection Authority): notification of the Athlete selected for Sample collection; accompanying and observing the Athlete until arrival at the Doping Control Station; accompanying and/or observing Athletes who are present in the Doping Control Station; and/or witnessing and verifying the provision of the Athlete's Sample where the training qualifies him to do so.

112. Later on, when dealing with the Missed Test the Sole Arbitrator will discuss what is revealed about the situation of 12 April 2019. Now I will just discuss the alleged procedural error.

113. Chapter 4 of the Regulations deals with "Conducting Sample Collection Session". Article 4.22 in the Regulations states, among others, the following:

In conducting the Sample Collection Session, the following information shall be recorded as a minimum:

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(m) the name and signature of the witnessing DCO/Chaperone

114. The Sole Arbitrator notes that Chapter 4 provides the rules in the situation when a Sample is collected. On 12 April 2019, there was an alleged Missed Test and no Sample Collection took place. This means that Article 4.22 of the Regulations is not applicable.

115. According to the definitions provided in the Regulations, an Unsuccessful Attempt Report is this: a detailed report of an unsuccessful attempt to collect a Sample

from an Athlete in a Registered Testing Pool, setting out the date of the attempt, the location(s) visited, the exact arrival and departure time at the location(s), the steps taken at the location(s) to try to find the Athlete (including details of any contact made with third parties) and any other relevant details about the attempt.

116. The ISTI also deals with Unsuccessful Tests. The Commentary to Article I.4.3 (c) of the ISTI reads like this:

[Comment to I.4.3(c): Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60-minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete. See WADA's Guidelines for Implementing an Effective Testing Program for guidance in determining what is reasonable in such circumstances.

Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO may (but does not have to) telephone the Athlete (assuming he/she has provided his/her telephone number in his/her Whereabouts Filing) to see if he/she is at the specified location. If the Athlete answers the DCO's call and is available at (or in the immediate vicinity of) the location for immediate testing (i.e., within the 60-minute time slot), then the DCO should wait for the Athlete and should collect the Sample from him/her as normal. However, the DCO should also make a careful note of all the circumstances, so that it can be decided if any further investigation should be conducted. In particular, the DCO should make a note of any facts suggesting that there could have been tampering or manipulation of the Athlete's urine or blood in the time that elapsed between the phone call and the Sample collection. If the Athlete answers the DCO's call and is not at the specified location or in the immediate vicinity, and so cannot make himself/herself available for testing within the 60-minute time slot, the DCO should file an Unsuccessful Attempt Report (**emphasis added**).

Because the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the lack of a telephone call does not give the Athlete a defence to the assertion of a Missed Test.



117. The Sole Arbitrator finds that there is nothing in the rules for an Unsuccessful Attempt Report that prescribes that the Chaperone shall sign the Form. The DCO has during the hearing declared that there was no box for the name and signature of the Chaperone in the Forms that were used at this time. This can also be seen from the Form adduced in the file.

118. The Sole Arbitrator deems that there is no deviation from the rules when the Chaperone did not sign the Unsuccessful Attempt Report Form.

F) There is a conflict with the legal principle of “*ne bis in idem*” to prosecute the Athlete for the Filing Failure

119. The Sole Arbitrator in this matter refers to the discussion under the Merits concerning the Filing Failure.

G) Other submissions according basic principles of due process of law

120. The Athlete has made several other submissions than these under A) to F) according that the AIU has failed to comply with the IAAF Rules and the Regulations, the principles of a fair trial and the principle of equality of arms.

121. The Sole Arbitrator has carefully taken into account all of these submissions and arguments presented by the Athlete. The Sole Arbitrator considers that there are no deviations from the rules in the aspects pointed out by the Athlete other than these the Sole Arbitrator has dealt with under A) to F). Nor can I find that the Athlete hasn't got a fair trial. The Athlete had, specifically asked about it during the hearing, no objection in respect of his right to be heard. The parties had the opportunity to present their case, comment on the evidence, submit their arguments and answer the questions posed by the Sole Arbitrator. The parties were treated equally during these proceedings.

## **C. The Merits**

### **The Provisions Governing ‘Whereabouts Failures’**

122. Article 2.4 of the 2019 IAAF Rules defines what is meant by Whereabouts Failures:

Any combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool.

123. The Rule was the same in 2018 IAAF Rules.

124. A Missed Test is defined by the ISTI and the Regulations as follows:

Missed Test: a failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his Whereabouts Filing for the day in question in accordance with these Anti-Doping Regulations.

125. A Filing Failure is defined by the ISTI and the Regulations like this:

Filing Failure: a failure by an Athlete (or by a third party to whom the Athlete has delegated such a task in accordance with paragraph 3.7 of Appendix A) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in the Whereabouts Filing or to update that Whereabouts Filing where necessary to ensure that it remains accurate and complete, all in accordance with these Anti-Doping Regulations.

126. As a background to the discussion about Missed Test and Filing Failure, it is interesting to look at the rules of the Whereabouts Filing requirements. In the Regulations Appendix A this is stipulated:

### 3. Whereabouts Filing requirements

3.1 On a date specified by the IAAF that is prior to the first day of each quarter (i.e., 1 January, 1 April, 1 July and 1 October), an Athlete in the Registered Testing Pool must file a Whereabouts Filing with the IAAF that contains at least the following information:

- (a) complete mailing address where correspondence may be sent to the Athlete for formal notice purposes. Any notice or other item mailed to that address will be deemed to have been received by the Athlete five working days after it was deposited in the mail;
- (b) details of any impairment of the Athlete that may affect the procedure to be followed in conducting a Sample Collection Session;

- (c) specific confirmation of the Athlete's consent to the sharing of his Whereabouts Filing with other Anti-Doping Organisations having Testing authority over him;
- (d) for each day during the following quarter, the full address of the place where the Athlete will be staying overnight (e.g. home, temporary lodgings, hotel, etc);
- (e) for each day during the following quarter, the name and address of each location where the Athlete will train, work or conduct any other regular activity (e.g. college), as well as the usual time-frames for such regular activities;
- (f) the Athlete's Competition schedule for the following quarter, including the name and address of each location where the Athlete is scheduled to compete during the quarter and the date(s) on which he is scheduled to compete at such location(s); and
- (g) any other information related to the Athlete's whereabouts as the IAAF may require in order to conduct Testing efficiently and effectively.

3.2 Subject to paragraph 3.3 below, the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location.

127. The exception in 3.3. deals with so called In-Competition Dates, i.e. when an athlete is scheduled to compete and the Anti-Doping Organisation that puts the athlete into the RTP is satisfied that enough information is available.

128. It is also interesting to learn what happens when there is a change in circumstances. Article 3.5 in the Regulations Appendix A deals with this situation:

3.5 Where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete as required by paragraph 3.4 above, the Athlete must file an update so that the information on file is again accurate and complete. In particular, the Athlete must always update his Whereabouts Filing to reflect any change in any day in the quarter in question (a) in the time or location of the 60-minute time slot specified in paragraph 3.2 above; and/or (b) in the place

where he is staying overnight. The Athlete must file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his filing for the day in question. A failure to do so may be pursued as a Filing Failure and/or (if the circumstances so warrant) as evasion of Sample collection under Article 2.3, and/or Tampering or Attempted Tampering with Doping Control under Article 2.5. In any event, the IAAF shall consider Target Testing of the Athlete.

129. Article 3.6 is also relevant in this case as it deals with situations when an athlete provides fraudulent information:

3.6 Any Athlete who provides fraudulent information in his Whereabouts Filing, whether in relation to his location during the specified daily 60-minute time slot, or in relation to his whereabouts outside that time slot, or otherwise, thereby commits an anti-doping rule violation under Article 2.3 (evading Sample collection) and/or Article 2.5 (Tampering or Attempting to Tamper with Doping Control).

130. With a slight difference Article 3.9 of the Regulations Appendix A is the same as Article I.3.6 of the ISTI. The difference is in 3.9 (b) which in the Regulations reads:

(b) that the Athlete failed to comply with that requirement by the applicable deadline (e.g., (i) where he did not make any such filing or failed to update that filing or update as required (ii) where he made the filing or update but did not include all of the required information in that filing or update; (iii) where he included information in the original filing or update that was inaccurate or insufficient to enable the IAAF to locate him for Testing;(emphasis for the difference between ISTI and IAAF Regulations Appendix A)

131. The effect of this provision is that an athlete violates Article 2.4 where he or she has any combination of three Missed Tests or Filing Failures within a twelve-month period, starting on the day of the first relevant Missed Test/Filing Failure.

132. Article 4.3 of the Regulations Appendix A provides as follows:

4.3 An Athlete may only be declared to have committed a Missed Test where the IAAF (or Member or other responsible Anti-Doping Organisation with results management authority) can establish each of the following:

- (a) that when the Athlete was given notice that he had been designated for inclusion in the Registered Testing Pool, he was advised that he would be

liable for a Missed Test if he was unavailable for Testing during the 60-minute time slot specified in his Whereabouts Filing at the location specified for that time slot;

- (b) that a DCO attempted to test the Athlete on a given day in the quarter, during the 60minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;
- (c) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;
- (d) that paragraph 4.2 above does not apply or (if it applies) was complied with; and
- (e) that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at subparagraphs (a) to (d) above. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his part caused or contributed to his failure (i) to be available for Testing at such location during such time slot; and (ii) to update his most recent Whereabouts Filing to give notice of a different location where he would instead be available for Testing during a specified 60-minute time slot on the relevant day.

### **Burdens and Standards of Proof**

133. Article 3.1 of the 2019 IAAF Rules states as follows:

#### **3.1 Burdens and Standards of Proof**

The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that 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 these Anti-Doping Rules 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.

134. This rule is the same in the 2018 IAAF Rules and shall be applied in this case.

## **The Anti-Doping Rule Violations**

### The April 2018 Alleged Missed Test

#### ***The AIU***

135. The AIU has in summary argued the following:

136. The AIU has obtained rainfall data from the Republic of Kenya Ministry of Environment and Forestry Kenya Meteorological Department, including rainfall data for the month of April 2018 from the Cheptebo Rainfall Station, the closest station to Kolol, the alleged location of the landslide that the Athlete encountered on his way back to Iten. Contrary to the Athlete's assertion that there was heavy rainfall, so severe as to cause a landslide and his mobile phone connection to be lost, the rainfall data provided for 27 April 2018 provides that the total rainfall in the Cheptebo area for this date was only moderate, at just 13.6ml. In addition, open-source weather data indicates that on 27 April 2018, weather conditions across, Muskut and Iten were generally dry with minimal precipitation and a top temperature of 22 degrees Celsius. There is no evidence of heavy rain or significant inclement weather as asserted by the Athlete. From the time that the Athlete says he left Muskut (20:30) to return to Iten, the weather conditions for both locations are given as either "Partly cloudy", "Passing Clouds" or "Clear". The only rainfall for the areas of Iten and Muskut on 27 April 2018 occurred at approximately 15:00 - 16:00, with historical weather datasets stating that the weather conditions were either "scattered showers, broken cloud" or "thunderstorms, partly sunny" during these times.

137. The Athlete has definitely not fulfilled his burden to establish that that no negligent behaviour on his part caused or contributed to his failure.

***The Athlete***

138. The Athlete's arguments follow:

139. The Athlete travelled to Muskut for his sister's pre-wedding arrangements which was to take place on Saturday 28 April 2018. He wanted to travel back to Iten, because he planned to go for a long run the next morning. His 60-minute timeslot was set at 22:00 - 23:00 hours at his home in Iten. He left Muskut at 8.30pm. He was sure that he would be in Iten by 9.30pm, because the journey from Muskut to Iten normally takes around one hour at the most. Therefore, he would be home well before his 60-minute time slot. However, there was a Force Majeure. Due to heavy rains, there was a heavy land slide along the route from Muskut to Iten at a place called Kolol. Therefore, Mr Kipsang had to take another route to Iten, which took him longer and he didn't arrive in Iten until 1am. In the period March - June 2018 there were floods all over East Africa, including Kenya. Due to the bad weather conditions the Athlete had no phone signal and was therefore unable to notify his management in order change his Whereabouts information. The Unsuccessful Attempt Form confirms that his cell phone had no service, since the number was not going through.

140. The Athlete has provided general information from the Internet about the 2018 East Africa Floods which were natural disasters in Kenya and other East African countries affecting millions of people. The floods began when excessive rains began falling in March 2018 following a year of severe drought, leading to massive flooding, landslides, and the failure and overflow of several dams. Record rainfall was recorded in several areas, surpassing various records set during the 1950s and during the 1997-98 El Niño event.

141. The Athlete finds that he has established that no negligent behaviour on his part caused or contributed to his failure to be available for testing at the location during the time slot and to update his most recent Whereabouts Filing to give notice of a different location where he would be instead.

### ***The Sole Arbitrator's considerations***

142. The Athlete has admitted that he wasn't available for Testing between 22:00 and 23:00 on 27 April 2018 and that he didn't update his whereabouts information with a different location at which he would be available for Testing during the given time slot.
143. As cited above, Article 4.3 of Appendix A in the Regulations stipulates that an Athlete will be presumed to have been negligent upon proof of the matters set out at subparagraphs (a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his part caused or contributed to his failure to be available for Testing at his location during the time slot and to update his most recent Whereabouts Filing to give notice of a different location where he would instead be available for Testing during a specified 60-minute time slot on the relevant day.
144. In a situation like this it is therefore presumed that the Athlete has been negligent as he was not available for testing on the given time slot and did not update his Whereabout Filing and it is therefore up to the Athlete to rebut this presumption.
145. In this part, the Athlete didn't explicitly comment on what happened that evening during the hearing. At the hearing, the Sole Arbitrator has also listened to the testimonies from Mr Keitany and Mr Langat.
146. Mr Keitany has thus stated that he confirms everything in his written statement and that he doesn't want to correct or clarify anything in that statement. He has also testified that no landslide was registered in April 2018, but there was on 22 May 2018 in the area in question. From his written statement also appears that on 11 May 2020, he was informed by the Elgeyo Marakwet County Government that there was sufficient rainfall that caused a landslide/mudslide in Kolol on 22 May 2018 and that the details of this landslide were posted to the Elgeyo Marakwet County Government Facebook page on that date. In his written statement you can also read that the Elgeyo Marakwet County Government confirmed that the Government was not aware of any landslides that occurred at Kolol on 27 April 2018. Mr Langat has confirmed everything in his written statement. In his written statement, he also informs that he visited the Elgeyo Marakwet County



Government together with Mr Keitany and he has confirmed the information provided by Mr Keitany.

147. Furthermore, the AIU has provided rainfall data from the Republic of Kenya Ministry of Environment and Forestry Kenya Meteorological Department, including rainfall data for the month of April 2018 from the Cheptebo Rainfall Station, the closest station to Kolol. The data for 27 April 2018 means that the total rainfall in the Cheptebo area for this date was 13.6ml. The AIU has also provided open-source weather data from the Internet for 27 April 2018, which indicates that weather conditions across Muskut and Iten were generally dry with minimal precipitation and a top temperature of 22 degrees Celsius. There is no evidence of heavy rain or significant inclement weather.
148. The Sole Arbitrators conclusion is that the rainfall and weather data according 27 April 2018 supports the statements from Mr Keitany and Mr Langat. The weather data provided by the Athlete refers to the entire country and does not deal with any particular region or any specific date.
149. When the IAAF Rules places the burden of proof upon the Athlete to rebut a presumption, the standard of proof shall be by a balance of probability. The evaluation of the evidence in this part implies that it is more likely that there was no landslide than the opposite. The conclusion of this is that the Athlete has not established that no negligent behaviour on his part caused or contributed to his failure to be available for Testing at such location during the given time slot and to update his most recent Whereabouts Filing to give notice of a different location where he would instead be available for Testing during a specified 60-minute time slot on the relevant day.
150. The inference of this is that the failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his Whereabouts Filing for 27 April 2018 in accordance with the 2018 IAAF Rules shall be deemed as a Missed Test.

The April 2019 Alleged Missed Test

## ***The AIU***

151. The AIU has in summary argued as follows:
152. The Unsuccessful Attempt Report Form filed by the DCO for the April 2019 Missed Test states clearly that the Athlete arrived as she was leaving the address after 23:20. The Witness Statement from the DCO confirms that the Athlete had not arrived by 22:55 and that she therefore made several attempts to reach him by telephone between 22:55 and 22:59. The screenshots provided by the DCO corroborate the DCO's attempts to call the phone numbers given in the Athlete's whereabouts information between 22:55 and 22:59 on 12 April 2019. Moreover, the DCO confirms that she also called Mr Huijskens, a representative of Clearidium her employer, by telephone after 23:00 for guidance on how to proceed, specifically because the Athlete had not arrived at his nominated address during the 60-minute timeslot. The DCO has told that she was advised to remain at the Athlete's address until 23:20 to see if the Athlete returned, failing which the attempt should be cancelled and no Sample collected. The Witness Statement of Mr Huijskens, Clearidium Area and Client Manager, confirms that the DCO called him to request guidance on how to proceed because the Athlete had not arrived during the specified 60-minute timeslot and that the phone call was made five or six minutes past 10pm in the Netherlands, which means 23:05-06 in Kenya. The statement from Mr Lagat, the witnessing chaperone and driver, also confirms that the DCO made attempts to contact the Athlete by phone during the last five minutes of the 60-minute timeslot and that she also contacted her boss.
153. The AIU submits that the Tribunal should adopt the same approach as taken by the CAS in CAS 2016/A/4700 *WADA v. Lyudmila Vladimirovna Fedoriva* when considering the evidence of the DCO, Mr Lagat and Mr Huijskens in this matter, by starting from the clear assumption that none of these persons has any personal interest in fabricating or misrepresenting the facts in this matter. For the Tribunal to be persuaded otherwise, the Athlete must present cogent and substantial counterevidence to rebut the version of events put forward by the DCO, Mr Lagat and Mr Huijskens. This position was supported by the Sole Arbitrator in CAS 2016/A/4700.

154. In considering the counterevidence that has been put forward by the Athlete in this case, the Tribunal must bear in mind that this evidence includes the Athlete's own written statements and those from his wife and a security guard/watchman employed by the Athlete in an attempt to corroborate the Athlete's version of the events. The AIU submits that any evidence from the Athlete's wife and a security guard employed by the Athlete should be treated with particular caution by the Tribunal. The CAS Panel in CAS 2015/A/4163 *Niksa Dobud v. FINA* described the motive of an athlete's family to cover up an anti-doping rule violation.
155. The AIU wants to point out that the written statements provided by the Athlete, his wife, and his security guard exhibit elements of concertation in terms of format, style and, in particular, in relation to their precise recollection of the time that the Athlete arrived at his address (22:50) on 12 April 2019.
156. It is the AIU's position that the Athlete clearly did not arrive within the 60-minute whereabouts slot. He has put forward facts that he knows to be untrue in an attempt to exculpate himself. Worse still, he asked his wife and security guard to file statements that supported his invented version of the facts, and produced those statements in an attempt to mislead this Tribunal. The AIU sets out further submissions in this respect in relation to the violation of Article 2.5 of the 2019 IAAF Rules by the Athlete.

### ***The Athlete***

157. The Athlete has maintained the following:
158. He arrived at 22:50 hours at the latest. He has provided several witness statements to support this fact. It took a while before the Athlete was able to provide a urine sample. The DCO was called back to Nairobi and could not wait any longer. She told the Athlete that no Missed Test would be recorded in those circumstances and that she would return later. On 15 April 2019 she did return. He was not informed that she had a male chaperone.
159. The requirements for a Missed Test have not been met since there was no negligent behaviour from Mr Kipsang. He arrived within the 60-minute time slot.

### ***The Sole Arbitrator's considerations***

160. The Athlete has asserted that he arrived at his address at 22:50 on 12 April 2019, i.e. within the time slot identified in his Whereabouts Filing for that day.
161. In this part the Tribunal has heard the Athlete tell his version of what happened on the evening of 12 April. The Tribunal has also listened to five witnesses telling their version of the events that evening.
162. During the hearing it has become clear that the Athlete has maintained his version of what happened and that he has been supported by the testimonies from his wife and his security guard.
163. In the Unsuccessful Attempt Report Form for 12 April 2019 the DCO has among other things written the following:
- "The watchman said that Wilson was not around and he himself went in and asked the wife to call him but at first he didn't pick, later on he called and said he was on his way".*
- "As we were leaving the athlete's home we met him just outside the gate, he just arrived but we could not start the test since it was past 23:20hrs I explained to him why we could not do the test and he understood and he promised to be home in his time slot next time".*
164. From the Form you can also see that the DCO has noted that she tried to make several phone calls to the Athlete. Four of them on number [REDACTED] he didn't answer, the other one at 22:59 on number [REDACTED] which didn't go through. The screenshots show that the call to the last-mentioned number were made at 22:59 and that four attempts to the other number were made between 22:55 and 22:59.
165. The DCO has stated that she and her driver Mr Lagat, also serving as witnessing chaperone when she needs to collect urine samples from men, arrived at the Athlete's address at 22:15 and that the Athlete did not arrive until she and Mr Lagat were ready to leave at around 23:30. By 23:10, when the Athlete still was not present at the address she contacted Mr Maurits Huijskens from Clearidium by phone for confirmation of how to proceed. Mr Huijskens instructed

her to remain at the address until 23:20 and if the Athlete had not returned by this time, she should cancel the test and no sample should be collected.

166. Mr Lagat has confirmed the information provided by Ms Chepchirchir.
167. Mr Huijskens has testified that he recalls that Ms Chepchirchir called him by phone at 22:05-06, when he was in the Netherlands, asking for instructions for what to do because the Athlete had not arrived during his specified 60-minute time slot. He told the DCO that she was to wait for 15 minutes in accordance with instructions from the AIU and that if the Athlete did not show up by that time, that the test should be cancelled. He is aware that the Athlete arrived after the phone call but that no sample was collected at that time according to the instructions that were given. Mr Huijskens was aware that the DCO was assisted by her driver and urine witness Mr Lagat because Ms Chepchirchir is not allowed to witness urine samples provided by males.
168. The WA has the burden of establishing that an ADRV has been committed. The standard of proof shall be whether the WA has established the commission of the alleged ADRV to the comfortable satisfaction of the hearing panel.
169. The AIU has referred to CAS 2016/A/4700 when considering the evidence of the DCO, Mr Lagat and Mr Huijskens in this matter. In that case, the Sole Arbitrator started from the clear assumption that a DCO has no personal interest to fabricate or consort any facts, or to bring false accusations against an Athlete. In CAS 2016/A/4700 the Sole Arbitrator found that very substantial counter-evidence must be presented to rebut the DCO's version of the facts.
170. In this case the Athlete has the support of the testimonies of his wife and of his security guard. In CAS 2015/A/4163 the Panel held that the family motive to cover up test evasion by the Athlete was far more obvious - the Athlete's reputation, his career, his ability to support his wife and children were all in jeopardy if his appeal failed.
171. The DCO has clearly testified that the Athlete did not arrive until after 23:20. She is supported by Mr Lagat, who was present as a driver and intended chaperone. The DCO's notes in the Unsuccessful Attempt Report Form strongly support their

testimonies. The fact that the DCO made five phone calls to reach the Athlete between 22:55 and 22:59 contradicts that the Athlete had arrived home at 22:50. Finally, the witness Mr Huijskens has provided information which excludes that the Athlete had arrived before 23:05-06. The testimonies from these three witnesses all appear to be very trustworthy.

172. The conclusion from the Sole Arbitrator is that the WA has established the commission of the alleged ADRV to the comfortable satisfaction of the Sole Arbitrator. This means that the WA has fulfilled its burden of establishing that an ADRV has been committed.
173. The Sole Arbitrator reiterates that when the IAAF Rules place the burden of proof upon the Athlete to rebut a presumption, the standard of proof shall be by a balance of probability. The conclusion here is that the Athlete has not established that no negligent behaviour on his part caused or contributed to his failure to be available for Testing at such location during the given time slot and to update his most recent Whereabouts Filing to give notice of a different location where he would instead be available for Testing during a specified 60-minute time slot on the relevant day.
174. Thus, the failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in his Whereabouts Filing for 12 April 2019 shall in accordance with the 2019 IAAF Rules be deemed a Missed Test.

#### The May 2019 Alleged Missed Test

175. The Athlete has accepted that his failure to be available for Testing at the location and time specified in the 60-minute time slot identified in his Whereabouts Filing for 17 May 2019 in accordance with 2019 IAAF Rules is considered as a Missed Test.
176. The evidence provides support for the Athlete's consent. This failure shall be deemed a Missed Test.

## The Alleged Filing Failure Q1 2019

### ***The AIU***

177. The AIU has in summary argued as follows:
178. Before considering the facts of the Filing Failure in detail, it should be noted that on 4 February 2019, the AIU wrote to the Athlete and confirmed that he had not committed a Missed Test in relation to his failure to be available for Testing on 18 January 2019. In particular, the Notice of Decision not to record a Missed Test dated 4 February 2019 provided the following:
- “Taking into consideration the abovementioned, the AIU considers that on 18 January 2019, when the apparent Missed Test occurred, you tried to update your Whereabouts information as soon as your circumstances changed. Consequently, you were compliant with article 3.5 of the Appendix A of the Regulations, which requires from an Athlete to update his information as soon as possible after the circumstances change and in any event prior to the 60-minute time slot specified in his filing for the day in question. Your behaviour was not negligent and therefore the apparent Missed Test on 18 January will not be recorded against you.”
179. The AIU has also described the same facts which the Sole Arbitrator has done in paragraph 90 above. Specifically, the AIU has pointed out that the Administrative Review partially upheld the Athlete’s explanation as being sufficient for a Filing Failure not to be recorded against him for the updates that were made to the Athlete’s whereabouts information for 15 January 2019 to 17 January 2019 and 19 January 2019 to 26 January 2019. The AIU concluded that the updates to the Athlete’s whereabouts information for these dates were made as soon as the Athlete’s circumstances had changed. However, the AIU has noted that the update to the Athlete’s whereabouts information for 18 January 2019 was made 1 hour and 21 minutes prior to the commencement of the Athlete’s 60-minute time slot for that date (22:00-23:00) by updating the location of that time slot from Iten to Narok.
180. Noting that the distance between Iten and Narok is approximately 300km and 6 hours of travel by car, the AIU concluded that it was inconceivable that the Athlete

only became aware of the required change to his whereabouts based on his individual circumstances less than two hours before the beginning of the 60-minute time slot. The Athlete must have known at the very latest approximately 6 hours before his time slot on 18 January 2019 (22:00) that his circumstances had changed such that he was required to update his whereabouts information at that time and not less than two hours before that time.

181. The AIU therefore concluded that the Athlete had failed to demonstrate that no negligence on his part caused or contributed to the failure to update his whereabouts information as soon as his circumstances changed on 18 January 2019 and confirmed the Filing Failure.
182. The AIU has also challenged the Athlete's position that the Filing Failure should not be recorded against him because the AIU had already concluded that the same conduct should not constitute a Whereabouts Failure in the context of the decision not to record a Missed Test against the Athlete on 18 January 2019, asserting that in these circumstances, the confirmation of a Filing Failure against him for failing to update his whereabouts information as soon as his circumstances changed on 18 January 2019 would be unfair, contravene the Regulations, violate the principle of legal certainty and violate the legal principle of "*non bis in idem*".
183. With respect, it is the AIU's view that the Athlete appears to have fundamentally misunderstood the different requirements for a Missed Test and a Filing Failure. The AIU emphatically rejects the Athlete's arguments and invites the Tribunal to dismiss the request that the Filing Failure should not be counted against the Athlete.
184. First, the AIU submits that there is no violation of the legal principle of "*non bis in idem*" in relation to the Filing Failure. A Missed Test and a Filing Failure are fundamentally distinct Whereabouts Failures that involve entirely separate causes of action. Moreover, the determination was made by the AIU on 4 February 2019 within the context of the review of the potential Missed Test; it preceded any charge and, *a fortiori*, the disciplinary proceedings. There is no authority for the proposition that such a determination could amount to a *res judicata* that would engage the principle of *ne bis in idem*. Indeed, the Swiss Federal Tribunal has held



that only the decision of an arbitral tribunal or state court, and not the internal tribunal of a sport’s federation, could amount to a *res judicata*.

185. The AIU has referred to a table where the relevant causes of action are set out in the requirements to confirm a Missed Test and a Filing Failure in Article I.4.3 of the International Standard for Testing and Investigations (“ISTI”) and Article I.3.6 of the ISTI respectively:

<p>I.3.6 An Athlete may only be declared to have committed a Filing Failure where the Results Management Authority establishes each of the following:</p>	<p>I.4.3 An Athlete may only be declared to have committed a Missed Test where the Results Management Authority establishes each of the following:</p>
<p>(a) that the Athlete was duly notified (i) that he/she had been designated for inclusion in a Registered Testing Pool; (ii) of the consequent requirement to make Whereabouts Filings; and (iii) of the Consequences of any <u>Failure to Comply</u> with that requirement</p>	<p>(a) that when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for Testing during the 60minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;</p>
<p>(b) that the Athlete failed to comply with that requirement by the applicable deadline</p>	<p>(b) that a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete’s Whereabouts Filing for that day, by visiting the location specified for that time slot;</p>
<p>(c) in the case of a second or third Filing Failure in the same quarter) that he/she was given notice, in accordance with</p>	<p>(c) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e.</p>

<p>Article I.5.2(d), of the previous Filing Failure, and (if that Filing Failure revealed deficiencies in the Whereabouts Filing that would lead to further Filing Failures if not rectified) was advised in the notice that in order to avoid a further Filing Failure he/she must file the required Whereabouts Filing (or update) by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received) and yet failed to rectify that Filing Failure by the deadline specified in the notice; and</p>	<p>given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;</p>
<p>(d) that the Athlete's Failure to Comply was at least negligent. For these purposes, the Athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to the failure.</p>	<p>(d) that Article I.4.2 does not apply or (if it applies) was complied with; and</p>
	<p>(e) that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For</p>

	<p>these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Articles I.4.3(a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to his/her failure (i) to be available for Testing at such location during such time slot and (ii) to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day.</p>
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186. According to the AIU, it is plainly apparent from the above that the causes of action for a Missed Test include that a DCO must have attempted to test an athlete on a given day during the quarter during the 60-minute time slot specified for that date, and that the DCO must have done what was reasonable in the circumstances to locate an athlete during that time. An athlete was unavailable for Testing during the specified 60-minute time slot at the designated location, and an athlete was negligent in failing to be available for Testing and failing to update their whereabouts information.
187. The causes of action for a Filing Failure are that an athlete fails to comply with the requirement to make Whereabouts Filings, as specified in the Comment to Article I.3.6(b) of the ISTI, which include:
1. where he/she does not make any such filing, or where he/she fails to update the filing as required by Article I.3.5; or

2. where he/she makes the filing or update but does not include all of the required information in that filing or update; or

3. where he/she includes information in the original filing or the update that is inaccurate; and

4. where he/she was at least negligent.

188. The AIU has referred to the Athlete's argument that the contents of the letter from the AIU dated 4 February 2019, which provided that its conclusion not to confirm the Missed Test on 18 January 2019 had been based on the Athlete's whereabouts update being made as soon as his circumstances changed, in support of his defence. However, it is apparent from the specific criteria set out in Article I.4.3 of the ISTI that there is no requirement that relates to the timeliness of a whereabouts update in relation to a Missed Test. Instead, Article I.4.3(e)(ii) of the ISTI sets out specifically that an athlete may rebut the presumption of negligence against him or her in relation to a Missed Test if he or she establishes that no negligent behaviour on their part caused or contributed to a failure to update a Whereabouts Filing at all; there is no requirement that any update be made as soon as circumstances change.

189. Therefore, in circumstances where the Athlete filed an update to his whereabouts information for 18 January 2019 in advance of the 60-minute time slot on that date, thereby giving notice of the different location where he would be available for Testing, the Athlete established that there was no failure to update his Whereabouts Filing on that date and rebutted the presumption of negligence against him. The AIU was therefore unable to establish that the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot on 18 January 2019 was at least negligent as expressly and specifically required by Article I.4.3(e) of the ISTI. Consequently, no Missed Test was recorded against the Athlete on this specific basis.

190. The conclusion not to confirm the Missed Test against the Athlete was made exclusively in relation to the requirements of Article I.4.3 of the ISTI which do not include the timeliness of the Athlete's whereabouts update relative to changes to his individual circumstances on that date. Consequently, there is nothing that

prevents or prohibits the AIU from asserting, and ultimately confirming, the Filing Failure against the Athlete based on a separate cause of action, i.e., for failing to update his whereabouts information as soon as his circumstances changed - as required by Article I.3.5 of the ISTI - on 18 January 2019.

191. For the avoidance of doubt, the AIU considers that the facts set out in the Notice of Charge demonstrate that each of the Article I.3.6 conditions of the ISTI have been met in respect of the Filing Failure. In particular:

1. Since his inclusion in the RTP, the Athlete has been regularly reminded to make Whereabouts Filings and the consequences for failing to do so and for failing to update this information in accordance with his individual whereabouts responsibilities.
2. The Athlete failed to comply with the requirement to make Whereabouts Filings, specifically because he failed to update his Whereabouts Filing as soon as his circumstances changed on 18 January 2019.
3. The Athlete's explanation failed to establish that no negligent behaviour on his part caused or contributed to the failure to update his whereabouts information as soon as his circumstances changed on 18 January 2019.

### ***The Athlete***

192. The Athlete's position is as follows:

193. Although the AIU is of the opinion that there is no violation of the legal principle of *ne bis in idem* ("double jeopardy") in relation to the Filing Failure, since they are distinct Whereabouts Failures that would involve separate causes of action, it completely ignores the fact that the Athlete's "act" has already been decided upon by the AIU and confirmed by letter dated 4 February 2019. It is therefore in conflict with the legal principle of *ne bis in idem* to prosecute the Athlete again for the same "act", even if this is on another legal basis. As the AIU has stated, it is responsible for the Results Management for WA. In that context, the AIU must indeed conform to the *ne bis in idem* principle at all times.

194. The AIU has set out the various requirements for a Missed Test and a Filing Failure. The AIU qualifies the alleged Filing Failure as a separate cause of action. However, the AIU fails to acknowledge that the "act" is the same as the act regarding the alleged Missed Test on 18 January 2019.
195. The Athlete was performing work in Narok County. The Athlete owns a construction company called "Oamtai Investment Ltd." The Athlete is one of the directors of this company. Narok County awarded the contract for drainage work to the Athlete's construction company. On 18 January 2019 the Athlete's 60-minute time slot was set at his home in Iten. The journey from Narok County to Iten takes about 2.5 hours. It was not easy to estimate how long the project for the drainage work was going to take, due to bad weather conditions. On 18 January 2019, the Athlete had a meeting with Country Officials, and he was prepared to leave Narok immediately after the meeting. The meeting took longer than expected. The Athlete then informed his management to change his Whereabouts from Iten to Narok. He did this as soon as the circumstances changed.
196. Regarding the Filing Failure, the AIU accuses the Athlete of failing to comply with article I.3.6 (b) ISTI or article 3.9 of Appendix A of the Regulations. A failure to do so may be pursued as a Filing Failure if the circumstances so warrant. It is not disputed by the AIU that the Athlete fully complied with this first requirement: He changed his Whereabouts due to a change in the circumstances well before the 60-minute time slot. The second requirement is very subjective and as far as we know, there is no published case law on the matter. The AIU has concluded that the Athlete would not have complied with the stipulation "as soon as the circumstances changed". Remarkably, in the letter dated 4 February 2019, the AIU clearly stipulated that the Athlete changed his Whereabouts "*as soon as the circumstances changed*" and that the Athlete was compliant with article 3.5 of Appendix A of the Regulations. The Athlete finds that the situation has been decided on by a competent authority which was confirmed by letter dated 4 February 2019. In this letter the AIU said one thing and later on, changed its point of view, to his disadvantage. This is unfair. However, it is also very important that the acts of the AIU are in conflict with its own rules and with basic legal principles, and that the requirements of a Filing Failure were not met.

197. The Athlete finds that he complied with the stipulation to change his Whereabouts Information as soon as the circumstances changed. The Athlete did not fail to make a filing and also did not fail to update his Whereabouts. The requirements of a Filing Failure have not been met, since there was no failure to file the Whereabouts.

***The Sole Arbitrator's considerations***

198. The following facts are indisputable between the Parties. The update to the Athlete's whereabouts information for 18 January 2019 was made 1 hour and 21 minutes prior to the commencement of the Athlete's 60-minute time slot for that date (22:00-23:00) by updating the location of that time slot from Iten to Narok. The Athlete thus has confirmed that his whereabouts information for 18 January 2019 wasn't updated until 20:39 hours that evening by help of his management after he had sent them information about the change at 20:36. This information is supported by screenshots showing his messages to the management.

199. The Athlete has told the Tribunal that Narok County awarded the contract for drainage work to the construction company he owns and in which he is one of the directors. On 18 January 2019, Mr Kipsang's 60-minute time slot was set at his home in Iten. According to the Athlete it is about 175km between Narok Town to Iten via Nakuru, a distance which takes about 2.5 hours by car. He had a meeting with Country Officials and he was prepared to leave Narok immediately after the meeting. The meeting started late and ended later than expected. He could not interrupt the meeting to send a message to his manager. After the meeting Mr Kipsang informed his management to change his Whereabouts. This was as soon as the circumstances changed.

200. The Athlete's position is that the Filing Failure should not be recorded against him because the AIU had already concluded that the same conduct should not constitute a Whereabouts Failure in the context of the decision not to record a Missed Test against the Athlete on 18 January 2019. The Notice of Decision not to record a Missed Test dated 4 February 2019 provided the following:

"Taking into consideration the abovementioned, the AIU considers that on 18 January 2019, when the apparent Missed Test occurred, you tried to update your

Whereabouts information as soon as your circumstances changed. Consequently, you were compliant with article 3.5 of the Appendix A of the Regulations, which requires from an Athlete to update his information as soon as possible after the circumstances change and in any event prior to the 60-minute time slot specified in his filing for the day in question. Your behaviour was not negligent and therefore the apparent Missed Test on 18 January will not be recorded against you.”

201. As already explained, Article 3.5 in the Regulations’ Appendix A (and ISTI I.3.5) deals with the situation where there is a change in circumstances which means that the information in a Whereabouts Filing is no longer accurate.

3.5 Where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete as required by paragraph 3.4 above, the Athlete must file an update so that the information on file is again accurate and complete. In particular, the Athlete must always update his Whereabouts Filing to reflect any change in any day in the quarter in question (a) in the time or location of the 60-minute time slot specified in paragraph 3.2 above; and/or (b) in the place where he is staying overnight. The Athlete must file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his filing for the day in question.

202. To the Sole Arbitrator, with significant experience from a Swedish state court, it is absolutely clear that a decision of the AIU cannot cause *res judicata*. This means that the AIU can change its position during the process. This also means that even though the AIU in the letter of 4 February 2019 has written that “*on 18 January 2019, when the apparent Missed Test occurred, you tried to update your Whereabouts information as soon as your circumstances changed*” and furthermore referred to Article 3.5 in Appendix A which deals with Filing Failures, the AIU is not bound by this statement in these proceedings. This can be perceived as not being fair to the Athlete but formally, it is correct.

203. The crucial question thus becomes if the Athlete in this case updated his Whereabouts information as soon as his circumstances changed. The outcome is of great principle interest since neither the AIU, the Athlete’s counsel, nor the Sole Arbitrator has found any case law dealing with this issue.



204. Article 3.5 in Appendix A of the Regulations, cited above, provides that the Athlete must file an update where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete. In particular, the Athlete must always update his Whereabouts Filing to reflect any change in the time or location of the 60-minute time slot specified and/or in the place where he is staying overnight. The Athlete must file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his filing for the day in question.
205. When an Athlete, as in this case, needs to travel to reach the location of the 60-minute time slot, it can be accurate to say that he has to plan for the travel so he has enough time not only for the travel but also at least one extra hour for unforeseen events. This means that if an Athlete has a six-hour journey before he can reach the location of the time slot, he has to start the travel at least seven hours before the start of the time slot.
206. In this case, there have been discussions about the distance in kilometres and in hours between Narok, where the Athlete worked, and Iten, where his time slot was located for that day. The Athlete has claimed that the distance is 175km and that it takes 2.5 hours to drive that distance by car. The AIU has referred to Google Maps and suggested that it is about 300km between the two places and that it takes 5 hours 39 minutes to drive by car.
207. A search on the Internet by the Sole Arbitrator resulted in three different routes from Narok to Iten. One route is via Bomet and Eldoret (to Bomet on road B3) and this route is 324km long and takes 5 hours 59 minutes to drive by car. Another one goes via Moro and Eldoret (road A104), is 246km long and takes 5 hours 46 minutes to drive by car. The third alternative, via Nakuru (road B4), is 308 km long and takes 5 hours 56 minutes to go by car.
208. The basis for the assessment in this part of the case strongly indicates that the Athlete has greatly underestimated the length of the trip he had to make between Narok and Iten. Regardless of this, he had been required to start the journey no later than 18.30 according to the Athlete's own estimation of the time needed for

the travel. At the latest at that time he must have been aware that he either had to start the journey back home or had to change his Whereabouts information.

209. Given the essential purpose behind the rules on Whereabouts information, it is quite important that the circumstances that an athlete controls but still utilises as an excuse for not updating the Whereabouts information are very carefully considered when deciding whether or not an athlete has been negligent.
210. The Athlete in this case has stated that he was busy in a meeting and that he therefore did not have the opportunity to change his whereabouts information earlier than was done. The Athlete has also informed that all that was needed for him was a message to his management, who then handled the changes to his whereabouts information. In the Sole Arbitrator's view, the Athlete's explanation as to why he couldn't change his Whereabouts information earlier is a poor justification.
211. Article 3.9 (d) in Appendix A of the Regulations prescribes that for these purposes, the Athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to the failure.
212. The conclusion is that the Athlete has not established that no negligent behaviour on his part caused or contributed to his failure not to update his Whereabouts information as soon as possible after the circumstances changed.

#### Applying Article 2.4 of the IAAF Rules

213. Article 2.4 in the 2018 and 2019 IAAF Rules reads like this:

##### **Whereabouts Failures**

Any combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool.

214. The Sole Arbitrator has in summary found that the Athlete has committed a total of four Missed Tests and/or Filing Failures pursuant to Article 2.4 of the IAAF Rules. These are the following:

- A Missed Test on 27 April 2018,
- A Filing Failure related to the Athlete's whereabouts information provided for 18 January 2019,
- A Missed Test on 12 April 2019, and
- A Missed Test on 17 May 2019

215. However, by application of Article 10.7.4(a) of the 2019 IAAF Rules, the anti-doping rule violations committed by the Athlete shall be treated together as one single anti-doping rule violation and the sanction imposed shall be based on that which carries the more severe sanction.

Tampering or Attempted Tampering pursuant to Article 2.5 of the IAAF Rules

**In conjunction with the May 2019 Missed Test**

216. The parties have in summary argued as follows:

***The AIU***

217. The ADRV asserted against the Athlete pursuant to Article 2.5 in this matter is based upon the Athlete's explanation for the fourth Whereabouts Failure on his record, which is the Missed Test dated 17 May 2019, that the Athlete submitted to the AIU on 5 September 2019. In summary, the Athlete asserted that the Missed Test should not be recorded against him on the basis that he had been prevented from returning to Iten in time for his 60 minute time slot on that date due to a large traffic jam in Nakuru caused by a serious road traffic accident ("RTA"). In support of that explanation, the Athlete submitted a statement, a photograph that purported to be of the RTA that the Athlete encountered and that impeded his

journey to Iten on 17 May 2019, and a handwritten statement from Mr Victor Kigen corroborating the Athlete's explanation.

218. The Athlete has through his Counsel thus explained how he got the picture of the fallen down lorry:

"Mr Kipsang received the picture from his driver. The photo was taken on 17 May 2019 while traveling on the route as mentioned in Mr Kipsang's explanation. Attached you will find the picture in jpg as we received through Mr Kipsang."

219. Following an investigation conducted by the AIU into the explanation, supporting documents and evidence submitted by the Athlete concerning the Missed Test on 17 May 2019, the AIU concluded that the Athlete's explanation and the RTA that allegedly occurred on this date, and all related supporting statements, documents and evidence, were entirely false, on the basis of the following:

1. a video posted by the Daily Nation, a leading daily newspaper in Kenya, on YouTube on 19 August 2019 confirmed that the RTA relied upon by the Athlete to justify his failure to be available for Testing on 17 May 2019 in fact occurred on Monday 19 August 2019; and
2. an article posted on the website [www.watsupafrika.com](http://www.watsupafrika.com) (linked to the same YouTube video) corroborated that the RTA asserted to have taken place on 17 May 2019 occurred on 19 August 2019.

220. In addition, the AIU has obtained confirmation from the Daily Nation online desk that the video footage of the accident posted to YouTube by the Daily Nation on 19 August 2019 occurred on that date. It has become clear from the WhatsApp exchange produced by the Athlete on 6 May 2020 that he sent Mr. Kigen his statement about the accident, asked him to say that he was with him from Nairobi to Nakuru and also asked him to write a statement supporting his own. The Athlete also asked Mr. Kigen for "*photos showing that there was [a] traffic jam in Nakuru that caused the delay*". Before sending the photo of the accident involving the overturned lorry, which, it is now accepted by the Athlete, occurred in August 2019, Mr. Kigen sent the Athlete a YouTube video that patently has nothing to do with an accident in May 2019 in Nakuru. The video, posted on 2 August 2019, is a

7-minute long KTN news report concerning a large traffic jam on the Nairobi - Nakuru highway caused by construction work which occurred from that date.

221. Pursuant to the foregoing, the AIU considers that the evidence demonstrates overwhelmingly that the Athlete was engaged in Tampering or Attempted Tampering in breach of the IAAF Rules. The Athlete engaged in fraudulent and deceitful conduct by providing deliberately misleading and false information to the AIU in an attempt to obstruct and delay the investigation into his explanation and/or prevent normal procedures from occurring, namely the recording of a Missed Test against him. Specifically, the Athlete's explanation for his failure to be available for Testing on 17 May 2019 is prima facie highly misleading information. Furthermore, the submission of a witness statement from the Athlete, a written statement and an oral witness statement from a third party, Mr Kigen, and photographic evidence all in attempt to appear corroborative of the Athlete's explanation constitutes the submission of fraudulent information.
222. In this respect, the AIU draws the Tribunal's attention to CAS 2015/A/3979, *IAAF v. Athletics Kenya & Rita Jeptoo*, in which the CAS determined that the submission of false medical documents trespassed beyond the threshold of a legitimate defence and therefore constituted a Tampering violation. The analysis of the CAS Panel in Jeptoo was also adopted mutatis mutandis in SR/Adhocsport/140/2018 *IAAF v. Jemima Jelagat Sumgong*.
223. Moreover, and in striking similarity to the circumstances of the instant proceedings, the recent appeal decision of the UK's National Anti-Doping Panel ("NADP") in *UK Anti-Doping Limited v. Mark Dry* confirmed that lying to an anti-doping organisation in the context of an explanation for a single Whereabouts Failure to avoid the noting of a Filing Failure is sufficient to constitute a Tampering violation. In particular, the NADP Appeal Panel in Dry rejected the conclusion of the CAS Panel in CAS 2017/A/4937, *DFSNZ v Murray*, award dated 15 November 2017, that the correct test to apply to determine whether specific conduct amounts to a Tampering violation was whether the purpose or intended effect of providing misinformation was to subvert the doping control process.

224. The AIU therefore submits that the Tribunal can be comfortably satisfied that the Athlete has committed an anti-doping rule violation pursuant to Article 2.5 of the IAAF Rules for Tampering with any part of Doping Control. In the alternative, if the Tribunal does not agree that this conduct amounts to Tampering, as defined in the IAAF Rules, the AIU says that it amounts to Attempted Tampering.

### ***The Athlete***

225. The Athlete is accused of an alleged false statement regarding the Missed Test on 17 May 2019. He first became aware of this accusation when he received the Notice of Charge on 10 January 2020. He provided an explanation in the Results Management Process about a potential Missed Test on 17 May 2019. The Athlete finds that he did not provide a false statement when he provided information to the AIU, especially not in the sense of Article 2.5 IAAF Rules.

226. Article 2.5 of the IAAF Rules stipulates that Tampering shall include intentionally interfering with a Doping Control official, or providing fraudulent information to an Anti-Doping Organization. "Tampering" is defined as misleading or engaging in any fraudulent conduct to alter results or to prevent normal procedures from occurring. "Attempt" is defined as purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an ADRV. These definitions imply that there should be intent on the part of the athlete to actively mislead the Anti-Doping Organization. That is absolutely not the case here.

227. The AIU also refers to Article 5.10.9 of the IAAF ADR. This article relates to providing "false" and "misleading" information. Again, this is not what the Athlete did. The Athlete provided an explanation with regard to the alleged Missed Test on 17 May 2019. As stated before, his explanation was that he was in an enormous traffic jam, caused by an accident. To substantiate this, he also submitted an explanation from his driver, Mr Kigen. Mr Kigen also sent him a picture of the road accident. Mr Kigen has informed that he picked the photo up on Facebook and that the photo was taken by someone who was traveling via the route on 17 May 2019. The Athlete did not know that this was incorrect information. The Athlete did not

instruct his driver to lie or to provide false information in any way. There is no proof of that.

228. Apparently, the submitted picture was not taken on 17 May 2019, but the Athlete did not know this. The AIU also did not provide any proof that the Athlete knew this.
229. The AIU refers to case law that are very different from this case: CAS 2015/A/3979 (*IAAF v. Athletics Kenya & Rita Jeptoo*). This case related to false medical information submitted. The medical records were forged and the athlete knew this. Furthermore, she provided several false statements and there were several inaccuracies. In SR/324/2019 (*UK Anti-Doping Limited v. Mark Dry*), the athlete admitted that he told the Anti-Doping Organization a lie in his explanation and acknowledged that he had intentionally told an untruth and had also procured his partner to lie on his behalf.
230. In the case of the Athlete, there is no case of forgery and he also did not lie. The AIU provided no proof that the Athlete knowingly or deliberately lied. His behaviour cannot be considered fraudulent unless there was also a deliberate intent to subvert doping control. That is not the case here. Even if the Disciplinary Tribunal concludes that the Athlete has lied, which is contested by him, in CAS 2017/A/4937 (*DFSNZ v. Karl Munay*) the Panel concluded that a lie in itself does not amount to fraud or to providing fraudulent information. The recent case of SR/272/2019 between the IAAF and Michelle-Lee Ahye is also relevant in that regard.
231. The standard of proof required in doping cases for the WA is the one of "comfortable satisfaction". This lies on a sliding scale between the "balance of probabilities" of civil law and the "beyond reasonable doubt" involved in criminal cases. The "comfortable satisfaction" standard is a flexible one and, in circumstances such as these, it may be appropriate to consider the Briginshaw test: The more serious the allegation and its consequences, the more persuasive the proof must be. In the case CAS 2017/A/4937, the Panel considered that conduct for a serious offence such as (attempted) tampering, must be proven to a high threshold within the onus of comfortable satisfaction. Given the gravity of the

accusations and the possible implications, not only for the Athlete's career, but also for his entire future and that of his family, it could be reasonably argued that the burden of proof should fall closer to that used in criminal cases.

232. It is also relevant that the AIU not only not accepted the Athlete's statement and recorded a Missed Test on 17 May 2019, but also finds that he would have lied about his explanation, resulting in a double punishment regarding the explanation. This is unnecessary and in conflict with the IAAF Rules and Regulations and in conflict with basic legal principles. The AIU did not hear the Athlete about the alleged "tampering" before initiating the Notice of Charge. The Athlete considers this to be in conflict with the principle of a fair trial.

### **In conjunction with the April 2019 Missed Test**

#### ***The AIU***

233. The AIU submits that the Athlete has also engaged in Tampering with respect to the April 2019 Missed Test. As is already set out, the AIU submits that the evidence of the DCO, Mr Lagat and Mr Huijskens clearly demonstrates that the Athlete did not arrive at his home address at 22:50 on 12 April 2019 as he contends. Therefore, the Athlete's assertion that he arrived home at 22:50 on 12 April 2019 in his written statement, filed in support of his request for an Administrative Review of the decision to confirm the April 2019 Missed Test against him, and in his oral testimony before this Tribunal is demonstrably false and untrue. Moreover, this renders the same assertion made by the Athlete's wife and his security guard in their written statements filed in support of the Athlete's explanation for the apparent Missed Test also demonstrably wrong as are their oral testimonies.
234. In those circumstances, the AIU submits that the Tribunal should draw the clear and obvious inference from the precise, yet entirely false, recollection that the Athlete arrived at 22:50 on 12 April 2019 by all three individuals that there has been clear concertation between them as to the contents of their written statements in support of the Athlete's explanations for the April 2019 Missed Test.



235. The Athlete has engaged in deceitful conduct by providing deliberately misleading and false information to the AIU and to the Tribunal in his explanation for the April 2019 Missed Test in an attempt to obstruct the investigation into his explanations and ultimately to avoid the confirmation of a whereabouts failure against him.
236. Whereas, the Athlete seeks to rely on the conclusions in CAS 2017/A/4937 *DFSNZ v. Murray* that a lie in itself does not amount to fraud or providing fraudulent information in the context of Article 2.5 ADR, the AIU repeats the submission concerning the decision of the National Anti-Doping Appeal Panel in *UK Anti-Doping Limited v. Mark Dry*. It is clear that the Panel in *Dry* rejected the conclusion of the CAS Panel in *Murray* and concluded that the correct test, as the first instance Panel in that case had accepted, was whether the words "*providing fraudulent information*" in Article 2.5 covered "*the deliberate provision of false information with the intention of evading the proper operation of the ADR*" and decided that a lie told to avoid the noting of a whereabouts failure subverts the Doping Control process and thus falls within the definition of Tampering.
237. The Athlete objects to the AIU's accusations relating to the April 2019 Missed Test being used against him as evidence in support of the violation of Article 2.5 of the IAAF Rules. However, this objection is misguided. Tampering violations can of course be based on fabricated evidence or fraudulent explanations provided within the context of results management or disciplinary proceedings. In any event, the specification of grounds in respect of the Athlete's violations of Article 2.5 of the IAAF Rules does not abrogate any due process of law in these (first instance) proceedings because the Athlete has been afforded the opportunity to address those grounds in a written response, the Athlete has had the right to cross-examine all relevant witnesses and to challenge the evidence adduced in support of the Athlete's violation of Article 2.5 of the IAAF Rules, and he has had the opportunity to make full oral submissions concerning the entirety of the evidence in support of the Charges at the hearing of this matter.
238. Therefore, the suggestion that the Sole Arbitrator should not consider the circumstances of the April 2019 Missed Test in the context of the Athlete's violation of Article 2.5 of the IAAF Rules and that the Athlete has not been afforded due process or a fair hearing should be rejected. The AIU submits that the Tribunal can

therefore be more than comfortably satisfied that the Athlete committed Tampering (or Attempted Tampering) within the meaning of Article 2.5 of the IAAF Rules.

### ***The Athlete***

239. Initially the AIU only based the accusation regarding Article 2.5 of the IAAF Rules on the alleged "lies" about the Missed Test on 17 May 2019. The AIU has during the proceedings put forward new grounds for the tampering allegations which include the alleged Missed Test on 12 April 2019, despite the Athlete only repeating his earlier explanations regarding the alleged Missed Test on 12 April 2019. No new information has been put forward.
240. The fact that an Athlete responds to accusations from the AIU should not be used against him as evidence for an accusation on another ground, even more so since no new information has been submitted and Mr. Kipsang only repeated what was said before. Earlier, the AIU did not consider this as Alleged Tampering or Attempted Tampering and now, more than a year later, the AIU tries to use this in an attempt to substantiate the claim of "(Attempted) Tampering". The actions of the AIU are contrary to due process of law. Therefore, the Athlete requests that the alleged Missed Test on 12 April 2019 coupled with the charge of (Attempted) Tampering is inadmissible.

### ***The Sole Arbitrator's considerations***

241. The Sole Arbitrator now deals with both charges according to Article 2.5 of the IAAF Rules, i.e. both in conjunction with the Missed Test on 12 April 2019 and on 17 May 2019. There is no procedural obstacle to deciding the matter in conjunction with the Missed Test on 17 May 2019.
242. During the hearing, the Athlete has given his version of what happened on 17 May 2019. The Tribunal has also heard witness testimonies from Mr Kigen, Mr Keitany and Mr Langat.
243. Mr Kigen has testified that he and the Athlete encountered a traffic jam in the outskirts of Nakuru on the way from Nairobi to Iten on 17 May 2019. He also told

the Tribunal that he found the photo of the fallen down lorry on the Internet and that it was sent to Mr Kipsang and Mr Kipsang's management and that Mr Kigen then wrote that the photo was from the 17 May accident. At the time, he believed that this photo was from the accident that caused the jam.

244. Against the statements of the Athlete and Mr. Kigen has been set the testimonies given by the witnesses Mr. Keitany and Mr. Langat. Mr Keitany has testified and we can also read from his written statement that on 23 April and 12 May 2020 he and Mr Langat were granted access to the traffic department and office of the Nakuru Central Police Station and that he and Mr Langat were shown the Occurrence Book, which records details of all incidents - from petty theft to major incidents, including road traffic accidents - reported to the Nakuru police. He has confirmed that he and Mr Langat were given access to and permission to review and search in the Occurrence Book for any records of road traffic accidents reported to the Nakuru Police on 17 May 2019. Mr Keitany has testified that the review and search of the Occurrence Book did not reveal any records of any road traffic accidents involving a trailer, a bus or another heavy goods vehicle on 17 May 2019. He has added that if there had been an accident on 17 May 2019 which involved a trailer and a bus or other big vehicles near Nakuru and for which it took three hours to clear up he would definitely expect such an accident to be reported to the police and recorded in the Occurrence Book. Mr Langat, who is a Chief Inspector in the Kenyan Police and the Directorate of Criminal Investigations, has confirmed all of Mr Keitany's statement.
245. Regarding the events around 12 April 2019 the AIU has pointed at the written statements of Mr Kipsang, his wife, his security guard and Mr Kigen and described how similar these statements are to each other according to formatting and wording in details. One example of this is the headline which for all of them starts with "REF". Other examples are "of sound mind" (used by Mr Kipsang, his wife and Mr Kigen), "I do remember very well" (used by Mr Kipsang and his security guard) or "I do recall very well" (used by Mr Kipsang's wife) and "that is all I wish to state" (used by Mr Kipsang and his wife) or "that is all I can state" (used by the security guard).

246. Mr Kipsang, his wife Ms Doreen Chebi, his security guard Mr Cosmas Kipkemoi and Mr Kigen have all testified that they wrote their statements by themselves without consulting anyone else and without reading any other statement. According to the April 2019 Missed Test, the Athlete, his wife, and his security guard have all testified that the Athlete arrived home at 22:50 and that they remember that very clearly. Each of them has in a written statement stated that this has been the case. All of them have during the hearing given testimonies and maintained this fact.
247. On the other hand, Ms Chepchirchir, the DCO, Mr Lagat, the driver and intended chaperone and Mr Huijskens, whom Ms Chepchirchir has asked for advice, have all in written statement and in testimonies during the hearing provided information to the contrary, excluding the possibility that the Athlete, his wife and his security guard are telling the truth. There is convincing evidence to support the testimonies given by Ms Chepchirchir, Mr Lagat and Mr Huijskens in the form of screenshots showing phone calls from Ms Chepchirchir to the Athlete during the time when he and his witnesses have said that he had already arrived home.
248. The Sole Arbitrator has already described Article 3.1 of the 2019 IAAF Rules which deals with the Burdens and Standards of Proof. I want to underline that in a case like this it is the AIU that has the burden of establishing that an ADRV has been committed. The standard of proof shall be whether the AIU has established the commission of the alleged ADRV to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that 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.
249. The Sole Arbitrator has significant experience from criminal cases in District courts and Appeal courts. In the Sole Arbitrator's view, the overall evidence in this regard convincingly shows that there is proof beyond a reasonable doubt, and thus, even more so than the comfortable satisfaction required, that the Athlete did not arrive home until after 23:20 on 12 April 2019.
250. Regarding the events on 17 May 2019, the Tribunal has heard the Athlete give his testimony as did his witness Mr Kigen. Both of them have authored written

statements. Both in written words and in their oral testimonies before the Tribunal they have certified that they encountered a heavy traffic jam in the outskirts of Nakuru which caused them a delay of three hours. Against this information is that provided by the witnesses Mr Keitany and Mr Langat. According to the research made by these two witnesses, there was no accident in Nakuru on 17 May that could have caused such a traffic jam.

251. In addition, it has been found that the picture adduced by the Athlete and produced by Mr Kigen, after the Athlete asked him to produce images in support of the traffic accident they had referred to, did not show an accident from 17 May but from August 2019.
252. Based on the evidence presented in this regard, the Tribunal finds that the evidence convincingly shows that there is proof, again beyond a reasonable doubt, that there was no such accident as that referred to by the Athlete in Nakuru on 17 May which could have caused such a traffic jam he and his witness have described.
253. That said, the Athlete not only lied during these proceedings, but he also contributed to producing evidence that he realized was false.
254. Article 2.5 in 2019 IAAF Rules reads like this:

#### **2.5 Tampering or Attempted Tampering with any part of Doping Control**

Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization, or intimidating or attempting to intimidate a potential witness.

255. Regarding the legal application of the rules to the conduct of which the Athlete is found to have engaged in, I agree with the Sole Arbitrator in SR/Adhocsport/140/2018 *IAAF v. Jemima Jelagat Sumgong* in saying this:

“As to the law, the Athlete’s supply of a false explanation for the presence of r-EPO and the submission of false medical documents by her to the Kenyan Tribunal can only be analysed as a deliberate attempt to prevent the administration of justice in her case and improperly to affect the outcome of the hearing in respect of the AAF for r-EPO.

Perjury and forgery inevitably go beyond the bounds of legitimate defence under any civilized system of law.”

256. Furthermore, it is quite obvious that the purpose or intended effect of providing misinformation and false evidence in this case was to subvert the proceedings brought against the Athlete.
257. What the Athlete has provided in these proceedings is a deliberate attempt to prevent the administration of justice and to improperly affect the outcome of the proceedings. His actions are sufficient to constitute two Tampering violations in accordance with Article 2.5 of the IAAF Rules.
258. However, as already outlined in relation to the Whereabouts Failures, by application of Article 10.7.4(a) of the 2019 IAAF Rules, the ADRVs committed by the Athlete shall be treated together as one single ADRV and the sanction imposed shall be based on that which carries the more severe sanction.

#### **D. Sanction**

##### Period of Ineligibility

The Parties’ arguments in short are the following:

##### ***The AIU***

259. Article 10.3.1 of the 2019 IAAF Rules provides that the consequences to be imposed for an ADRV under Article 2.5 for Tampering or Attempted Tampering with any part of Doping Control is a mandatory period of four years. The comment to Article 10.5.2 of the WADC also confirms that a reduction for No Significant Fault under this Article is not applicable to ADRVs where intent is an element of the ADRV, including Article 2.5.
260. The standard applicable sanction for a violation of Article 10.3.2 of the 2019 IAAF Rules is a two-year period of ineligibility. The period of ineligibility is subject to a possible reduction on the basis of the Athlete’s degree of Fault.

261. However, by application of Article 10.7.4(a) of the 2019 IAAF Rules, the ADRVs committed by the Athlete shall be treated together as one single ADRV and the sanction imposed shall be based on that which carries the more severe sanction.
262. The mandatory four-year period of Ineligibility, which shall not be reduced, shall commence on the date of the Tribunal's award with credit given to the Athlete for the period of Provisional Suspension served against the total period of ineligibility, provided that it has been effectively served.

### ***The Athlete***

263. Primarily, the Athlete argues that there is no violation of the IAAF Rules or any other provision and that the charges should be fully dismissed by the Disciplinary Tribunal.
264. In the alternative, should it be found, a possibility with which Mr Kipsang is emphatically not in agreement, that Mr Kipsang violated Article 2.4 of the IAAF Rules, the sanction should be reduced to one year of ineligibility, based on Article 10.3.2 of the IAAF Rules, since there was no deliberate act, fault, intention and/or negligence, serious or otherwise, in the sense of the IAAF Rules and/or the WADC.
265. In the ultimate alternative, if the Disciplinary Tribunal concludes that Article 2.4 IAAF Rules and/or Article 2.5 IAAF Rules have been violated, the Athlete requests that the lightest possible sentence is imposed and the period of ineligibly is maximally reduced. Mr Kipsang requests the Tribunal to apply article 10.7.4 (a) of the IAAF Rules and treat this as one ADRV, in the event that the Tribunal concludes that both articles have been violated. In any case, if a sanction is imposed, the Athlete should receive credit for the provisional suspension served, that was imposed on 10 January 2020.

### ***The Sole Arbitrator's considerations***

266. Article 10.7 (a) of the 2019 IAAF Rules states the following:
- (a) For purposes of imposing sanctions under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if the Integrity Unit can establish that the Athlete or other Person committed the second Anti-Doping

Rule Violation after the Athlete or other Person received notice, or after the Integrity Unit made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation. If the Integrity Unit cannot establish this, the Anti-Doping Rule Violations shall be considered together as one single Anti-Doping Rule Violation for sanctioning purposes, and the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction.

267. Article 10.3 of the IAAF Rules reads as follows:

The period of Ineligibility imposed for Anti-Doping Rule Violations under provisions other than Articles 2.1, 2.2 and 2.6 shall be as follows, unless Article 10.5 or 10.6 is applicable:

10.3.1 For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete or other Person's first anti-doping offence, the period of Ineligibility imposed shall be four years unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years.

10.3.2 For an Anti-Doping Rule Violation under Article 2.4 that is the Athlete's first anti-doping offence, the period of Ineligibility imposed shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing.

268. As has been said twice above, by application of Article 10.7.4(a) of the 2019 IAAF Rules, the ADRVs committed by the Athlete shall be treated together as one single ADRV and the sanction imposed shall be based on that which carries the more severe sanction.

269. As can be seen in a comparison of Articles 10.3.1 and 10.3.2 of the IAAF Rules, the more severe sanction is prescribed for a violation against Article 2.5 (Tampering or Attempted Tampering) of the Rules. The period of Ineligibility imposed shall be four years, unless Article 10.5 or 10.6 is applicable.



270. The AIU has pointed to the Comment to Article 10.5.2 WADC (with the same wording as 10.5.2 IAAF Rules) which states:

[Comment to Article 10.5.2: Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.]

271. Article 10.6 is not applicable here. This means that neither Article 10.5 nor 10.6 can be applicable in this case. This results in a four-year period of Ineligibility.

#### Commencement of the Period of Ineligibility

272. According to Article 10.10 of the IAAF Rules, commencement of the period of Ineligibility shall come into force and effect on the date that the decision imposing the consequences is issued, and the provisional suspension served by the Athlete shall be credited.

#### Disqualification of Results and Other Consequences

273. The Parties' submissions are these:

##### ***The AIU***

274. Pursuant to Article 10.8 of the 2019 IAAF Rules, any competitive results obtained by the Athlete from the date that the ADRV occurred through to the start of the Provisional Suspension shall be disqualified, including forfeiture of any medals, titles, ranking points, prize and appearance money.

275. The WA submits that the ADRV occurred on the date of the Athlete's third Whereabouts Failure in the 12-month period beginning on 27 April 2018, i.e. on 12 April 2019. Therefore, all competitive results from 12 April 2019 through the beginning of the Athlete's Provisional Suspension on 10 January 2020 shall be disqualified, with all associated consequences.

## ***The Athlete***

276. The AIU has stated that all results achieved by the Athlete since the date of the alleged Missed Test on 12 April 2019 must be disqualified. The AIU refers to Article 10.8 of the IAAF Rules. It follows from that rule that all competitive results achieved after a positive sample has been obtained or after another ADRV has taken place will be disqualified. However, this article also includes an exception, namely: "*unless fairness requires otherwise*". That is the case here. Firstly, no positive sample has ever been found in the case of Mr Kipsang. Even if the Disciplinary Tribunal were to assume that an ADRV has taken place, this ADRV cannot be considered to have taken place on a specific date, and therefore not on 12 April 2019 either.
277. Since there are no positive sample results, the Athlete's competition results have not been affected by an ADRV and in that regard, it would be unfair and unnecessary to disqualify his results.
278. Furthermore, the financial consequences for the Athlete will be severe if the Tribunal would disqualify his results in addition to impose a period of ineligibility, which would end his career for good.
279. The Athlete's position is that if the Disciplinary Tribunal Panel finds that he has committed an ADRV, fairness requires that his results not be disqualified.

## ***The Sole Arbitrator's considerations***

280. Article 10.8 of the IAAF Rules provides that:

### **Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation**

In addition to the automatic Disqualification, pursuant to Article 9, of the results in the Competition that produce the Adverse Analytical Finding (if any), all other competitive results of the Athlete obtained from the date the Sample in question was collected (whether In-Competition or Out-of-Competition) or other Anti-Doping Rule Violation occurred through to the start of any Provisional Suspension or Ineligibility period shall be Disqualified (with all of the resulting consequences, including forfeiture of any

medals, titles, ranking points and prize and appearance money), unless the Disciplinary tribunal determines that fairness requires otherwise.

281. In a situation like this when an Athlete has deliberately attempted to prevent the administration of justice in his case and to improperly affect the outcome of the proceedings, the Sole Arbitrator can't see any reason to apply the exception "when fairness requires otherwise". It is settled case law in relation to Whereabouts Failures that the ADRV is considered to have occurred on the date of the Athlete's third Whereabouts Failure in the 12-month period.
282. Pursuant to Article 10.8 of the IAAF Rules, the Sole Arbitrator concludes that all competitive results obtained by the Athlete from 12 April 2019 through the beginning of the Athlete's Provisional Suspension on 10 January 2020 shall be disqualified, with all of the resulting consequences, including the forfeiture of any titles, awards, medals, points, prizes, and appearance money.

#### **E. Costs**

283. Article 8.9.3 in the IAAF Rules states the following:

The Disciplinary Tribunal has the power to make a costs order against any party, where it is proportionate to do so. If it does not exercise that power, each party shall bear its own costs, legal, expert and otherwise. No recovery of costs may be considered a basis for reducing the period of Ineligibility or other sanction that would otherwise be applicable.

284. The usual order is for the unsuccessful party to make a contribution to the costs incurred by the successful party. Accordingly, in the Sole Arbitrator's opinion the WA should receive the benefit of a costs order. It should be taken into account that the Athlete has extended the proceedings with false evidence.
285. The Sole Arbitrator has determined that the Athlete should contribute the sum of 3,000 GBP to the costs incurred by the WA and it is so ordered.

## **F. The Athlete's Request for Damages and Lost Income**

286. The Athlete has claimed for general damages consisting of emotional damage, damage to reputation, commercial damage and lost income to be paid by the WA. He has maintained this claim during the hearing and has stated that it is grounded on both sports law and civil law.

287. The AIU has objected to the claim and stated among other things that:

- The scope of the IAAF Rules - and therefore the authority of the Disciplinary Tribunal, which applies those IAAF Rules - extends to the determination of whether any of the ADRVs set out in Article 2 of the IAAF Rules have been committed and the appropriate consequences to be imposed, on the athlete or other person, in circumstances where it is concluded that a violation has occurred pursuant to Article 10 of the IAAF Rules;
- Article 10 of the IAAF Rules makes no reference to any award of damages in the anti-doping context.

288. Notwithstanding that the Athlete's claims for damages and loss of earnings fail to specify how the relevant legal tests are satisfied, where the IAAF Rules define the scope of authority of the Tribunal and do not provide for any assessment of damages or restitution for alleged loss of income, the AIU submits that the Tribunal has no authority to make any determination to that effect. Indeed, the AIU is not aware of a single decision, either at first instance or on appeal to CAS, where a Panel convened in the anti-doping context under applicable anti-doping rules has issued an award for damages or entertained a claim for loss of earnings by an Athlete.

289. The AIU therefore submits that the Panel must dismiss the Athlete's claims for damages and loss of income in this matter.

### **The Sole Arbitrator's considerations**

290. It is outside the jurisdiction of the Disciplinary Tribunal to determine matters of damages and compensation for lost income.

291. Accordingly, this claim must be dismissed.

### **VIII. DECISION AND ORDERS**

292. The Disciplinary Tribunal has jurisdiction to decide on the subject matters of this dispute.

293. The Athlete has committed ADRVs under Articles 2.4 and 2.5 of the IAAF Anti-Doping Rules.

294. A period of Ineligibility of four years is imposed upon the Athlete commencing on the date of the Disciplinary Tribunal's award. The period of provisional suspension imposed on the Athlete from 10 January 2020 until the date of the Tribunal Award shall be credited against the total period of Ineligibility.

295. The Athlete's results from 12 April 2019 until the date of the provisional suspension on 10 January 2020 shall be disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

296. The Athlete shall contribute the sum of 3,000 GBP to the costs incurred by the WA.

297. The Athlete's claim for damages is dismissed.

### **IX. THE RIGHT OF APPEAL**

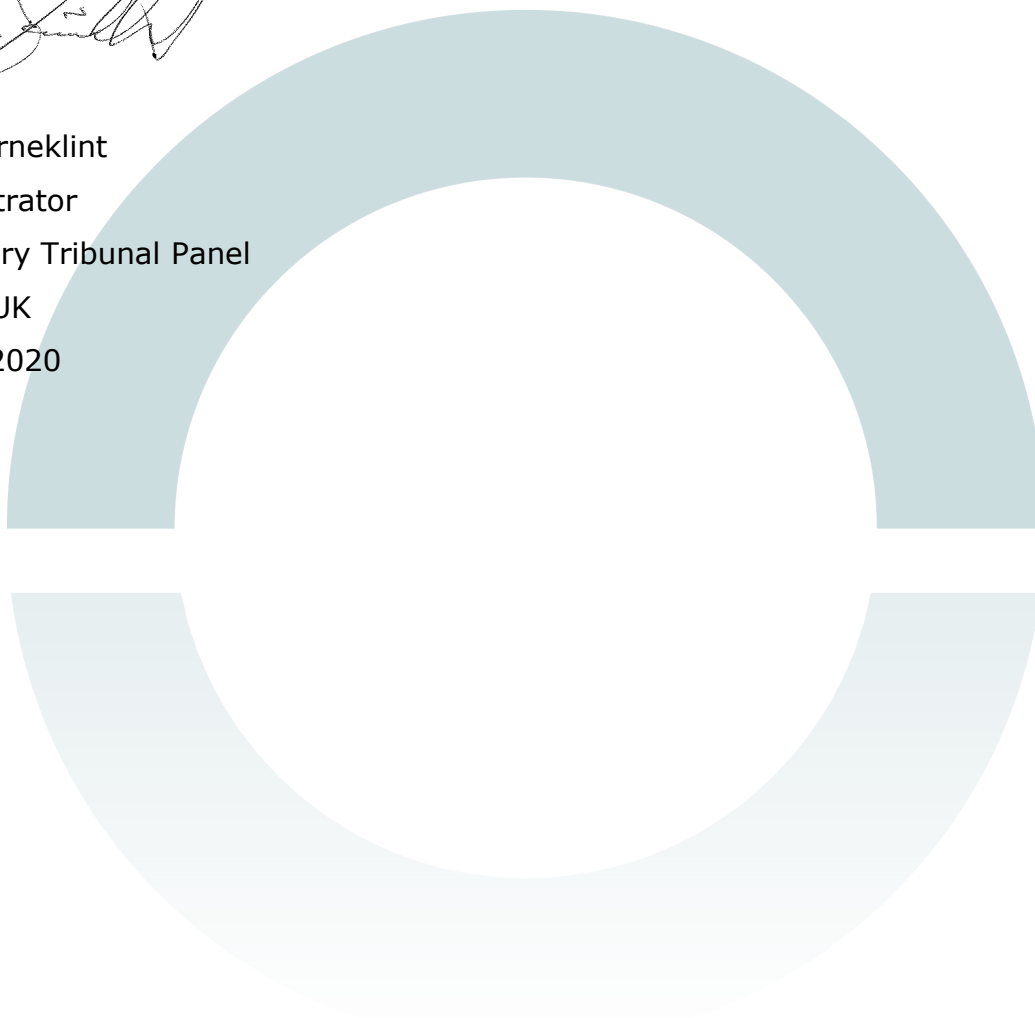
298. Article 8.9.2 of the IAAF Rules requires the Panel to set out and explain in its decision the rights of appeal applicable pursuant to Article 13 of the IAAF Rules.

299. As this proceeding involves an International Level Athlete, the decision may be appealed exclusively to CAS (see Article 13.2.2 of the IAAF Rules). The scope of review on appeal includes "all relevant issues to the matter and is expressly not limited to the issues or scope of review before the initial matter" (see Article 13.1.1 of the IAAF Rules). The deadline for filing an appeal to CAS is 30 days from

the date of receipt of the decision by the appealing party (see Article 13.7.1 of the IAAF Rules), save where WADA is the appealing party (in which case Article 13.7.2 of the IAAF Rules provide additional time). In making its decision, CAS need not give deference to the discretion exercised by the Disciplinary Tribunal (see Article 13.1.2 of the IAAF Rules).



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