TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2021/A/7761 World Atheltics v. Joyce Chepkirui & Anti-Doping Agency of Kenya (ADAK) & Athletics Kenya (AK)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Ms Annett Rombach, Attorney-at-law, Frankfurt am Main, Germany

in the arbitration between

World Athletics, Monaco
Represented by Mr. Tony Jackson of the Athletics Integrity Unit and Mr. Ross Wenzel of Kellerhals Carrard, Lausanne, Switzerland

Appellant

and

Ms. Joyce Chepkirui, Nairobi, Kenya
Represented by Dr M. Owuor of Agan & Associates Advocates, Nairobi, Kenya

First Respondent

&

The Anti-Doping Agency of Kenya, Nairobi, Kenya
Represented by Mr. Bildad Rogoncho, Nairobi, Kenya

Second Respondent

&

Athletics Kenya, Nairobi Kenya
Represented by Mr. Elias J. Masika of Triple Ok Law LLP Advocates, Nairobi, Kenya

Third Respondent

I. THE PARTIES

1. World Athletics (the "Appellant" or "WA"), formerly the International Association of Athletics Federations ("IAAF"), is the international governing body for the sport of athletics, recognised as such by the International Olympic Committee. It has its headquarters in Monaco. One of its responsibilities is the regulation of long-distance running, including, under the World Anti-Doping Code ("WADC"), the running and enforcing of an anti-doping programme.

2. Ms. Joyce Chepkirui (the "Athlete" or the "First Respondent"), born in 1988, is an International-Level long-distance runner of Kenyan nationality.

3. The Anti-Doping Agency of Kenya (the "ADAK" or the "Second Respondent") is the national anti-doping organisation for the country of Kenya, recognized as such by the World Anti-Doping Agency ("WADA"). It has its registered seat in Nairobi, Kenya.

4. Athletics Kenya ("AK" or the "Third Respondent") is the national governing organisation for the sport of Athletics in Kenya and is, as such, the relevant World Athletics member for the country of Kenya. It has its registered seat in Nairobi, Kenya.

5. The Athlete, ADAK and AK are collectively referred to as the "Respondents". The Appellant and the Respondents are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, she refers in this Award only to the submissions and evidence she considers necessary to explain her reasoning.

7. The Athlete has been charged with violating Rule 32.2(b) of the 2016-2017 IAAF Competition Rules (the "2016 IAAF Rules"): "*Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*".

8. The evidence of the Athlete's alleged anti-doping rule violation in the matter at hand is based on a longitudinal analysis of her Athlete Biological Passport ("ABP") and allegedly involves prohibited blood doping since 2016.

9. Between 18 April 2013 and 4 August 2017, WA collected ten (10) ABP blood samples from the First Respondent. Each of the samples was analyzed by a laboratory accredited by the WADA and logged in the Anti-Doping Administration & Management System ("ADAMS") using the Adaptive Model, a statistical model that calculates whether the reported HGB (haemoglobin concentration), RET% (percentage of immature red blood

cells - reticulocytes) and OFF-score (a combination of HGB and RET%) values fall within an athlete's expected distribution.

10. The registered values for HGB, RET% and OFF-score in the Athlete's respective samples are as follows:

No.	Sample code	Date of Sample	HGB (g/dL)	RET%	OFF-score
1	567878	18 April 2013	14.3	1.18	77.82
2	838494	10 April 2014	13.8	1.27	70.4
3	62647	17 April 2015	14	1.46	67.5
4	128732	06 April 2016	16.6	1.58	90.6
5	63394	13 April 2016	14.7	2.18	58.4
6	64129	03 November 2016	16.1	1.84	79.6
7	223856	15 December 2016	16.8	1.34	98.54
8	228459	22 February 2017	16.2	2.35	70.02
9	3833764	13 April 2017	16	1.6	84.1
10	338433	04 August 2017	15.9	0.95	100.5

11. The Athlete's ABP was submitted to a panel of experts for review on an anonymous basis. The expert panel was comprised of three experts with knowledge in the field of clinical haematology, laboratory medicine (assessment of quality control data, analytical and biological variability and instrument calibration), sports medicine and exercise physiology: Dr Olaf Schumacher, Prof. Giuseppe D'Onofrio and Prof. Michel Audran (together the "Expert Panel").

12. The Expert Panel examined the Athlete's ABP (which was anonymized and identified by the code "BPID BPC2025T171") and produced a joint opinion dated 10 February 2018 (the "First Expert Panel Joint Opinion"). The Expert Panel noted that there were several "abnormalities" at 99.00% specificity:

"In the automated analysis by the automated model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the profile was flagged with abnormalities at 99% specificity on several occasions:

- *Sample 4 Upper limit for haemoglobin concentration*
- *Sample 5 Upper limit for reticulocyte%*
- *Sample 6 Upper limit for haemoglobin concentration*
- *Sample 7 Upper limit for haemoglobin concentration and OFF score*
- *Sample 8 Upper limit for reticulocyte%"*

13. The Expert Panel explained the abnormalities identified by it as follows:

"A clear difference in haemoglobin concentration and reticulocytes when comparing the years before and after 2015. Whereas between 2013 and 2015, the athlete displayed normal values for a female athlete, both haemoglobin concentration and reticulocytes are markedly higher and more variable in 2016 and 2017. This is especially visible when comparing the samples obtained in April 2013- 2017 (Marathons/ Half Marathons in London, Prague and Boston). All these locations were at sea level and it appears that the athlete sojourned at altitude during the remaining time of the years from 2013 to 2017, thus making any environmental impact on the profile an unlikely explanation for the difference. The pairing of high haemoglobin and high reticulocytes, which is unlikely to be natural (as identified by the adaptive model). From a haematological point of view, the association of high reticulocytes with high haemoglobin concentration is not physiological and is not seen in any known disease (except rare congenital forms of erythrocytosis, in which values are usually stable over time). The use of erythropoiesis stimulating substances, on the other end, represents a plausible explanation."

14. The Expert Panel concluded unanimously that "[…] *the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using an erythropoietic stimulant is high. The likelihood of a medical condition causing the abnormality is low.*"

15. On 26 March 2019, the Athletics Integrity Unit ("AIU"), on behalf of WA, informed the Athlete that it had initiated an investigation into a potential anti-doping rule violation against her and that she was given the opportunity to provide an explanation for the alleged abnormalities detected in her ABP.

16. On 24 April 2019, the Athlete submitted an explanation for the abnormalities (the "Athlete Explanation") and, on 29 April 2019, provided further medical documents in support of that explanation. The Athlete Explanation sets forth the following:

"[…] I hereby state that during the past years have been suffering from vaginal bleeding which led hormonal imbalance, secondary to the three (3) month injection for contraceptive. Have always been using Depo-provera to stabilize this condition. Other drugs that have been using are:

1: STERON TABLETS
2: RANFERON SYRUP
3: IRON SUCROSE INJECTION

Moreover, am always on dietary iron rich diet like animal products and vegetables, for example, Soybeans, Lentils, red kidney beans, Pumpkins, Spinach, Broccoli and beetroots also liver and red meat."

17. The Athlete Explanation was subsequently provided to the Expert Panel. In its joint report dated 25 May 2019 (the "Second Expert Panel Joint Opinion"), the Expert Panel rejected the Athlete Explanation as a valid cause for the Athlete's allegedly abnormal blood values and confirmed the First Expert Panel Joint Opinion in the following terms:

"In conclusion, it is our unanimous opinion that based on the information provided by the athlete at this stage, the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using an erythropoietic stimulant is high. The documentation submitted by the athlete did not explain several of the abnormal features of the profile. Environmental factors such as altitude exposure are also improbable to be the unique causal effect, as based on the available documentation, the athlete sojourned at altitude most of the time and only left this environment for major events."

18. On 28 June 2019, the AIU served a Notice of Charge upon the Athlete and imposed a provisional suspension effective immediately pending the outcome of the matter.

19. On 8 July 2019, the Athlete informed the AIU that she denied the charges and requested a hearing.

20. On 15 July 2019, the AIU referred the matter to AK, which, on the same day, forwarded the case file to ADAK as the competent entity to provide first instance disciplinary proceedings against athletes in Kenya.

21. On 18 November 2019, ADAK filed a Notice of Charge against the Athlete with the Sports Dispute Tribunal of Kenya ("SDT"). On 4 August 2020, the Athlete submitted her Defense to the SDT. On 19 November 2020, the SDT issued a decision (the "Appealed Decision"), ruling the dismissal of the matter.

22. On 11 January 2021, ADAK sent a copy of the Appealed Decision to the AIU. On the same day, the AIU noted the incompleteness of the Appealed Decision (in that it was missing a page) and requested a copy of the full case file.

23. On 22 January 2021, ADAK provided the AIU with the complete Appealed Decision together with a copy of the case file.

24. On 28 February, upon a request by WA to comment on the Athlete's submission to the SDT dated 4 August 2020, the Expert Panel noted that the Athlete had only repeated her previous arguments. It came to the following conclusions (the "Third Expert Panel Joint Opinion"):

"Given that no new aspects have been presented in the "Respondents submission", we confirm our previous unanimous opinion that based on the information available at this stage, the likelihood of the abnormalities in profile BPC2025T17 being due to blood manipulation, namely the artificial increase of red cell mass using an erythropoietic stimulant is high. In contrast, the likelihood for environmental, medical or analytical effects as a possible cause is low. "

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 5 March 2021, the Appellant filed its Statement of Appeal/Appeal Brief (the "Appeal") against the Respondents in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). The Appellant proposed that the matter be

submitted to a Panel composed of a sole arbitrator in accordance with Article R50 of the Code.

26. On 9 March 2021, the CAS Court Office sent a letter to the Respondents informing them, *inter alia*, that according to Article R55 of the Code, they shall submit their Answer within thirty (30) days of receipt of said letter. Furthermore, the Respondents were invited to inform the CAS Court Office within five (5) days whether they agree to the appointment of a sole arbitrator.

27. On 12 March 2021, the Third Respondent sent a letter to the CAS Court Office, confirming its agreement to the appointment of a sole arbitrator.

28. By letter of 26 March 2021, the CAS Court Office informed the Parties that the First and Second Respondent had failed to provide their position in respect of the appointment of a sole arbitrator, and that it would be for the President of the CAS Appeals Division, or her Deputy, to decide the issue.

29. On 6 April 2021, the First Respondent submitted her Answer and a "Notice of Cross Appeal".

30. On 7 April 2021, the Third Respondent submitted its Answer.

31. On 7 April 2021, the Second Respondent requested an extension of 15 days for the filing of its Answer ("Request for Extension").

32. On 13 and 14 April 2021, the Appellant and the Third Respondent consented, respectively, to the extension of the time limit for the filing of the Second Respondent's Answer.

33. On 16 April 2021, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel appointed is constituted as follows:

    Sole Arbitrator: Ms. Annett Rombach, Attorney-at-Law in Frankfurt, Germany

34. On 19 April 2021, the CAS Court Office informed the Parties that the Second Respondent's Request for Extension was granted. On 28 April 2021, the Second Respondent submitted its Answer.

35. By correspondence of 29 April 2021, the CAS Court Office requested the First Respondent, within three (3) days, to state whether she maintains her "Cross-Appeal", or further explain and provide evidence of (a) CAS jurisdiction for a "Cross-Appeal"; and (b) proper filing of a Cross-Appeal (including payment of a filing fee). The Parties were further invited to inform the CAS Court Office, by no later than 5 May 2021, whether they prefer a hearing to be held or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

36. On 6 May 2021, the CAS Court Office informed the Parties about the Appellant's, and the Second and Third Respondent's preference for an oral hearing to be held in the matter.

37. On 31 May 2021, the CAS Court Office noted that the First Respondent did not state whether she would maintain her "Cross-Appeal" within the prescribed deadlines, and

informed the Parties that CAS would consider her "Cross-Appeal" withdrawn, unless the CAS Court Office would hear otherwise from the First Respondent by 4 June 2021. Furthermore, the Parties were informed that the Arbitrator had decided to hold a hearing by video-conference.

38. By correspondence of 16 June 2021, the CAS Court Office informed the Parties that the video hearing would be held on 24 June 2021 at 9:30 am (Swiss time).

39. On 23 June 2021, the CAS Court Office, on behalf of the Sole Arbitrator, transmitted the Order of Procedure to the Parties which was duly signed and returned by the Appellant and the Third Respondent. Despite a respective reminder, the First Respondent and the Second Respondent have not signed the Order of Procedure.

40. On 24 June 2021, a hearing via video-conference was held. At the outset of the hearing, all Parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.

41. In addition to the Sole Arbitrator and Ms. Andrea Sherpa-Zimmermann, Counsel at the CAS, the following persons attended the video hearing:

For the Appellant:	Mr. Ross Wenzel, Counsel;
For the First Respondent:	Dr. Maurice Ajwang Owuor, Counsel;
For the Third Respondent:	Mr. Elias J. Masika, Counsel; Mr. Emmanuel Obam, Assistant; Ms. Elsie Kimeli, Intern.

42. The Second Respondent did not participate in the hearing, despite having been duly invited to do so.

43. The hearing began at 09:30 am and ended at 11:15 am without any technical interruption or difficulty. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator. After the Parties' final and closing submissions, the hearing was closed and the Sole Arbitrator reserved her detailed decision for this written award.

44. Upon closing the hearing, the Appellant and the Third Respondent expressly confirmed that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The First Respondent stated that it could have been accorded a better chance to present her case without certain miscommunications that had happened before the hearing (see below at Section **VIII. B.**).

45. The Sole Arbitrator has carefully taken into account all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarized in the present Award.

IV. THE POSITION OF THE PARTIES

46. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that she has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Position of the Appellant

47. The Appellant submits the following in substance:

- As a matter of principle, the ABP is a reliable means of establishing blood doping. This is well settled in CAS case law. The Athlete's ABP profile constitutes clear evidence of blood doping between 2016 and 2017. The Athlete, therefore, has committed an ADRV in breach of Rule 32.2(b) as follows:
  - There is a clear difference in haemoglobin concentration and reticulocytes when comparing the first three samples collected between 2013 and 2015 and the following samples collected in 2016 and 2017;
  - The pairing of high haemoglobin and high reticulocytes, in particular in Sample 8, is abnormal.
- None of the Athlete's arguments explain the abnormalities in her ABP. Since the Athlete has failed to submit any further arguments to explain those abnormalities beyond the dismissal of her initial explanations by the Expert Panel, they remain entirely unexplained. In view of the foregoing and, in particular, on the basis of the First, Second and Third Joint Expert Opinions, the Appellant submits that the ABP profile of the Athlete constitutes reliable evidence of blood doping in the period between 2016 and 2017.
- In accordance with Rule 40.2(a)(i) of the 2016 IAAF Rules, the period of ineligibility shall be four (4) years. The Athlete has failed to meet her burden to establish that her violation was not intentional.
- The period of ineligibility shall commence on the date of the CAS award, but the Athlete shall be afforded credit against the period of ineligibility for the period of the provisional suspension served (from the date of the Notice of Charge issued on 28 June 2019 until the date of the Appealed Decision on 19 November 2020) pursuant Rule 40.11(c) of the 2016 IAAF Rules.
- Pursuant to Rule 40.9 of the 2016 IAAF Rules, any competitive results obtained by the Athlete between the date of her first ADRV (6 April 2016) and the date on which the CAS award enters into force shall be disqualified.

48. In light of the above, the Appellant submits the following prayers for relief in the Request for Arbitration:

"World Athletics hereby respectfully requests the CAS to rule as follows:

a) The Appeal of World Athletics is admissible.

b) The Appealed Decision dated 19 November 2020 rendered by the SDT is set aside.

c) The Athlete is found to have committed an Anti-Doping Rule Violation under Rule 32.2(b) of the Rules.

d) The Athlete is sanctioned with a period of ineligibility of four (4) years starting on the date on which the CAS award enters into force. Any period of Provisional Suspension effectively served by the Athlete before the entry into force of the CAS award shall be credited against the total period of Ineligibility to be served.

e) Any results obtained by the Athlete between 6 April 2016 and the date on which the CAS award enters into force are disqualified with all resulting consequences (including forfeiture of any titles, awards, medals, points, prize and appearance money).

f) The arbitration costs, if any, shall be borne by the Athlete (or jointly and severally by the Athlete and Athletics Kenya).

g) World Athletics is granted a significant contribution towards its legal and other costs."

B. The Position of the First Respondent

49. The First Respondent submits the following in substance:

- The presumption of innocence until proof of guilt is trite law. The burden to demonstrate an anti-doping rule violation lies on the Appellant.
- The SDT did not err in finding that the Athlete had not committed an anti-doping rule violation. The ABP cannot be considered conclusive evidence for determining whether an Athlete has intentionally manipulated his or her blood. Between 2010 and 2011, a large number of reports regarding the stability of the blood variables used to determine the ABP have shown mixed results. This demonstrates that there is a risk of misinterpreting the physiological variations of the haematological parameters determined by the anti-doping authorities in the ABP. The analytical variability due to exercise training and competitions and/or to different metabolic energy demands, hypoxia treatments, etc. could lead to an increase in false positives when using the ABP. Furthermore, there are various topics which are not defined and scientifically completely explained in the ABP, limiting its effectiveness as evidence.
- There is no clear difference in haemoglobin concentration and reticulocytes when comparing years before and after 2015.
- The First Respondent denies that the pairing of high haemoglobin and high reticulocytes is unlikely to be natural and that, from a haematological point of view, the association of high reticulocytes with high haemoglobin concentration is not physiological and is not seen in any known disease (except rare congenital forms of erythrocytosis, in which values are usually stable over time).
- The Appellant's position erroneously presupposes that the Athlete has a duty of

explaining the abnormalities noted in the ABP. It is trite law that the burden of proof lies with the person who makes the allegations, in this case ADAK. This is set forth in Rule 33.1 of the 2016 IAAF Rules.

- In anti-doping matters, the standard of proof should be the comfortable satisfaction of the hearing panel – not of the experts – bearing in mind the seriousness of the allegations. Although the utility and significance of expert evidence is not to be underestimated, it is the panel which ultimately determines the matter before it based on law and evidence.

- The alleged abnormalities in the Athlete's ABP can be plausibly explained as follows:

  - The Athlete has been suffering from excessive vaginal bleeding and resulting hormonal imbalance, caused by the use of a contraceptive (*Depo provera)* injected every 3 months.

  - The Athlete has been suffering from an iron deficiency, and has, therefore, always been on a diet with iron-rich products, e.g. animal products (including liver and red meat) and vegetables (including soybeans, lentils, red kidney beans, pumpkins, spinach, broccoli and beetroots).

  - The Athlete has also taken *Steron Tablets*, *Ranferon Syrup* and *Iron Sucrose Injections*. Steron helps control excessive vaginal bleeding during menstruation. The drug is also effective in treating hormonal imbalance. Iron Sucrose Solution is a treatment for people whose blood is poor of iron.

- The Athlete, considering her medical background, acted with no fault/significant fault, no negligence/significant negligence and without intention to manipulate her blood for purposes of gaining an unfair advantage over her competitors.

- The Athlete should not be punished on the account of inadequate scientific knowledge, *inter alia* the causes of hormonal imbalance, the abnormal increase of red blood cells in a person's blood and thus suffer the consequence of the results found by laboratory technicians, whose findings are unreliable considering the level of scientific knowledge.

- Equality before the law must be adhered to and not violated on the account of gender and gender challenges caused by menstrual periods which is a physiological natural occurrence and requires medication, the effects of which could influence the total blood count and cause the increase of red blood cells.

50. The First Respondent requests the following relief:

"The Respondent humbly requests the Panel to rule that:

THAT, in view of the possible inaccuracy of the Athletes ABP and non conclusiveness of the laboratory results as proof of blood doping and balance of probability that the increase of red blood cells may have been caused by other factors other than deliberate

blood manipulation and the uncertainty of scientific knowledge in this complex field and the plausible explanation of the Athlete, the above charge be dismissed and the suspension be lifted to allow the athlete pursue her career and engage in gainful employment."

51. With her Answer, the First Respondent also submitted the following "Cross Appeal":

"MEMORANDUM OF CROSS APPEAL

JOYCE CHEPKIRUI being wholly dissatisfied with the Appeal of World Athletics to the Court of arbitration for Sports made on the 5th March 2021 DOES HEREBY CROSS APPEAL to the Court of Arbitration for Sports on the following grounds:

1. The Appeal is not well founded.

AND IT IS PROPOSED to ask the honourable Panel to allow the cross appeal with costs and to find THAT:

a. The Appeal be dismissed

b. THAT the suit against the Appellant/Respondent be dismissed with costs."

C. The Position of the Second Respondent

52. The Second Respondent concurs with the submissions made by the Appellant and further submits the following:

- The SDT erred in concluding that the evidence tendered was insufficient, inconclusive and uncorroborated. The documentary evidence was sufficient, reliable and conclusive in establishing the anti-doping rule violation against the Athlete. The Athlete's position had been disapproved scientifically.
- It is the Sole Arbitrator's mandate to determine whether the Expert Panel's joint opinions are soundly based on primary facts and whether the Expert Panel's consequent appreciation of the conclusion derived from those facts is equally sound and logic.
- The ABP has been accepted in CAS jurisprudence as a reliable and accepted means of evidence to assist in establishing anti-doping rule violations. The Sole Arbitrator is not called to adjudicate on whether some other or better system of longitudinal profiling than the ABP could be created but has to respect the WADA-approved use of the ABP.
- The Athlete did not make any reference to any defects in the process of analysis or breaches in the chain of custody which could make the results of the critical tests unreliable.
- Based on the fact that the pattern of values under scrutiny was entirely consistent with blood manipulation, according to the Expert Panel, the Second Respondent submits

that the ABP profile of the Athlete constitutes reliable evidence of blood doping.

- The Athlete must establish that the anti-doping rule violation was not intentional in order to avoid a sanction of four years of ineligibility. It is uncontroversial that blood manipulation is an intentional form of doping, and the Athlete has made no arguments that the alleged violations are not intentional.

- Therefore, a sanction of up to four (4) years of ineligibility shall be imposed on the Athlete. The Athlete neither adduced evidence in support of the origin of the prohibited substance nor demonstrated no fault or negligence on her part as required to warrant a reduction of the sanction.

53. The Second Respondent requests the following relief:

"The Second Respondent respectfully requests the Sole Arbitrator to grant the following prayers.

1. *The Appellant's Appeal be allowed.*
2. *The Decision dated November 19, 2020 rendered by the Sports Dispute Tribunal of Kenya in the matter of ADAK Vs Joyce Chepkirui be and is hereby set aside.*
3. *The Arbitration Costs be borne by First and Third Respondents jointly and severally.*
4. *The Second Respondent be granted a contribution to its legal costs as the Sole Arbitrator shall deem fit."*

D. The Position of the Third Respondent

54. The Third Respondent supports the Appeal and adopts the position taken by the Second Respondent and the charges brought before the SDT. In addition, it submits the following:

- According to section 5(1) of the Anti-Doping Act of Kenya and Art. 7.1.1 of the Anti-Doping Rules of Kenya, ADAK is the only organisation permitted to carry out anti-doping activities in Kenya. This role makes ADAK the sole body mandated to undertake results management in Kenya. This includes the prosecution of anti-doping rule violations. Thus, the Third Respondent cannot be held liable for the results management and the decision of the SDT which is being appealed against. The role of the Third Respondent can only be considered, at best, as one of an observer of a proceeding, which cannot take an active part in proceedings.

- The Third Respondent has not done or failed to do anything in regard to these proceedings that it ought to have done or ought not to have done and therefore, there is no basis for the Sole Arbitrator to find it liable for costs at all. The Third Respondent therefore asserts that it bears no proportion of the arbitration costs or that it should be ordered to pay any significant contribution to the legal and other costs incurred by the Appellant in these appeal proceedings (see also CAS 2017/A/5157).

- The participation of the Third Respondent in this appeal is strictly in line with its role in ensuring that doping in sports is fully stamped out and that any individuals involved in doping should face the penalties prescribed upon following the due process laid down by the various Statutes, Rules and Regulations.

55. The Third Respondent requests the following relief:

"The 3rd Respondent prays that the appeal herein be allowed but only to the extent that no order of costs should be made as against the 3rd Respondent as prayer under Paragraph 97(f) of the Statement of Appeal."

V. JURISDICTION

56. Article R47 of the Code provides, *inter alia*, as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior the appeal, in accordance with the statutes or regulations of that body".

57. The 2016 IAAF Rules, which are applicable to the present appeal *ratione tempore* (see below at **Section VI.**), provide in Rule 42.3:

"In cases [...] *involving International-Level Athletes* [...], *the first instance decision of the relevant body of the Member shall not be subject to further review at the national level and shall be appealed exclusively to CAS in accordance with the provisions set out below".*

58. According to Rule 42.5 of the 2016 IAAF Rules:

"In any case [...] *involving an International-Level Athlete* [...], *the following parties shall have the right to appeal to CAS:*

(a) the Athlete [...];

(b) the other party to the case in which the decision was rendered;

(c) the IAAF;

[...]".

59. The 2016 IAAF Rules define as *"International-Level Athlete"* all athletes who are in the Registered Testing Pool established at international level by the IAAF (now WA) or who are competing in an international competition under Rule 35.9 of the 2016 IAAF Rules. In the present case it is uncontested that the First Respondent is an *"International-Level*

Athlete" in that sense as she competed, *inter alia*, in the 2015, 2016 and 2017 Boston Marathon, the 2015 Amsterdam Marathon and the 2016 New York Marathon.

60. Furthermore, it is uncontested that the Appealed Decision constitutes *"the first instance decision of the relevant body of the Member"* in the sense of that same rule.

61. In the light of the foregoing, the Sole Arbitrator finds that CAS has jurisdiction to hear the present appeal. In addition, all Parties confirmed CAS jurisdiction by execution of the Order of Procedure.

VI. ADMISSIBILITY

62. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.* [...]".

63. In its relevant parts, Rule 42.15 of the 2016 IAAF Rules provides that:

> "[...] *the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS, such period starting* [...] *from the day after the date of the receipt of both, the decision to be appealed and the complete file relating to the decision* [...]".

64. The Appellant received notification of the full appealed decision and received the file relating to the appealed decision on 22 January 2021. It filed its Statement of Appeal, which also constitutes the Appeal Brief, on 5 March 2021.

65. By doing so, the Appellant clearly and undisputedly respected the forty-five (45) day period set out by the 2016 IAAF Rules to file the appeal. Moreover, neither of the Respondents did object with regard to the Appellant respecting the deadline to appeal.

66. In the light of the foregoing, the Sole Arbitrator finds that the appeal is admissible.

VII. APPLICABLE LAW

67. The Appellant and the Third Respondent submit that both the substantive aspects of the alleged anti-doping rule violation as well as the procedural aspects of these proceedings shall be subject to the 2016 IAAF Rules.

68. The other Respondents did not put forth any specific position in respect of the applicable law.

69. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

70. The present Appeal was lodged on 5 March 2021. The applicable rules in force at that time were the 2021 World Athletics Anti-Doping Rules, effective since 1 January 2021. Rule 1.7.2 (b) of the 2021 World Athletics Anti-Doping Rules states the following:

"These Anti-Doping Rules do not apply retroactively to matters pending before the Effective Date, save that:

Any anti-doping rule violation case that is pending as of the Effective Date or is brought after the Effective Date but based on an anti-doping rule violation that occurred prior to the Effective Date, shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred and not by the substantive anti-doping rules set out in these Anti-Doping Rules, unless the hearing panel determines that the principle of lex mitior appropriately applies under the circumstances of the case, and with respect to procedural matters by (i) these Anti-Doping Rules for anti-doping rule violations committed on or after 3 April 2017, and (ii) the 2016-2017 IAAF Competition Rules for anti-doping rule violations committed prior to 3 April 2017.[...]"

71. Rule 1.7.2 (b) of the 2021 World Athletics Anti-Doping Rules enshrines the legal principle of *tempus regit actum*, i.e. the regulations in force at the moment that the violation occurred shall be applicable. The violations at issue in these proceedings occurred between 6 April 2016 and 4 August 2017. The Sole Arbitrator notes that she follows the prevailing doctrine established in CAS case law and in literature, which provides that the rules in force at the time of the first sample taken shall be applied to the substantive issues in ABP cases (*see e.g.* CAS 2010/A/2178, CAS 2016/O/4464, CAS 2017/O/4980; *see also* MAVROMATI D., The Athlete's Biological Passport (ABP), TAS-CAS Bulletin, 2/2011 p. 39). In the present case, the first sample on which the Appellant relies in establishing an anti-doping rule violation had been taken on 6 April 2016. Hence, on the basis of CAS case law and legal literature, the 2016 IAAF Rules are applicable to the substantive issues of this case. The same accounts for the procedural matters, which are also subject to the 2016 IAAF Rules (see Rule 1.7.2 (b) (ii) of the 2016 IAAF Rules).

72. Rule 42.23 of the 2016 IAAF Rules reads as follows:

"In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulation). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence".

73. Further, Rule 42.24 of the 2016 IAAF Rules provides that in "*all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise*".

74. Rule 30.1 of the 2016 IAAF Rules states that "[t]*he Anti-Doping Rules shall apply to the IAAF, its Members and Area Associations and to Athletes, Athlete Support Personnel and other Persons who participate in the activities or Competitions of the IAAF, its Members and Area Associations by virtue of their agreement, membership, affiliation, authorisation or accreditation*".

75. As set forth above, the First Respondent is an "*International-Level Athlete*" in the sense of this provision.

76. Based on the above, the applicable laws in this arbitration are the IAAF regulations, in particular the 2016 IAAF Rules, and, subsidiarily, Monegasque law.

VIII. OTHER PROCEDURAL ISSUES

A. The First Respondent's "Memorandum of Cross Appeal"

77. Together with her Answer to the Appeal, the First Respondent lodged a separate "Cross-Appeal" (see Rule 42.10 of the 2016 IAAF Rules). Upon a repeated invitation by the CAS Court Office to explain her "Cross-Appeal" (including CAS's jurisdiction for such "Cross-Appeal"), and to fulfill the filing requirements for a "Cross-Appeal", including payment of a filing fee, the First Respondent did not make any further submissions in this respect, nor did she pay any filing fee.

78. Hence, in accordance with Art. R 44.5(1) of the Code, which applies to cross appeals by way of analogy, and in light of the First Respondent's failure to comply with the filing requirements for a cross-appeal, the "Cross-Appeal" is to be deemed withdrawn.

B. The First Respondent's Objection as to Proper Communication

79. During the hearing, the First Respondent complained that she had only received CAS's communication about the oral hearing 3 days prior to the hearing, on 21 June 2021, and only indirectly through the Second Respondent. Indeed, as the CAS Court Office later confirmed, the correspondence had been sent to the First Respondent's counsel only by courier, but not by e-mail, because the respective e-mail had inadvertently been sent to the Athlete directly, not to the registered e-mail address of her counsel. The First Respondent's complaint that the late notification did not give her enough time to prepare for the hearing was, however, not explained in any further detail. During the hearing, the Sole Arbitrator expressly invited the First Respondent to identify any defenses or submissions that she was unable to bring forward as a result of the delayed notification. The First Respondent did not respond to this invitation. Apart from her general objection at the end of the hearing that she could have prepared better for the hearing with an earlier notification, no further request or objection was made in this respect (i.e. no request for a

postponement of the hearing, or for further written submissions to make up for any impediments allegedly arising from the late notification).

80. The Arbitrator is convinced that despite the late notification of the hearing date, the First Respondent's right to be heard was fully granted. The First Respondent had any opportunity to either request a postponement of the hearing, or to request the possibility for an additional written submission. Instead, the First Respondent chose to participate in the hearing despite the late notification, and to make pleadings on the merits of her case. The First Respondent's choice not to cross-examine the experts or any of the witnesses cannot be linked to the late hearing notification, and no such link has been alleged by the First Respondent herself. Hence, the Arbitrator is sufficiently comforted that the First Respondent's right to be heard has not been violated, and that she had any chance to plead her case before and during the hearing.

IX. MERITS

81. Considering all Parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:

A. Did the Athlete commit an anti-doping rule violation, *i.e.* violate Rule 32.2(b) of the applicable 2016 IAAF Rules?

B. In case the first question is answered in the affirmative, what is the appropriate sanction to be imposed on the Athlete?

A. Did the Athlete Commit an Anti-Doping Rule Violation?

82. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits of the present case:

83. Rule 32.2 of the 2016 IAAF Rules specifies the circumstances and conduct that constitute anti-doping rule violations. This includes Rule 32.2(b), which provides as follows:

> *"32.2(b) Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*
>
> *(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body and that no Prohibited Method is used. Accordingly, it is not necessary that intent, Fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for use of a Prohibited Substance or a Prohibited Method.*
>
> *(ii) the success or failure of the use or Attempted use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was used, or Attempted to be used, for an antidoping rule violation to be committed."*

84. The applicable burdens, standards and means of proof are the following (Rule 33.1, 33.2

and 33.3 of the 2016 IAAF Rules):

> *"33.1. The IAAF [...] shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF [...] has established an anti-doping rule violation to the comfortable satisfaction of the relevant 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.*
>
> *33.2. Where these Anti-Doping Rules place the burden of proof upon the Athlete [...] to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*
>
> *33.3. Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third persons, witness statements, expert reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete Biological Passport and other analytical information."*

85. The Sole Arbitrator observes that, in its attempt to establish an anti-doping rule violation of the Athlete under Rule 32.2(b), WA relies on conclusions drawn from longitudinal profiling as shown by the Athlete's ABP. WA focuses on (i) the Athlete's ABP containing a number of individual outlier samples for HGB, RET% and OFF-score values, meaning that such samples are abnormal at 99% specificity (ii) as well as the First and Second Expert Panel Joint Opinion.

86. In the First Expert Panel Joint Opinion, on the basis of its analysis of the Athlete's ABP, the Expert Panel found the following:

> *"In the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the profile was flagged with abnormalities at 99% specificity on several occasions:*
>
> - *Sample 4 Upper limit for haemoglobin concentration*
> - *Sample 5 Upper limit for reticulocyte%*
> - *Sample 6 Upper limit for haemoglobin concentration*
> - *Sample 7 Upper limit for haemoglobin concentration and OFF score*
> - *Sample 8 Upper limit for reticulocyte%*
>
> [...]
>
> *In our view, the data of the athlete bears abnormal features which require explanations:*
>
> - *A clear difference in haemoglobin concentration and reticulocytes when comparing the years before and after 2015. Whereas between 2013 and 2015, the athlete displayed normal values for a female athlete, both haemoglobin concentration and reticulocytes are markedly higher and more variable in 2016*

and 2017. This is especially visible when comparing the samples obtained in April 2013-2017 (Marathons/ Half Marathons in London, Prague and Boston). All these locations were at sea level and it appears that the athlete sojourned at altitude during the remaining time of the years from 2013 to 2017, thus making any environmental impact on the profile an unlikely explanation for the difference.

- *The pairing of high haemoglobin and high reticulocytes, which is unlikely to be natural (as identified by the adaptive model). From a haematological point of view, the association of high reticulocytes with high haemoglobin concentration is not physiological and is not seen in any known disease (except rare congenital forms of erythrocytosis, in which values are usually stable over time). The use of erythropoiesis stimulating substances, on the other end, represents a plausible explanation."*

87. Based on these findings, the Expert Panel reached the following conclusion:

"It is our unanimous opinion that considering the information available at this stage and in the absence of an appropriate physiological explanation, the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using an erythropoietic stimulant is high. The likelihood of a medical condition causing the abnormality is low. Analytical shortcomings are also highly unlikely to have caused the suspicious pattern in the profile. Environmental factors such as altitude exposure are also improbable to be the unique causal effect, as based on the available documentation, the athlete sojourned at altitude most of the time and only left this environment for major events."

88. The Athlete relies on two defences to challenge the alleged anti-doping rule violation. *First*, she challenges, as a matter of principle, the validity of the ABP as a reliable means of evidencing intentional blood manipulation. *Second*, she puts forth different explanations for the abnormal values in her ABP. The Sole Arbitrator will address each of these challenges in turn below.

1. Reliability of the ABP as a means of evidencing an ADRV

89. The Athlete alleges that the ABP alone cannot be considered conclusive evidence for an anti-doping rule violation. In support of this allegation, she cites three articles published in 2011 (FABIAN SANCHIS-GOMAR ET AL., Current limitations of the Athlete's Biological Passport use in sports, Clin Chem Lab Med 2011, 49(9):1413-15 (May 2011); GIUSEPPE BANFI, Limits and pitfalls of Athlete's Biological Passport, Clin Chem Lab Med 2011, 49(9):1417-21 (May 2011); GIOVANNI LOMBARDI ET AL., Stability of haematological parameters and its relevance on the athlete's biological passport model, Sports Med 41(12): 1033-42 (Dec 2011)).

90. It is the Sole Arbitrator's view that these three rather short and generic articles, which flag certain risks potentially associated with the interpretation of ABP data, are not an appropriate basis to call into question the principal reliability of the ABP, which has been confirmed by the CAS in numerous cases that evolved after the publishing of the articles (see, e.g., CAS 2012/A/2773; CAS 2014/A/3614 & 3561; CAS 2016/O/4464; CAS

2016/O/4463; CAS 2016/O/4469; CAS 2016/O/4481; CAS 2018/O/5822) and which has been codified by WADA and by the WA (Rule 33.3 of the 2016 IAAF Rules, cited above) on the basis of reliable scientific evidence.

91. Furthermore, contrary to what the First Respondent suggests, the blood values saved in the ABP are not the only basis for establishing blood doping. WA has implemented the ABP in accordance with its Anti-Doping Regulations through a procedure designed to afford the athlete due process in establishing whether the doping regulations have been violated. In essence, the procedures consist of the following four steps (laid out in paragraph 8.10 to 8.33 of the IAAF Anti-Doping Regulations):

- an assessment by the Adaptive Model to determine whether the athlete's blood profile is normal or abnormal;
- if it is abnormal, an analysis of the athlete's ABP, together with other relevant information (e.g., whereabouts information and the athlete's competition schedule) by three scientific experts who do not know the athlete's identity;
- an opportunity for the athlete to challenge the expert's conclusions if the experts find indications of prohibited doping; and
- the initiation of disciplinary proceedings against the athlete if the expert panel, upon consideration of the record (including the athlete's submissions), unanimously confirms its position that it is likely that the athlete had used a Prohibited Substance or Prohibited Method and it is highly unlikely that the profile is the result of any other cause.

92. These steps, which include a comprehensive analysis of the assessment produced by the Adaptive Model by three independent experts, and which provide the Athlete with ample opportunity to put forward alternative explanations for an abnormal blood profile, sufficiently ensure the reliability of the ABP as evidence for doping.

2. The Athlete's explanations for the abnormal values found in her ABP

93. In her e-mail dated 24 April 2019, the Athlete provided the Athlete Explanation quoted above at para. 16. The Athlete Explanation was subject of the Second Expert Panel Joint Opinion. The Athlete submitted the same explanations during these proceedings. They are addressed in the following:

(i) Vaginal bleeding following hormonal imbalance caused by a parenteral contraceptive treatment over three months since 2013

94. The Athlete alleges that she had *"been suffering from vaginal bleeding"* following hormonal imbalance which was caused by a parenteral contraceptive treatment over three months since 2013.

95. In the Second Expert Panel Joint Opinion, the Expert Panel evaluated the Athlete's arguments relating to the vaginal bleeding. The Expert Panel noted that bleeding of any kind would cause distinct changes in the blood picture, depending on whether the bleeding is acute, subacute or chronic. In chronic bleeding, such as described by the

Athlete, the typical features relate to progressive drainage of the iron stores, i.e. resemble those of an iron deficient, hypoproductive anaemia with low haemoglobin, low MCV and low reticulocytes. However, in the Athlete's profile, there was, according to the Expert Panel and contrary to what the Athlete herself claims, no sign of anaemia. Haemoglobin in the Athlete's blood was always normal (samples 1-3) or rather high for a female athlete and so were reticulocytes (sample 4 onwards).

96. The Expert Panel further noted that, in the ABP of the Athlete, MCV and MCH were slightly lower in samples 1 and 2 compared to the rest of the profile, which could indicate subclinical iron deficiency at the time of these samples. Since there were no exact dates regarding the treatment mentioned by the Athlete, the Expert Panel could only speculate. It pointed out that, though it is indeed possible that the treatment of iron deficiency with the medication mentioned by the Athlete led to the increase of MCV and MCH later, it would not explain the supraphysiological increase in haemoglobin concentration. It would furthermore not explain the abnormality of the pairing of high haemoglobin and high reticulocytes in several samples from 2015 onwards, because sustained vaginal bleeding would cause the opposite of high haemoglobin, namely low haemoglobin.

97. Furthermore, the Expert Panel noted that the Athlete did not provide any reliable test results concerning the hormonal imbalance, as there were no results of measurement of these hormones available in the documentation she submitted. The Expert Panel has summarized that it is obvious that the abnormalities in the ABP profile are highly unlikely to have been caused by chronic bleeding.

98. The Athlete has not substantially challenged the validity of the statements made in the Second Expert Panel Joint Opinion. During the disciplinary proceedings as well as during this arbitration, she merely repeated the statements made in the Athlete Declaration, but failed to address the Expert Panel's opinion on why the Athlete Declaration was not a valid explanation for the detected abnormalities. In its Third Joint Expert Opinion, the Expert Panel re-confirmed its conclusions in light of the Athlete's later (repetitive) explanations. The Athlete did not offer any scientific evidence, nor did she choose to cross examine any member of the Expert Panel during the hearing. Hence, the Second Expert Panel Joint Opinion (confirmed by the Third Joint Expert Opinion), the findings of which the Arbitrator finds plausible and not suspicious of any flaws, remains uncontested. Consequently, the Sole Arbitrator finds that the blood values of the Athlete's samples cannot be explained by the alleged vaginal bleeding.

(ii) <u>The use of various medications (Depo-Provera, Steron Tablets, Ranferon Syrup), iron sucrose injections, and iron-rich diet</u>

99. In addition to vaginal bleeding following hormonal imbalance, the Athlete has suggested in her e-mail of 24 April 2019 as well as in her reply to the Appeal Brief that the abnormalities in her ABP profile could have been caused by the use of various medications, namely Depo-Provera, Steron Tablets, Ranferon Syrup and Iron sucrose injections. The Athlete has also offered an "iron rich diet" as an explanation for the abnormal ABP.

100. In its Second Expert Panel Joint Opinion, the Expert Panel explains that iron

supplementation, such as stated by the Athlete, can indeed lead to a normalisation of the values, but never cause a supraphysiological increase of haemoglobin, such as seen in the Athlete's ABP (exemplary in sample 8). According to the Expert Panel, it would also not cause large changes in reticulocytes (which can be seen for example sample 8 and 10). In fact, once iron stores were replenished, there would be a balance in red cell turn over with relatively stable reticulocytes and haemoglobin.

101. For the remaining medication used by the athlete (Depo-Provera (Medroxyprogesterone) and Steron Tablets (Norethisterone)), the Expert Panel notes that there is no indication that they might have a clinically relevant direct stimulating or inhibiting effect on the erythropoietic system and could therefore have caused the abnormalities seen in the profile.

102. Again, the Athlete failed to substantially contest the Expert Panel's findings of the Second Expert Panel Joint Opinion (confirmed by the Third Expert Panel Joint Opinion). The Arbitrator finds that there are no indications that would cast doubt on the plausibility and appropriateness of the Expert Panel's findings. As a result, the Sole Arbitrator deems that the abnormalities in the Athlete's ABP profile can neither be explained by her use of medications nor by her iron-rich diet.

3. Conclusion

103. On the basis of all of the above, the Sole Arbitrator is comfortably satisfied by the assessment of the Athlete's ABP that the Athlete has committed an anti-doping rule violation, i.e. that WA succeeded in establishing that the abnormal values of samples 4 to 8 in the Athlete's ABP were caused by blood doping. The Athlete has failed to prove by a balance of probability that the abnormal values in her ABP resulted from vaginal bleeding following hormonal imbalance, the use of various medications or an iron-rich diet.

104. Consequently, the Sole Arbitrator finds that the Athlete has violated Rule 32.2(b) of the 2016 IAAF Rules.

B. What Is the Appropriate Sanction to be Imposed on the Athlete?

1. Period of Ineligibility

105. Rule 40.2 of the 2016 IAAF Rules reads, in the relevant parts, as follows:

> *"The period of ineligibility imposed for a violation of Rules* [...] *32.2(b) (use or Attempted use of a Prohibited Substances or Prohibited Method)* [...] *shall be as follows, subject to potential reduction or suspension pursuant to Rules 40.5, 40.6 or 40.7:*
>
> *(a) The period of ineligibility shall be four years where:*
>
> *(i) the anti-doping rule violation does not involve a Specified Substance, unless the Athlete* [...] *can establish that the anti-doping rule violation was not intentional;*

(ii) [...]

(b) if Rule 40.2(a) does not apply, the period of ineligibility shall be two years."

106. Pursuant to Rule 40.2 (a) (i), the standard sanction to be imposed on an athlete for the use of a Prohibited Method (as in this case) is four years, unless the Athlete can establish that the anti-doping rule violation was not intentional. The burden of proof for demonstrating that an ADRV was not intentional lies on the Athlete. In this case, the Athlete has failed to meet her respective burden to establish that she acted without intent. As a result, the Sole Arbitrator finds that the Athlete is ineligible for a period of 4 years.

2. Commencement of the Period of Ineligibility

107. Pursuant to Rule 40.11 of the 2016 IAAF Rules the Period of Ineligibility shall principally "*start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date the Ineligibility is accepted or otherwise imposed.*" This would be the date of the present CAS Award.

108. However, the Sole Arbitrator notes that in accordance with Rule 40.11 (a) of the 2016 IAAF Rules, the Period of Ineligibility may start at an earlier date, including as early as of the date of sample collection, "*where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete*".

109. The Sole Arbitrator finds that the duration of the period from the date the last sample was collected (4 August 2017) until the Notice of Charge and the provisional suspension (28 June 2019) up until the rendering of the Appealed Decision (19 November 2020) has been particularly long without that there is any indication on record that the long duration of the results management process and the following proceedings before the SDT is attributable to the Athlete. What is particularly striking is that it took almost 20 months after the collection of the last sample to notify the Athlete of the alleged anti-doping rule violation. While the Sole Arbitrator is mindful of the fact that the time required for an anti-doping organization to discover and develop facts sufficient to establish an anti-doping rule violation may be lengthy, there is no explanation in the present case why, after the delivery of the First Expert Panel Joint Opinion on 10 February 2018, it took more than one year (until 26 March 2019, see above at ¶ 15) to inform the Athlete and to invite her to provide an explanation with respect to the results of the AIU's investigations. Even if it were assumed that the First Expert Panel Joint Opinion was not issued on 10 February 2018 (as the date on the report indicates), but one year later, on 10 February 2019 (as submitted by WA in the Request for Arbitration without, however, explaining the discrepancy to the date printed on the report), it would remain unexplained why it then took from 4 August 2017 until 10 February 2019 to obtain an expert report assessing the samples in the Athlete's ABP.

110. In any of the given scenarios, be it that the First Joint Expert Report was issued on 10 February 2018, or be it that the report was issued on 10 February 2019, there would be a substantial delay amounting to a minimum of one year in the results management process. In recent CAS awards dealing with blood doping evidenced through an athlete's ABP (see e.g. CAS 2019/A/6254; CAS 2018/O/5822; CAS 2017/A/5045; CAS

2017/O/4980; CAS 2017/A/5021), the time period between the last relevant sample in the ABP and the Notification of the Athlete was significantly shorter than in the present case. The delay, irrespective of whether it happened between sample taking and the issuance of the First Expert Panel Joint Opinion or between the issuance of the First Expert Panel Joint Opinion and the delivery of the notification of the Athlete, is not attributable to the Athlete, who had no role in the results management process conducted by AIU.

111. As a result of the substantial delay during the results management process, the Arbitrator finds it appropriate to backdate the start of the period of ineligibility to 28 June 2019, the date of the commencement of the provisional suspension. The benefit which the Athlete receives through the backdating of the starting date of the ban goes beyond the credit she would receive in any way under Rule 40.11 (c) of the 2016 IAAF Rules for the period of the provisional suspension imposed on her (which is to be credited against the period of ineligibility). The period of the provisional suspension lasted from 28 June 2019 until 19 November 2019 (the date of the Appealed Decision). For the time period after 19 November 2020, when the provisional suspension expired, the Athlete benefits from the above-explained backdating. In balancing the seriousness of the Athlete's anti-doping rule violation on the one hand and the substantial delay of at least one year of the results management, the Sole Arbitrator finds the chosen date for the commencement of the period of ineligibility to be an appropriate credit on behalf of the Athlete to make up for the delay.

3. Disqualification of Results

112. Rule 40.9 of the 2016 IAAF Rules reads as follows:

> *"In addition to the automatic Disqualification of the Athlete's individual results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained by the Athlete from the date the positive Sample was Collected (whether In-Competition or Out-of-Competition) or other antidoping rule violation occurred, through to the commencement of any Provisional Suspension or Ineligibility period shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money."*

113. WA submits that all results obtained by the Athlete between the date of the collection of sample 4 (6 April 2016), being the first evidence of an anti-doping rule violation, and the date on which this award enters into force shall be disqualified.

114. The Respondents did not put forward any specific position regarding the disqualification of results and the resulting consequences.

115. The Sole Arbitrator notes that pursuant to the plain wording of Rule 40.9 of the 2016 IAAF Rules all competitive results of the Athlete as from the moment the positive sample was collected until her provisional suspension was pronounced would have to be disqualified.

116. The Sole Arbitrator further observes that although the present facts are not a case of a specific "positive sample", it is still a case that falls under Rule 40 of the 2016 IAAF Rules, as a consequence of which the Athlete's competitive results are principally subject to disqualification. A complicating factor in this respect is that an anti-doping rule violation established on the basis of an ABP can normally not be determined on a specific date but merely for a certain period (see also CAS 2010/A/2235, para. 116; CAS 2016/O/4481, para. 187).

117. In the present case, the Arbitrator accepts that the period during which the Athlete used doping started on 6 April 2016 (Sample 4). Based on a literal reading of Rule 40.9 of the 2016 IAAF Rules, all of the Athlete's results as from this date until the date of the award would have to be disqualified, despite the fact that there is no evidence of doping use by the Athlete after 4 August 2017. In other words, there would be a period of more than four years (including the period of the provisional suspension) from the date of the last sample in the ABP, 4 August 2017, until the date of the award, for which there is no proof of doping, and for which the Athlete's results would be disqualified.

118. The Sole Arbitrator is not prepared to accept such a harsh consequence. The disqualification of results is, in itself, a severe sanction and, in a way, can be equated to a period of ineligibility. However, whereas the period of ineligibility to be imposed (even for the worst cases) is limited to four years, the period during which results can be disqualified is unlimited (see CAS 2016/O/4481, para. 190). In concurrence with the findings in CAS 2016/O/4481, the Sole Arbitrator considers it unfair to disqualify all the results of the Athlete over a period of more than five years in accordance with the applicable IAAF Rules, because the Athlete is not to blame for the fact that the result management took so long. If the results management had started as soon as the evidence (Samples 4 to 8 of the Athlete's ABP) was available to WA, the period of disqualification would be considerably shorter. Hence, in order to avoid an excessive sanction and in view of the principle of proportionality requiring that a sanction be appropriate to the committed violation, the Sole Arbitrator finds that the "fairness exception" re-introduced into Rule 40.9 of the IAAF Rules as of their 2015 version should apply in the present case.

119. Consequently, the Sole Arbitrator finds that the results of the Athlete from 6 April 2016 until 4 August 2017 are to be disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

X. COSTS

120. Article R64.4 of the Code provides:

> *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:*
> - *the CAS Court Office fee,*
> - *the administrative costs of the CAS calculated in accordance with the CAS scale,*
> - *the costs and fees of the arbitrators,*
> - *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee*

scale,
- *a contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters."*

121. Article R64.5 of the Code provides:

> *"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

122. WA submits that the costs of the arbitration should be borne by ADAK and/or AK. AK is the WA member federation bearing eventual responsibility for the adjudication of doping cases under Rule 38 of the 2016 IAAF Rules. As such, WA argues, AK is strictly liable for the decisions of a body, committee or tribunal to which it may have delegated the conduct of a hearing (Rule 38.5 of the 2016 IAAF Rules). ADAK, which is given responsibility for the adjudication of doping offenses under Kenyan law, prosecuted the charges against the Athlete, and WA argues that it was ADAK's fault that the Athlete was acquitted due to the unavailability of certain analytical documents which the SDT would have apparently required (but had never received) for a conviction. WA further submits that the Athlete should not bear any costs, because the Athlete should not be punished for defending herself before the first instance tribunal, and for a (wrongful) acquittal.

123. AK submits that it should not be responsible to bear any costs, because under the Kenyan Anti-Doping Act, ADAK is the only organization permitted to carry out anti-doping activities in Kenya. AK was only an observer in the proceedings before the SDT without any role in the prosecution or the outcome of the decision. ADAK submits that the costs of the arbitration should be borne by the Athlete and by AK. The Athlete did not put forward any specific position regarding costs.

124. As a starting point, the Arbitrator agrees with WA that neither WA nor the Athlete should bear any of the arbitration costs. WA successfully argued that the Appealed Decision has to be set aside, and its Appeal was therefore justified. The Athlete bears no fault in respect of the flaws that tainted the proceedings before the SDT, and that led to the Appealed Decision being brought before CAS. It is every athlete's right to defend himself/herself in disciplinary proceedings, and as long as there is no evidence that the Athlete provoked a wrong decision through illegitimate means (e.g. through a tampering of evidence), he or she should not bear responsibility for the arbitration costs in appeal proceedings before CAS.

125. What remains is the question whether the costs of the arbitration are to be borne by ADAK, AK, or by both. Two premises appear to be undisputed between the Parties in respect of this question. *First*, that under Kenyan law, ADAK is the only competent organization in Kenya to carry out anti-doping activities, including results management,

hearing process and adjudication. AK does not itself carry out any of these activities, and it is not a party to disciplinary proceedings before the SDT. *Second*, that under the applicable 2016 IAAF Rules, AK – as WA's Kenyan member federation – bears eventual responsibility for the decisions of any body, tribunal or committee upon which the adjudication of doping cases may have been vested. This means that AK is a proper respondent in CAS appeals involving decisions by the Kenyan SDT (see Rule 42.18 and 38.5 of the 2016 IAAF Rules; see also CAS Award 2017/A/5369, para. 121).

126. In deciding whether AK or ADAK – both losing parties in this case – should bear the arbitration costs under the specific circumstances at hand, the Sole Arbitrator principally enjoys discretion. As pointed out correctly by WA during the hearing, the issue is whether, in allocating costs, the Arbitrator shall take a "strict liability approach", under which AK would have to bear the costs as a result of its eventual responsibility for the SDT's decisions, or a "fault-based" approach, under which ADAK as the organization prosecuting the case against the Athlete before the SDT would be responsible for costs.

127. The Sole Arbitrator maintains that this decision needs to be taken on a case-by-case basis, but that in the present case it appears overwhelmingly clear that these CAS proceedings only became necessary because of ADAK's failure to provide the SDT with essential documents that were required for a conviction of the Athlete before the SDT. AK had no role in these proceedings and cannot be deemed responsible for the mistakes ADAK made in conducting them. Therefore, the Arbitrator finds it appropriate that in the present case, AK's strict liability stands behind ADAK's liability for its own faults made during the disciplinary proceedings. As a result, the Arbitrator finds that ADAK shall bear the arbitration costs in an amount that will be determined and notified to the Parties by the CAS Court Office.

128. Furthermore, pursuant to Article R64.5 of the Code, and in consideration of the complexity and outcome of the proceedings as well as the financial resources of the Parties, the Sole Arbitrator rules that the Athlete and AK shall bear their own costs, and that ADAK shall pay a contribution towards WA's legal fees and other expenses incurred in connection with these proceedings in the amount of CHF 2,000 (two thousand Swiss Francs).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 5 March 2021 by World Athletics with the Court of Arbitration for Sport against the decision of the Sports Dispute Tribunal of the Republic of Kenya dated 19 November 2020 is upheld.

2. The decision of the Sports Dispute Tribunal of the Republic of Kenya dated 19 November 2020 is set aside.

3. A period of ineligibility of four years is imposed on Ms. Joyce Chepkirui starting from 28 June 2019.

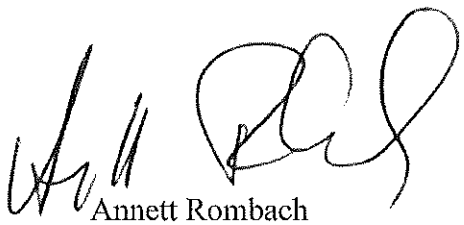
4. All competitive results of Ms. Joyce Chepkirui from 6 April 2016 until 4 August 2017 are to be disqualified, with all resulting consequences, including forfeiture of any titles, awards, medals, profits, prizes, and appearance money.

5. The costs of the arbitration, to be determined and served to the Parties separately by the CAS Court Office, shall be borne by the Anti-Doping Agency of Kenya.

6. The Anti-Doping Agency of Kenya shall pay an amount of CHF 2,000 (two thousand Swiss Francs) to World Athletics as contribution to its legal costs and other expenses incurred in the present proceedings.

Seat of arbitration: Lausanne, Switzerland
Date: 28 March 2022

THE COURT OF ARBITRATION FOR SPORT



Annett Rombach
Sole Arbitrator