REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. AD 3 OF 2019

IN THE MATTER BETWEEN

ANTI- DOPING AGENCY OF KENYA……APPLICANT

-Versus-

DAVID KIPKOECH NDUSU…….. ATHLETE

DECISION

Hearing : 22nd August 2019; 12th September 2019 & 5th November 2019

Panel : Mrs. Njeri Onyango - Panel Chair
Ms. Mary N Kimani - Member
Mr. Gichuru Kiplagat - Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant;

Mr. Kahiga Mungai of MKM Thibaru & Co Advocates, Kimathi Chambers, Kimathi Street, 6 Floor, P.O. Box Nairobi, 0721179093 kahigamosesm@gmail.com, Advocate for the Athlete.

The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.

2. The Respondent is a male adult of presumed sound mind, an Elite and International Level Athlete, of P. O. Box 119, Kapcherop (hereinafter **'the Athlete**').

Factual Background

3. The Athlete is an International Athlete hence the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.

4. On October 28th, 2018, ADAK Doping Control Officers in an In - competition testing during the 2018 Standard Chartered Marathon Nairobi, Kenya notified the Athlete that he was required to undergo a doping control process after the event. It is alleged the Athlete adamantly evaded and refused to comply to provide the Doping Control Officer with his sample for testing but proceeded to leave the venue, (see Pg. 11 in the Charge Document an Investigation Report Form dated 17th December 2018, DKN 1).

5. The position was communicated to the Respondent Athlete by Japhter K. Rugut, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 11th December 2018. In the said communication the Athlete was offered an opportunity to provide an explanation for the evasion by 27th December 2018.

6. The same letter also informed the Athlete of his right to accept or deny the charges and requesting for a hearing and gave a deadline of 27th December 2018 for his detailed response.

7. The Athlete responded vide a letter dated 10th January 2019. He denied the charges and stated that on the day of the event, he was approached by a person requesting him to provide his urine sample for testing. He stated that he feared for his safety as he was approached outside the venue of the event, an hour after the event was over, to provide his samples, the person requesting for his urine sample did not produce any identification to

support being a DCO or an ADAK personnel and he was alone therefore resulting to him not trusting this person and not providing him with his urine sample. He further stated that two weeks after the date of the event, he received a phone call from Athletics Kenya who requested his whereabouts in which he provided the information. He stated that a few days later, ADAK DCOs paid him a visit and informed him the purpose of their visit and produced their identifications. He stated that he complied with their request and provided them with both blood and urine samples for purpose of testing, (a copy of his letter dated 10th January 2019, DKN 3 is at Pg. 20 of the Charge Document).

8. A Notice to Charge dated 16th January 2019 was filed by ADAK on similar date.

9. The following directions were issued by the Tribunal:
   (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV and all relevant documents on the Respondent Athlete within 15 days of date hereof.
   (ii) The Panel constituted to hear this matter shall be as follows; Mrs. Njeri Onyango Panel Chair, Mr. Peter Ochieng, Member and Mr. Gilbert MT Ottieno, Member.
   (iii) The matter to be mentioned on 7th February 2019 to confirm compliance and for further directions.

10. On 7th February 2020 the Tribunal was not sitting therefore the matter was adjourned to be mentioned again on 20th February 2020.

11. Mr. Rogoncho who appeared for the Applicant was ordered to serve the Charge Document within 7 days and another mention set for 7th March 2019 for further directions.

12. On 7th March 2019 a copy of the Charge Document was filed with the Tribunal and during mention on same date Mr. Rongocho for the Applicant requested 14 days to effect service of the Charge Document on the Athlete. He also reported that he had communicated with the Athlete who requested to be allowed to attend only the hearing session. The matter was listed for a mention on 21st March 2019 for directions.

13. At mention on 21st March 2019, Mr. Rogoncho for the Applicant said he had not yet sent the Charge Document to the Athlete but had been in touch with

him and the Athlete had requested for a pro bona lawyer. Mr. Mungai who was present for a different matter expressed the wish to be placed on record as pro bono lawyer. The matter was set for mention on 17th April 2019.

14. When the matter was mentioned on 26th June 2019, Mr. Rongocho was in attendance for the Applicant. The Tribunal ordered he serve Mr. Mungai a mention notice so he could attend the mention on 25th July 2019 to enable the Tribunal issue proper directions with respect to the conduct of the matter and attendance of the Athlete at the hearing.

15. On 25th July 2019 a Statement of Defence was filed at the Tribunal and on even date Mr. Rongoncho who was present for the Applicant confirmed he had received the Athlete's Statement of Defence from his Counsel who though not present had asked Mr. Rongoncho to take a hearing date. The matter was set to be heard on 22/8/2019 and Mr. Rogoncho was to serve the Athlete the hearing notice.

16. The matter was partially heard on 22nd August 2019 by an altered panel consisting Mrs. Njeri Onyango, Panel Chair, Ms. Mary Kimani, Member and Mr. GMT Ottieno, Member. At the end of the hearing a further hearing was slated for 12/9/2019.

17. After hearing further witnesses on 12th September 2019 both Counsel who were present agreed that further hearing of the matter be set for 17/10/2019.

18. On 17th October 2019 The Athlete and his Counsel were not present. Mr. Rogoncho said they were indisposed and therefore the Applicant had liaised earlier with the Athlete's
    Counsel. Another date was set for 7/11/2019 with a notice to be issued to Mr. Mungai; this date was varied to 5th November 2019 when the Athlete testified before an altered panel of Mr. Gichuru Kiplagat, Panel Chair, Mary Kimani, Member and GMT Ottieno, Member in Eldoret Town. At the end of the hearing the Applicant was ordered to file and serve his written submissions within 7 days and thereafter the Athlete had 7 days to file his written submissions. Next mention to confirm compliance with these orders would be on 25/11/2019.

19. When the matter came up for mention on 4th December 2019, Mr. Rogoncho for the Applicant. The Athlete and his Counsel were not present. Mr. Rogoncho requested 7 more days to file and serve their

submissions and was granted and matter was slated for a mention on 11th December 2019.

20. On 10th December 2019 the Applicant's submissions were filed at the Tribunal.

21. At the mention on 11th December 2019 Mr. Rogoncho confirmed he had filed the written submissions. Mr. Mungai who was absent and had not yet filed his submissions. Mr. Rogoncho undertook to serve mention notice to Mr. Mungai. The matter was set for mention on 30/1/2020 to confirm compliance by Mr. Mungai.

22. On 30th January 2020 Mr. Rongoncho for the Applicant said that Counsel for the Athlete had indicated that he would appear for today's mention; he requested another mention be set for 20th February 2019 to confirm filing of the Athlete's submissions.

23. On 20th February 2019 the Applicant filed with the Tribunal copies of the Mention Notice and email sent to Mr. Mungai and at mention the Tribunal granted a last chance for filing/submission for the Athlete. Mention notice to issue from the Applicant for mention set for 27/02/2020.

24. A copy of the email notifying Mr. Mungai of the mention date of 27/02/2020 was filed with the Tribunal on even date by the Applicant. At the mention held on the same day Mr. Rogoncho was present while Mr. Mungai did not appear. The Tribunal ordered that as there had been no submission made on behalf of the Athlete, the panel would render its decision based on the material on record and the decision would be rendered on 26th March 2020.

25. It will be noted here that Mr. Mungai who at an earlier mention (on 21st March 2019) expressed the wish to be placed on record as pro bono lawyer for the Athlete did not eventually file a Notice of Appointment of Advocate with the Tribunal but he did act for the Respondent Athlete during the first two hearings.

The Hearing

26. The hearings were conducted on 22nd August 2019, 12th September 2019 and 5th November 2019.

Submissions

27. Below is a summary of the main relevant facts and allegations based on Parties written submissions.

A. Applicant's Submissions

28. Mr. Rogoncho, Counsel for the Applicant, informed the Panel that the Agency wished to adopt and own the Charge Document dated 22nd February 2019 and the annexures thereto as an integral part of its submissions.

29. He submitted that the Athlete who was charged with an ADRV for Evading, Refusing or Failing to submit to Sample Collection in contravention of ADAK ADR is a National level Athlete and therefore the results management authority vested with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in Anti-Doping Act No. 5 of 2015 to constitute a hearing panel which the Athlete was comfortable with. Further, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADC and the ADAK ADR apply to him he said.

30. At his No. 3 he states, *"The matter was set down for hearing and the athlete represented himself."*

31. In his submissions he listed the legal position under Article 3 of ADAK ADR/WADC… the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel. He also listed the Presumptions under Article 3.2 which included that facts relating to an ADRV may be established by any reliable means including admissions. He laid down the roles and responsibilities of the athlete as under WADC's Article 22.1 and also the principals enunciated in preface to the ADR regarding the duties of the athlete.

32. At No 19 of its submissions the Applicant stated that *"In his defence, the Respondent made several admissions and a few general denials. In his* ***evidence in chief*** *the respondent made the following admissions;*

a) *He admitted to his lack of interest whatsoever regarding the fight against doping as he has never attended any anti-doping workshop but has seen articles of it online*
b) *He admitted to being approached and requested to provide his urine sample*
c) *He admitted that he disregarded the request to provide his sample as he did not trust that the chaperone was an ADAK official*
d) *He admitted to not requesting the chaperone to provide official identification that identifies him as an ADAK official*
e) *He admitted to walking away from the venue without complying to the request of sample collection*

33. Counsel for the Applicant touched on the matter of burden of proof-shift to the athlete to demonstrate no fault, negligence or intention to entitle him to a reduction of sanction submitting at its No. 23 "*For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability,* ***she/he did not know that his conduct constituted an ADRV*** *or that there was no significant risk of an ADRV. According to established case-law of* ***CAS 2014/A/3820, par.77*** *the proof by a balance of probability requires that* ***one explanation is more probable than the other possible explanation.*** *For that purpose, an athlete must provide actual evidence as opposed to mere speculation.*[1]"

34. Regarding Fault/Negligence the Applicant's Counsel argued that the Athlete failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR. He specifically singled out Rule 22.1.2 *To be available for Sample collection at all times* and Rule 22.1.6 *To cooperate with Anti-Doping Organizations investigating anti-doping rule violations*.

B. Athlete's Submissions

35. In absence of submissions made on behalf of the Athlete by his Counsel, the Panel will rely on written material on record (including the oral hearings).

36. In this regard, find rendered verbatim the Athlete's handwritten explanation date 10/01/2019 (in page. 20 of the Charge Document) which was largely similar to the oral testimony he gave on 5th November 2019 in Eldoret and which we shall refer to variously when analyzing the merits of this case:

'DAVID KIPKOECH NDUSU,
P.O. BOX 119
KAPCHEROP

10/01/2019

TO THE CEO ANTI-DOPING AGENCY OF KENYA

I would like to put into your kind attention sir that on 28th October 2018 I participated in the Standard Chartered Nairobi Marathon. After finishing I managed position 13 in the full marathon. After finishing line there were many people especially race officials, I could not even allocate the points. I left with my clothes, after around 10 minutes I was lucky to see some athletes I knew, we had a little talk about the race then I asked one of them why I was not seeing the medals and straight he pointed to where they were giving out and I got the medal. At this point I still had only running kit and it was very cold and same time I was tired, so I borrowed a phone and I called him and said I was still in town and at this point we were already outside the venue. At some point on the way to the town (city) a guy came and allegedly told me I need your sample and for real I did not trust him because:

1. *It was outside the venue*
2. *He came after one hour after finishing the race*
3. *He was alone without notification*
4. *He never showed me his Identification Card*

So, at this point I was so worried and scared about him, so I said my County comes first, I walked away.

After two weeks I was called by somebody I did not save the contact but he said he was calling from Athletics Kenya and he wanted me to provide my whereabout and I provided them, after some few days ADAK surprisingly came to me with their full details, in fact they showed me their identification and notified me immediately and I signed the notification with this I proved myself right that the guy who came to me was not from ADAK because of the ADAK guys notified me accordingly and I complied with them according to the notification and provided them with the samples both urine and blood and I had no problem with them.

On 10th January 2019, I got a notification of charge and provisional suspension under Anti-Doping Agency Kenya (ADAK) Rules through No. 0720848014 at 12.10 and sent me through whatsapp.

With me I advocate for clean sport since I started training 10 years ago, my best time in Marathon is 2.18 and in half marathon 63 mins but through my hard work. I'm 100% clean and am working so hard to achieve better results and earn something through my hard work.

All that I have explained about the alleged allegation is true to the best of my knowledge.

THANK YOU
Sincerely,
David Kipkoech Ndusu'

Jurisdiction

37. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti- Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

Applicable Law

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

The following constitute anti-doping rule violations:

2.3 Evading, Refusing or Failing to Submit to Sample Collection

Evading *Sample* collection, or without compelling justification, refusing or failing to submit to *Sample* collection after notification as authorized in applicable anti-doping rules.

[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.]

Merits

39. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

40. The Tribunal will address the issues as follows:

a. ***Whether there was an occurrence of an ADVR, the Burden and Standard of proof;***
b. ***Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***
c. ***Reduction based on No Fault;***
d. ***Whether there should be a reduction based on the Athlete's prompt admission;***
e. ***The Standard Sanction and what sanction to impose in the circumstance.***

A. The Occurrence of an ADRV, the Burden and Standard of proof.

41. As used in WADC's Article 3.1:

> ***The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.***
>
> […]. ***Where the Code places the burden 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.***

42. During the hearing on 5th November 2019 the Athlete explained that indeed somebody got a hold of him and asked him what position he had garnered. The Athlete answered he had emerged position 13th and this 'somebody' said he wanted a sample. As reiterated in his hand written explanation dated 10/01/2019 contained in Pg. 20-21 of the Charge Document, the Athlete stated he was surprised and wary of his security the Athlete made a conscious decision to leave/went away without giving this person his urine sample as requested.

43. The Applicant in their submissions surmised as follows in its No. 19:
    f) *He admitted to being approached and requested to provide his urine sample;*
    g) *He admitted that he disregarded the request to provide his sample as he did not trust that the chaperone was an ADAK official.*

44. As summed up in WADC's Article 3.2: Methods of Establishing Facts and Presumptions

> 'Facts related to anti-doping rule violations may be established by any reliable means, **including admissions**.'

45. Inferring from the above, it is found that the Athlete, both in his written explanation and oral rendering at the hearing admitted to having refused or failed submit to Sample Collection during the 2018 Standard Chartered Marathon in Kenya and therefore committed an ADRV.

B. Was the Athlete's ADRV intentional?

46. The burden then shifted to the Athlete to prove that commission of his ADRV was not intentional as under Article 10.3 of the WADC:
Ineligibility for Other Anti-Doping Rule Violations

> The period of *Ineligibility* for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.5 or 10.6 are applicable:
>
> **10.3.1 For violations of Article 2.3 or Article 2.5, the period of *Ineligibility* shall be four years unless, in the 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.**

47. The main relevant rule in question in the present case then is Article 10.2.3 of the ADAK ADR, which reads as follows:

> ***As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. [...]***

48. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

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

49. While giving oral evidence the Applicant's 1st witness Benson Kipkemei Rop (who's written statement dated 17/12/2018 in Pg. 8 of the Charge Document was adopted) signified to the Panel that random selection was employed to decide which athlete would be notified beyond the mandatory 1st, 2nd, 3rd finishing positions. On that particular occasion he was to process the person who finished position No. 11; he said he changed his mind when he heard the athlete in bib No. 1513 who was walking about a meter ahead of him say in his mother tongue that he didn't want to be within the bracket of No. 10 so that he doesn't get tested.

50. The Panel has given some thought to the chaperone's claims above, which the Athlete denied during his oral testimony. In absence of an independent witness and having established that there may have been variances in the dialects spoken by both the chaperon and Athlete, the Panel will not detain itself on what exact conversation may have actually transpired between the two at the scene, safe in its determination that a routine decision to notify the Athlete had been taken by the chaperone acting on behalf of the Testing Authority, which was done procedurally and/or was in accordance with ISTI tenets.

51. Benson Rop further testified that he approached the Athlete, identified himself, (he clarified that he had a tag on the branded T-Shirt he wore), and read out to the Athlete his rights and responsibilities in English language but the Athlete who had by then given him his race position and name, rebuffed him allegedly saying he was not in the category of elite athletes and that he was going to warm down. The Athlete, he said, dropped the bib number on his luggage and walked away so Benson called to inform the happenings the other DCO – who arrived soon after to the scene where he was – and together they waited for a while but the Athlete did not show up again.

52. The Athlete in his defense said that the person who approached him did so
    - "*outside the venue*;
    - *He came one hour after finishing the race;*
    - *He was alone without notification*;
    - *He never showed no identification card.*"

53. From the Athlete's own description, during the oral hearing, of his struggle to find where the medals were being awarded, to borrowing a T-Shirt as he was feeling cold, right up to borrowing a phone to reach a Bernard who was ostensibly carrying his bag, it would seem that the Athlete had indeed already cooled down and was not in the actual race venue. This notwithstanding, the Athlete would have needed to prove to this Panel that Benson, the chaperone, found him in a place where notification was inappropriate or downright impossible but judging from the evidence given by the Athlete himself i.e. that he (Athlete) was able to borrow a phone to call his acquaintance by the name Bernard in that same place, therefore, it did not seem such was the circumstance; the more probable situation was what Benson described, *"[…] We advised the few athletes that were at the scene asking them to tell Mr. Ndusu of the importance of complying with the doping processes. We waited for the athlete to return since he had left some of his luggage at the scene. The athlete however did not show up"*, which was the picture of a venue where there were some athletes dispersed about engaging in and/or completing their cooling down activities.

54. This conclusion then calls attention to the Athlete's averment, that he felt insecure - *"In Nairobi you don't believe people"*, said the Athlete - which informed his decision to walk away. Yet the Athlete testified that he was at a venue where there were people familiar enough for him to borrow from them a T-shirt and a phone to contact the person holding his bag; it is the considered opinion of this Panel that he could have further interrogated this stranger asking for his urine sample in the same environment. The Athlete's claims that the chaperone was 'alone without notification and that he (chaperone) showed no identification card' would need to have been canvassed with some form of evidence (including collaborative) and turning to walk away did not seem to enable the Athlete secure any such further evidence other than what is currently available to the Panel, which is his (Athlete's) own word against that of the chaperone.

55. In any case, the appropriate 2017 ISTI Article 5.3.3 specified the kind of documentation required of the chaperone and the Athlete did not prove on any balance of probability that Benson, the chaperone assigned his notification did not possess such standard papers; **'5.3.3 *Sample* Collection Personnel shall have official documentation, provided by the Sample *Collection* Authority, evidencing their authority to collect a *Sample* from the *Athlete*, such as an authorisation letter from the *Testing***

Authority. DCOs shall also carry complementary identification which includes their name and photograph (i.e., identification card from the *Sample* Collection Authority, driver's licence, health card, passport or similar valid identification) and the expiry date of the identification.' (Our emphasis).

56. As for the Athlete's contention that he was approached outside the venue and assuming that indeed was the case, either way, that situation would not have been fatal to the notification process as Article 5.3.5 of 2017 ISTI left it to the chaperone and/or DCO to decide where/how/when to conduct the notification given their applicable circumstances; **'5.3.5 The *Sample* Collection Authority, DCO or Chaperone, as applicable, shall establish the location of the selected *Athlete* and plan the approach and timing of notification, taking into consideration the specific circumstances of the sport/*Competition*/training session/etc. and the situation in question.'**

57. We agree with the Athlete's Counsel's observation that the other DCO, Sammy Muruka who was the Applicant's 2nd witness and whose written statement dated 17/12/2018 at Pg. 10 of the Charge Document was adopted at the oral hearing chiefly relied on the Benson's report and did not interrogate e.g. interview Benson or take a photo of the bib at the scene. This witness though, collaborated the Athlete's claim that the notification to the Athlete took a bit too long, coming about 1 hour after the race had ended which, the DCO said, may have been as a result of any number of factors including the last moment decision to change from the Position 11 to Position 14 of 'intelligence' based notification.

58. The Athlete while narrating how Athletics Kenya (AK) personnel called him about two weeks later to establish his whereabouts further stated that, "*the guy who held me at Stanchart was among*" the group of people who came to test him at his home about two weeks after the 2018 Nairobi Standard Chartered Marathon incident. In particular, the Athlete said *"the chaperone was asked if he (Athlete) was 'the one' and he (chaperone) said yes"*, confirming to the Panel that the chaperone by the name of Benson Rop had actually engaged him at the Nairobi Standard Chartered Marathon. Queried by the Panel as to why he did not accede to the notification at the competition venue despite correctly identifying himself to the chaperone, the Athlete said that after a bad incident where he was slapped and mugged in Nairobi in 2014, he does not talk to strangers or *"I would not even believe him if he (chaperone) was a pastor."* The Athlete said "*if he had come to me at the dais, I would have complied but he got me at back of street going to town*" and "*I thought*

he was a "mukora"-a thug". The Athlete said in his experience, "*I had seen others taken by WADA immediately after the race*". The Panel then asked him what he had that would have been stolen since he had described himself being only in his running attire to which came a non-committal answer.

59. Granted that this was the first time ever that the Athlete was approached for a doping test and that he had not received any formal doping education, it is not lost on the Panel that the Athlete at 34 years was not a minor and had told the Panel he had participated in a number of events from 2008 which included Standard Chartered Marathons Nairobi in 2008/9, Berlin Half Marathon 2010, KASS FM 2013 and he also had run in Poland and Czech Republic.

60. The Panel is also cognizant of the facts (i) that personal security concerns are primal and (ii) that there may have been a language hitch with the chaperone using the Nandi dialect while the Athlete used the Marakwet dialect of the Kalenjin language. Yet, as noted above, this was not the Athlete's debut athletic event and for a person with at least his sporting experience, this Panel is of the opinion that he could have tackled both aspects above using the scraps of doping bits he had seen done at the other many events he had participated in without having to hastily compromise his notification since, in voluntarily signing up for the race, he had expressly bonded himself to the WADC/ADAK ADR. The panel in **Kajuga v. Africa Zone V RADO A-01-2016** at para.4.3.5 put it thus: 'Kajuga is a 30-year-old elite athlete who after being notified, decided to ignore several attempts from numerous people that implored him to provide a sample. There is no evidence that he did any investigations that would have allayed his expressed fears as to the validity of the request to provide a urine sample nor did he exercise any level of care to ensure his conduct is appropriate after been informed of the possible consequences thereof' - (our emphasis).

61. After deciding the lone chaperone was a danger to him, the Athlete wrote, *"so at this point I was so worried and scared about him, so I said my County/security comes first I walked away"*; that he consciously declined to proceed with his notification process is rightly construed to be an intentional act by the Applicant, a view upheld by this Panel, the Athlete not having presented before it any compelling reason(s) to justify what can only be termed as a hasty or perhaps phobic reaction toward the chaperone on duty in this particular incident. In **Kajuga v. Africa Zone V RADO A-01-2016** the panel similarly averred at para. '4.3.2.2 In the matter of Federation

Internationalede Natation ('FINA') v William Brothers[12] reference is made to the aforementioned CAS 2008/A/1557 involving the football players Mannini and Possanzini where the Panel held the word *compelling* underscores *the strictness with which justification needs to be examined.* Para.

4.3.2.3 In Sport Dispute Resolution Centre of Canada ('SDRCC') matter[13] of Shari Boyleit was held that "… to be compelling, her departure would have to have been unavoidable. In fact, her *departure from the track and field was voluntary and intentional.* **Even if she was sick, she knew no sample had been taken when she left the Centre** …."[14] Kajuga, despite feeling the officials were very casual and the process did not look professional, knew the chaperone and doping control officer were there to take a urine sample from him. Kajuga declined to provide one in order to focus on his race. He was the only athlete on the night that declined to provide a sample.'

C. Reduction Based on No Fault or Negligence/No Significant Fault or Negligence/Knowledge

62. Since it is already concluded above that the Athlete's ADRV was ruled intentional, the Panel does not deem it necessary to assess whether the Athlete may have had No fault or Negligence in committing the anti-doping rule violation.

63. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had no fault or negligence in committing an anti-doping rule violation.

64. Additionally, the Tribunal finds that the above reasoning also applies to "no significant fault or negligence" (Article 10.5 of the ADAK Rules). The Tribunal observes that the comment to Article 10.5.2 of the ADAK Rules takes away any possible doubts in this respect:

> *"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 […] or an element of a particular sanction […]".*

65. In regards to knowledge, this Panel takes cognizance of the fact that even though the Athlete was being notified for the very first time, the Doping Program was not an entire novelty to him and even if it were, ignorance of

sports doping by adherents of the Code would be not be an adequate shield; as averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF):** *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating …would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules. A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.*

D. Whether there should be a reduction based on the Athlete's prompt admission

66. Reference is made to No. 6 of the Statement of Defence filed by the Athlete's Counsel; *"The Respondent avers that indeed he replied promptly to ADAK allegations which had been communicated to him vide a letter dated 11 December 2018."*

67. In addition to the WADC's Article 10.6.3 on Prompt Admission, the Panel first considered Article 5.4.3 in 2017 ISTI regarding notification, which it is noted is couched in mandatory terms: 5.4.3 'The Chaperone/DCO shall have the *Athlete* sign an appropriate form to acknowledge and accept the notification. If the *Athlete* refuses to sign that he/she has been notified, or evades the notification, the Chaperone/DCO shall, if possible, inform the *Athlete* of the *Consequences* of refusing or failing to comply, and the Chaperone (if not the DCO) shall immediately report all relevant facts to the DCO. When possible the DCO shall continue to collect a *Sample*. The DCO shall document the facts in a detailed report and report the circumstances to the *Testing* Authority. The *Testing* Authority **shall** follow the steps prescribed in Annex A – Investigating a **Possible** Failure to Comply.

68. Among the steps in the aforementioned Annex A that the Testing Authority/Applicant was required to follow were:

> **'A.4 Requirements**
>
> A.4.1 **Any potential** Failure to Comply **shall** be reported by the DCO and/or followed up by the *Testing* Authority as soon as practicable.

A.4.2 **If the *Testing* Authority determines that there has been a potential Failure to Comply, the *Athlete* or other party shall be promptly notified in writing:**

a) of the possible *Consequences*; and

b) that the potential Failure to Comply will be investigated by the *Testing* Authority and appropriate follow-up action will be taken.

A.4.3 Any additional necessary information about the potential Failure to Comply shall be obtained from all relevant sources (including the *Athlete* or other party) as soon as possible and recorded.'

69. In practice it seems the appropriate follow-up action of A.4.2(b) – of testing the Athlete after identifying his whereabouts through Athletics Kenya (AK) – was taken but the material on record before the Tribunal does not show any, let alone prompt **written notification** of **possible consequences** as required by A.4.2(a). From the reading of A.4.2(a), we opine that as the ADRV was committed on 28th October 2018 and subsequently the Applicant conducted A.4.2(b) or at least the practical part of it about two weeks following the Standard Chartered Marathon incident, then A.4.2(a) and written informatory required in A.4.2(b) should have been promptly documented/served to the Athlete in about the same two week period or at least **prior** to the Notice of Charge/ Provisional Suspension asserting the ADRV being served on the Athlete. In effect, we deem that a 'written notification of possible consequences' and a 'written notification of an asserted ADRV' are two distinct documentations according to ISTI's A.4.2(a) and the former must be served promptly IF the Testing Authority determines that there is a Potential Failure to Comply.

70. Judging from the Athlete's hand written explanation dated 10/01/2019 (Pg. 20 of the Charge Documents) and studying the Applicant's Charge Document at BACKGROUND No.5 it becomes clear that the Notice of Charge and Provisional Suspension dated 11th December 2018 on Pg. 20 of the Charge Documents was the first written documentation of the 'asserted' ADRV served to the Athlete through telephone number 0720848014 at 12.10 Noon via Whatspp by the Applicant. The Athlete stated that these were served on him on 10th January 2019. Additionally, if indeed the service was effected way after the 27th December 2018 deadline – imposed by the Applicant for Athlete's explanation to be handed in – had lapsed, then

Athlete was also Not procedurally accorded a chance to make himself available for WADC's Article 10.6.3 considerations:

> '10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1 An *athlete* or other *Person* potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing *Sample Collection* or *tampering* with *Sample Collection*), by promptly admitting the asserted anti-doping rule violation after being confronted by an *anti-doping organization*, and also upon the approval and at the discretion of both *Wada* and the *anti-doping organization* with results management responsibility, may receive a reduction in the period of *Ineligibility* down to a minimum of two years, depending on the seriousness of the violation and the *athlete* or other *Person's* degree of *fault*.'

71. The Applicant did not contest that this was the Athlete's first ADRV, including the fact that the notification that was the subject matter in this case, was also his first such notification during his entire athletic career, thus far and that the Athlete had not attended any formal anti-doping awareness program, which riveted the attention of this Panel to the principle enumerated in **Cilic CAS 2013/A/3377** para.76(c), 'The extent of anti-doping education received by the athlete (or the extent of antidoping education which was reasonably accessible by the athlete) (see also CAS 2012/A/2822, paras 8.21, 8.23).' The Athlete's limited doping education being a relevant consideration, we found that the matter of complying with the procedures directed in ISTI A.4.2 for example, fell squarely in the purview of the RMA/Applicant rather than the Athlete and the aforementioned twin lapses by the Applicant may have been of great import for the Athlete in regard to rebates predicated upon the WADC.

72. In this regard, the Panel noted the observations in CAS jurisprudence: In **CAS 2002/A/385 T. /FIG** the panel stated in para. 25. 'In order to assess the consequences of the Respondent's breach of its own rules**, the Panel has to examine the importance of this provision. It must take into account the reasons for which an athlete should ordinarily be informed of the time an**d date of the opening of the B-sample. […]' and para.34. 'In conclusion, the Panel **is inclined to view the procedural error committed in this case as compromising the limited rights of an athlete to such an extent t**hat the

results of the analysis of the B-sample and thus the entire urine test must be disregarded.'

73. For what reasons should an athlete be promptly informed of the possible consequences, in particular in writing, even as the Results Management Authority pursues its investigatory process of his/her failure to comply? The athlete's right to comprehensive information about his/her potential ADRV for his/her defence might be a reason. An alleged violation hanging in the air as opposed to one reduced in writing may have the effect of crystallizing the matter for both parties as ISTI's A.4.3 continues to advice, 'Any additional necessary information about the potential Failure to Comply shall be obtained from all relevant sources (including the *Athlete* or other party) as soon as possible and recorded.' Read together with WADC's Article 10.6.3, likely mitigation considerations might be another reason.

74. Armed with his apparently rudimentary knowledge in doping matters the Athlete in his explanation wrote, "*After two weeks I was called by somebody I did not save the contact but he said he was calling from Athletics Kenya and he wanted me to provide my whereabout and I provided them, after some few days ADAK surprisingly came to me with their full details, in fact they showed me their identification and notified me immediately and I signed the notification with this I proved myself right that the guy who came to me was not from ADAK because of the ADAK guys notified me accordingly and I complied with them according to the notification and provided them with the samples both urine and blood and I had no problem with them.*"

75. Minus the important written notification from the Applicant, the Athlete having finally given out his samples 'without problem with them' seemed oblivious to what other steps would be taken against him until, "*On 10th January 2019, I got a notification of charge and provisional suspension under Anti-Doping Agency Kenya (ADAK) Rules through No. 0720848014 at 12.10 and sent me through whatsapp.*", at which point again it seemed the Athlete scrambled to mitigate his situation and in this particular case, the Athlete's Counsel averred that 'indeed the Athlete replied promptly'. Yet, a study of the evidence on record showed that the possible relief associated with a prompt admission was in effect time barred by the 'missed deadline' attributable to the error of the RMA/Applicant.

76. Further, the Applicant did not refute the Athlete's assertion in his (Athlete's) handwritten explanation that it served him their Notice of

Charge and Mandatory Provisional Suspension dated 11th December 2018 on 10th January 2019. The Applicant in its submissions only stated, "*In the said communication the Athlete was offered an opportunity to provide an explanation for the evasion by 27th December 2018…*" Neither was the Athlete's claim that he instantaneously tendered his explanation (which was dated the same day – 10/01/2019 – which he(Athlete) said he received the Applicant's asserted ADRV Notice of Charge and Mandatory Suspension) challenged in the course of the arbitral procedure. We thus concur with the Athlete's Counsel's view that the Athlete, yet constrained by the very late service, 'replied promptly' admitting his failure to comply while simultaneously giving his explanation thereof. Therefore, right from the noncompliance by the Applicant with the procedural ISTI's A.4.2(a) requirement, to the missed deadline occasioned by late service again by the Applicant, the Athlete should have been on the line to benefit from respective/appropriate WADC's predicated reliefs.

77. Therefore in summary, the Panel having analyzed lack of adherence to the mandatory ISTI's A.4.2(a) clause and/or late serving of the notification of asserted ADRV, arrived to the conclusion that the departures impinged on the Athlete's limited rights and in particular impacted his right to effectively draw on the possible reliefs associated with the WADC.

78. Further, in **CAS 2014/A/3487 Campbell v. JAAA & IAAF** para. 147 'The Panel accepts there is considerable force in the proposition that, **in order to justify imposing a regime of strict liability against athletes for breaches of anti-doping regulations, testing bodies should be held to an equivalent standard of strict compliance with mandatory international standards of testing.** This is particularly important in view of the principal purpose of the WADA IST, namely to ensure "*the integrity, security and identity of the Sample*" (section 7.1). The need for a balanced approach to a regime of strict liability, on the one hand, and strict compliance with international standards, on the other, contributes to that purpose." Also see
PURPOSE, SCOPE AND ORGANIZATION OF THE WORLD ANTI-DOPING PROGRAM AND THE CODE under the sub-heading International Standards *'[…]. **Adherence to the International Standards is mandatory for compliance with the Code**.'*

79. Hence this Panel is compelled to call out the glaring noncompliance with the ISTI A.4.2 as doing otherwise would be tantamount to rendering the International Standards a nullity as held **CAS 2014/A/3487 Campbell v.**

JAAA & IAAF para. 181 'Only by cultivating a culture of responsibility, diligence and absolute intolerance of doping can fairness in professional sport be achieved and maintained, in a manner that protects all athletes. Anti-doping agencies play a critical role in that endeavor. **However, their ability to hold athletes to that strict standard of accountability is necessarily attenuated in circumstances where those agencies manifestly** and willfully **fail to uphold their side of the bargain. […]To adopt a different approach might be said to encourage non- compliance with international standards and could render such standards a nullity**.'

E. Sanctions

80. With respect to the appropriate period of ineligibility, Article 10.3 of the WADC/ADAK ADR provides that:

> *The period of ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.5 or 10.6 are applicable:*
> *10.3.1 For violations of Article 2.3 or Article 2.5, the period of Ineligibility shall be four years unless, in the 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.*

81. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

> *If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. …*

82. In regard to Disqualification, Article 10.8 of the ADAK ADR reads as follows:

> *Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*
> *In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive sample*

was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes.

83. During the oral hearing the Athlete in his plea deeply regretted this incident, saying if he knew (better) how it would disrupt his athletic career which he was just beginning to put back on track after a spate of injuries, he would have taken the time to give his sample and he was 100% sure he would comply in future.

84. At the tail end of his Statement of Defence, Counsel for the Athlete prayed that a proportionate sanction be meted out on the Athlete.

85. In determine appropriate sanction for Athlete's ADRV **CAS 2013/A/3327, paras. 76/77,** was instructive:

> '76. *Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also DE LA ROCHEFOUCAULD E., CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.).*
>
> *77. cc) Other factors – Elements other than fault (such as CAS 2012/A/2924, para 62) should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text.'*

86. Conscious of the caution in Cilic, **CAS 2013/A/3327, para. 77,** a sanction for the Athlete's fault, tempered by the minimum period of Ineligibility dictated by WADC's Article 10.6.3 for Article 10.3.1 (for evading or refusing Sample Collection) by promptly admitting the asserted ADRV after being confronted by an ADO lends itself to this Panel, in view of the Applicant's breach of the ISTI provision despite the obligations and duty under Results Management placed on it by the Code.

Decision

87. Consequent to the discussions on merits of this case:

(i) The applicable period of Ineligibility of two (2) years is hereby upheld;

(ii) The period of Ineligibility shall be from 28th October 2018, being the date on which the Athlete was provisionally suspended, until 27th October 2020;

(iii) All competitive results obtained by the Respondent Athlete from and including 28th October 2018 are disqualified including prizes, medals and points;

(iv) Each party shall bear its own costs;

(v) The right of appeal is provided for under Article 13 of WADA Code, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this *28th* **day of** *July,* **2020**

Mrs. Njeri Onyango, Panel Chairperson

Ms. Mary N. Kimani, Member

Mr. Gichuru Kiplagat, Member