

REPUBLIC OF KENYA



THE JUDICIARY
SPORTS DISPUTES TRIBUNAL

APPEAL NO. AD 10 OF 2019

IN THE MATTER BETWEEN

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

-versus-

HENRY KOSGEI..... ATHLETE

DECISION

Hearing: Exparte

Panel: Mrs. Elynah Shiveka - Panel Chair

Ms. Mary N Kimani - Member

Mr. Gichuru Kiplagat - Member

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

Mr. Kahiga Mungai, as instructed by the firm of Nzaku & Nzaku Advocates for the Athlete.

I. 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, a National Level Athlete, (hereinafter '**the Athlete**').

II Factual Background

3. The Athlete is a National 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 December 16th, 2018, ADAK Doping Control Officers in an In-competition testing during the 2018 Kisumu City Marathon in Kisumu, Kenya notified the Athlete that he was required to undergo a doping control process after the event. It is alleged by Applicant that the Athlete adamantly evaded and refused to comply to provide the Doping Control Officer with his sample for testing but instead proceeded to leave the venue.
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 23rd January 2019. In the said communication the Athlete was offered an opportunity to provide an explanation for the evasion by 6th February 2019.

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 6th January 2019 for his detailed response.
7. The Athlete responded vide his letter dated 18th February 2019. He denied the charges and laid his explanation therein.
8. A Notice to Charge dated 20th February 2019 was filed by ADAK on similar date subsequent to which the following directions were issued by the Tribunal:
 - i. Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form 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. Elynah Sifuna Shiveka, Panel Chair, Mr. Gichuru Kiplagat, Member and Ms. Mary Kimani, Member.
 - iii. The matter to be mentioned on 21st March 2019 to confirm compliance and for further directions.
9. On 21st March 2019 the Charge Document was filed at the Tribunal attached to which were the following:
 - a) Verifying Affidavit dated 14th March 2019, Pg. 4
 - b) List of Witnesses, Pg. 6
 - c) List of Witness Statements, Pg. 7-11
 - d) Investigative Report, Pg. 12-16
 - e) Doping Control Form, Pg. 17

- f) ADAK's Notice of Charge and Provincial Suspension letter dated 23rd January 2019, Pg.18-20
 - g) Athlete's Explanation dated 18th February 2019, Pg. 21
10. During the mention on 21st March 2019 Mr. Rogoncho who appeared for the Applicant confirmed that he had filed but not served the Charge Document. He also informed the Tribunal that the Athlete had requested for pro bono representation. The appointed Mr. Kahiga Mungai act as pro bono Counsel for the Athlete and the matter was set for mention on 17th April a Mention Notice to issue by Applicant.
11. The matter was next mentioned on 27th June 2019 when only Counsel for the Applicant appeared. Mr. Rogoncho suggested that the matter be mentioned on 25th July 2019 when Mr. Mungai who was on record for the Athlete would be at the Tribunal. The Tribunal slated the next mention on 25th July 2019.
12. On 25th July 2019 the Statement of Defence was filed at the Tribunal; the following unpagged documents were attached:
- a) Verifying Affidavit dated 25th July 2019;
 - b) List of Exhibits (including Athlete's Reply letter date 18th February 2019);
 - c) List of Witnesses.
13. During the mention on 25th July 2019 Mr. Rogoncho was in attendance for the Applicant told the Tribunal Mr. Mungai for the Athlete had filed his response and though not in court, he had a

date for hearing be taken. A hearing date was set for 22/8/2019 with a Notice to issue by the Applicant.

14. On the hearing date on 22nd August 2019 Counsel for both parties were before the Tribunal but Mr. Mungai requested for more time to get in touch with the Athlete. Mr. Rogoncho offered to give him the contacts of the Athlete. A mention was set for 29/8/2019 to ascertain the status of the matter.
15. At the mention on 29th August 2019 when Mr, Mwakio held brief for Mr. Rogoncho (Applicant), the Tribunal Mr. Mungai who was to get in touch with the Athlete had gone quiet. The matter would be mentioned again on 11/9/2019.
16. On 12th September 2019 when the matter came up for mention Counsel for both parties were in attendance. Mr. Mungai told the Tribunal that he had not been able to contact the Athlete and requested for one more week. Mr. Rogoncho was of the opinion that the mention be set on a date when Counsel would be sure that the Athlete would be present. The Tribunal ordered the mention be set for 2nd October 2019.
17. On 2nd October 2019 only the Applicant's Counsel were present and they informed the Tribunal had agreed with Mr. Mungai (who was not present in court), that the matter be set for hearing on 17th October 2019 which the Tribunal obliged them.

18. On 17th October 2019 Mr. Mwakio who held brief for the Applicant informed that Mr. Rogoncho was unwell and requested the matter be adjourned. Mr. Mungai (Athlete's Counsel) was not present. Another hearing date of 7th November was set by the Tribunal and the Notice was to issue accordingly.
19. On 14th November 2019, the hearing failed to take off as Mr. Mungai was not present neither was the Athlete. Mr. Mwakio who was holding brief for Mr. Rogoncho was asked to serve a Mention Notice to Mr. Mungai for 21/11/2019.
20. On 30th January 2019 when the matter next came up for mention there was no appearance by Mr. Mungai. Mr. Rogoncho appearing for the Applicant confirmed that he had served the Mention Notice on Counsel for the Athlete. The Tribunal directed the matter be mentioned on 20th February 2020 for further directions. A fresh Mention Notice was to issue accordingly.
21. During the mention on 20th January 2020 when Mr. Mwakio held brief for the Applicant's Counsel and there was no appearance by the Athlete's Counsel, Mr. Mwakio informed the Tribunal that the Athlete had been evasive and had not responded even to his own Counsel. A final mention was requested which the Tribunal set for 27/02/2020. A Mention Notice was to issue accordingly.
22. On 27th February 2020 a copy of an email correspondence addressed to the Athlete was filed at the Tribunal by the Applicant.
During the mention on even date Mr. Mwakio holding brief for

Mr. Rogoncho for Applicant explained that the Athlete had been evasive. He stated that there were two (2) other matters pending against the Athlete. He said the Applicant had been unable to trace the Athlete through his phone or by any other means. In the circumstances, the Tribunal ordered substituted service by advertisement. The Tribunal thereby stood over the matter for 21 days until the other two (2) pending matters had been filed. Matter was adjourned to 19th.

23. At the mention on 4th June 2020, Mr. Mwakio who was representing the Applicant said that the Applicant had resolved to file separate charges against the Athlete. On query by the Tribunal Mr. Mwakio said he had spoken with the Athlete's Counsel who was agreeable to a hearing on any date. The Tribunal advised that it would be wise if the order with respect to service was to be made together. Tribunal proposed that the matter be mentioned in 21 days so that once the two(20) other matters are filed Mr. Mwakio would simple notify the Tribunal of said filing and request for orders for substituted service for all three matters. Tribunal then ordered that the two other matters against the Athlete be filed and served within 21 days and to be placed before the Tribunal together with the present matter. Next mention was slated for 25th June 2020.
24. On 24th June 2020 Mr. Rogoncho appearing for the Applicant told the Tribunal that he had lodged the Notice to Charge on the other two (2) matters and therefore requested a date for mention in 21 days. The Tribunal ordered that the matter be mentioned on 23rd July 2020.

25. At the mention on 30th July 2020 the Applicant's Counsel informed the Tribunal that the Athlete's Counsel was no longer acting in the matter as he was frustrated by the fact that the Athlete was not cooperating. Further Mr. Rogoncho said that they have the Athlete's phone numbers and they have tried calling him but he does not pick. Mr. Rogoncho invited the Tribunal to look at the ADRV Notice and indicated that they unfortunately did not have the one the Athlete had received as that copy was with the Athlete; he brought to the Panel's attention that the Athlete had actually received the ADRV Notice (*showed the Tribunal the signature of the Athlete on the document on camera*) and this way back on 26th April 2019.
26. Upon fully hearing the Counsel for the Applicant the Tribunal directed and ordered as follows:
- i. The Applicant shall on or before the 20th August 2020 file and serve the Athlete and the Tribunal electronically with their submissions.
 - ii. The Applicant's Submissions shall be filed and shall be copied to each member of the Panel at their respective email address and shall also electronically serve each of the parties at their designated email addresses.
 - iii. The matter would come up for mention on 20th August 2020 for compliance and determination for date of decision.
27. On 19th August 2020 when the matter was mentioned the Applicant's Counsel Mr. Rogoncho informed the Tribunal that he

had filed his submissions and shared with the panel members. It was directed that the decision would be rendered on 30th September 2020.

28. On 26th August 2020 a copy of submissions by the Applicant were filed at the Tribunal.

29. At a mention on 1st October 2020 the Tribunal upon hearing the Applicant's Counsel in this case as follows:

- i. The matter had come up for mention to confirm if the parties had filed their submissions; the Applicant filed his submissions on 26th August 2020 which the Chairman confirmed receipt of;
- ii. The Athlete did not participate in the proceedings and Counsel for the Applicant requested a date for the decision on the matter; and
- iii. The Tribunal directed that the decision shall be delivered on 11th November 2020.

III. The Hearing

30. The matter was heard exparte.

IV. Submissions

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

A. Applicant's Submissions

32. Mr. Rogoncho, Counsel for the Applicant, informed the Panel that the Agency wished to adopt and own the Charge Document dated 17th August 2019 and filed on 26th August 2020 and the annexures thereto as an integral part of its submissions.
33. He submitted that the Athlete who was charged with an DRV for Evading, Refusing or Failing to submit to Sample Collection in contravention of ADAK ADR was 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.
34. At his No. 5 he stated *"The matter was set down for hearing and the athlete was represented by Mr. Mungai who filed his Defence in the cause before the tribunal."*
35. Giving his summary of the Athlete's letter dated 18th February 2019 Counsel for the Applicant submitted that the Athlete's response was evaluated by ADAK and it was deemed to constitute an ADRV and referred to the Sports Disputes Tribunal for determination.

36. At its No. 14 -15 the Applicant stated that *“On 26th April, 2019, The athlete appeared before the Sports Disputes Tribunal, however the Tribunal did not sit. On 26th April 2019, the athlete was served with the Charge Document and the ADRV Notice, to which he appended his signature, (see the evidence of the signature on two documents referred to). No. 16 The athlete has since that date refused, declined and failed to attend before the Tribunal despite numerous notifications through phone calls, text messages and WhatsApp texts.”*
37. Further the Applicant’s Counsel said that the Athlete though aware of the pendency of this matter has deliberately decided to his matter. *“We therefore invoke **Rule 3.2.5 as read with Rule 7.10.2 of the ADAK Anti-Doping Rules** and urge this Panel to render a Decision in this matter which has been adjourned too any times.”*, Counsel submitted.
38. In his submissions he stated his legal position under Article of ADAK ADR/WADC... the Agency had the burden of proving the DRV 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 a reliable means including admissions. He laid down the roles and responsibilities of the athlete as under WADC’s Article 22. And also the principals enunciated in preface to the ADR regarding the duties of the athlete.

39. At No 24 of its submissions the Applicant stated that *"In his defence, the Respondent made several admissions and a few general denials. In his response the respondent made the following admissions;*

- a) *He admitted to his lack of interest to familiarize himself with Anti-Doping rules and regulations nor to attend any anti-doping workshop.*
- b) *He admitted to being approached and requested to provide his urine sample.*
- c) *He admitted to not requesting the chaperone to provide official identification that identifies him as an ADAK official*
- d) *He admitted to walking away from the venue without complying to the request of sample collection"*

40. The Applicant's Counsel touched on the matter of proof of ADRV stating *"the burden of proof-shift to the athlete to demonstrate no fault, negligence or intention to entitle him to a reduction of sanction"* in its submission at No. 26.

41. *"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 on explanation is more probable than the other possible explanation. For that purpose, an athlete must provide actual evidence as opposed to mere speculation.¹", Applicant's Counsel submitted.*

42. 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*.
43. He stated that, *"It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before intentionally evading, refusing or failing to submit to Sample collection, he was thus grossly negligent"*.
44. Further, the Applicant's Counsel contended that the Athlete has had a long career in athletics and it is only questionable that he has had no exposure to the crusade against Doping. Counsel prayed an ADRV be found against the Athlete and a maximum sanction of four (4) years Ineligibility be imposed as no plausible explanation had been advanced for the ADRV.

B. Athlete's Submissions

45. In absence of submissions made by or on behalf of the Athlete, the Panel will rely on any/all relevant written material on record including the Athlete's letter dated 18th February 2019, (see copy in Pg. 21 of the Charge Document), which we hereby set out:

"Anti-doping Agency of Kenya 18th February 2019

I Henry Cheruiyot Kosgei participated in Kisumu marathon on 16th December 2018, of which I managed to finish in fourth position. Thereafter, I met the anti-doping of whom he told me to go and have a bottle of water and I told him that I wanted to change my clothes He then told me to carry on, he then showed me their offices where I would meet them later.

Thereafter, I went to change my clothes in my room, and then when coming back I found some police arresting some people who were drinking in a bar that was in the same building as my room.

They then arrested me thinking I was among the people who were drinking with, but I pleaded with them and therefore I did not reach the police station and they asked for a fee of 2000Ksh which I did not have at that moment. I had to wait for around 7 hours to raise the cash, this led them to free me at around 7.15PM.

I came back to the field as soon as possible with hopes of finding the officials But found no one there since it was late. This forced me to come back home.

The first action I did was to look for the contacts of the AK officials of Kisumu Marathon then I called him through his number (0733790582) who was supposed to give me the Anti-doping Agency contacts which he told me he doesn't have at the moment he then directed me to look for the Nandi county AK official by the name (Kennedy Tanui).

I used a friend by the name (Jonathan) who talked with the Nandi county AK official, thereafter Jonathan called me saying that when the money will be available, he will call me immediately. He did not give me further information.

Sir/madam, my ID no.24151658, I am ready for the anti-doping exercise any day of your choice.

Yours faithfully

(Signed)

Henry Cheruiyot''

46. In his Statement of Defence the Athlete expressly denied the ADRV allegation in the Charge Document and submitted that he Had never engaged in doping in his entire career lasting ten years And prayed that the Tribunal take into consideration his history, His conduct in the prevailing circumstances of being in police custody, principle of fairness and proportionality and sanction him to a reprimand.

V. Jurisdiction

47. 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.

VI. Applicable Law

48. 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.]

VII. MERITS

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

50. 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/Negligence;*
- d. *The Standard Sanction and what sanction to impose in the circumstance.*

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

51. 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.

51. The Athlete in his written explanation dated 18th February 2019 'admitted' to having left the venue without issuing his Sample after being duly notified. WADC's Article 3.2 clearly states that 'Facts related to anti-doping rule violations may be established by any reliable means, including admissions. [...]'. The Athlete's written 'explanation' fits the bill of a written 'admission'. Further, the Panel is in agreement with the Applicant's assertions that the Athlete, b) " *admitted to being approached and requested to provide His urine sample and d) He admitted to walking away from the venue without complying to the request of sample collection"*

52. Hence by virtue of his own admission the Panel finds that the Athlete committed an ADRV and therefore Applicant has established the ADRV to the comfortable satisfaction of the Panel.

B. Was the Athlete's ADRV intentional?

53. Further as used in WADC's Article 3.1:
[...]. *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.*

54. The burden then shifted to the Athlete to prove by a balance of probability that commission of his ADRV was not intentional. WADC's Article 10.2.3 is instructive:

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 antidoping rule violation and manifestly disregarded that risk. [...]

56. 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.

57. Deducing from the Athlete's narration as evident in such paragraph, "[...] *The first action I did was to look for the contacts of the AK officials of Kisumu Marathon then I called him through his number (0733790582) who was supposed to give me the Anti-doping Agency contacts which he told me he doesn't have at the moment he then directed me to look for the Nandi county AK official by the name (Kennedy Tanui).[...]*", it was clear that the Athlete 'knew' he had to reach/contact ADAK officials. The fact that his so-called friend Jonathan faltered in connecting him to ADAK officials through the Nandi County AK official is in our opinion a lame duck excuse. That Jonathan "*did not give me further information*" falls way short of a justifiable and/or compelling reason for the Athlete to not have followed up his matter with ADAK to establish that indeed an unfortunate incident actually prevented him from complying with his Code duty as per Article 21.1.2, '*To be available for Sample collection at all times*'. Further, Athlete has not adduced any evidence to prove that he "*was in police custody for about seven hours until his release about 7:15pm*" as contended in his Statement of Defence. In all cases, as under WADC's Article 21, an athlete, (especially one such as in this case, with a career spanning ten (10) years), remains fully responsible for his anti-doping matter even if he/she might delegate his Code responsibilities to other person or Athlete Support Personnel.

58. The Panel also considered the submissions of the Applicant in regard to the difficulties it encountered while trying to trace and ensure the Athlete's cooperation in resolving his (Athlete's) ADRV matter and is of the opinion that the Athlete failed to comply with his Code duty as under WADC's Article 21.1.6, '*To cooperate with Anti-Doping Organizations investigating anti-doping rule violations.*'

59. From the foregoing, this Panel is persuaded that the Athlete without justifiable reason avoided issuing his Sample on 16th December 2018 as required under his Code duty and Comments to Article 2.3 surmise:

[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.]

60. Hence according to the facts on record in this case, the Athlete intentionally evaded Sample collection and in ruling thus this Panel aligns itself with **Kajuga v. Africa Zone V RADO A-01-2016** where the panel similarly averred at para. '4.3.2.2 In the matter of Federation Internationale de Natation ('FINA') v William Brothers¹² 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') matter¹³ 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.

Summary:

61. Studying the Athlete's 'explanation' dated 18th February 2019 and the witness statement recorded on 17/12/2018, (in Pg. 15 of the Charge Document) by the DCO/chaperone who directly attended to him or was responsible for notifying him, we noted that their narrations differed substantially but irrespective of whichever version is the truthful one, a nagging question lingered in the minds of this Panel which was, why, ultimately, the Athlete elected to also 'evade' the further proceedings regarding his own matter. Accordingly, his behavior lends credence to the claim by the Applicant that he intentionally evaded his Sample taking and further choose to boycott his own proceedings without a plausible explanation and as such this Panel finds WADC's Article 3.2.5 applicable in his case:

'The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's

or other Peron's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.'

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 a 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. Sanctions

66. 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.*
67. 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. ...

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

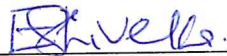
Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained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

VIII. DECISION

69. Consequent to the discussions on merits of this case:
- (i) The applicable period of Ineligibility of 4 years is hereby upheld;
 - (ii) The period of Ineligibility shall be from the date of this decision and for avoidance of doubt run from 19th November 2020 until 19th November 2024;

- (iii) All Competitive results obtained by the Respondent Athlete from and including 16th December 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 19th day of NOVEMBER 2020



Mrs. Elynah Sifuna-Shiveka,
PANEL CHAIRPERSON



Ms. Mary N. Kimani
MEMBER



Mr. Gichuru Kiplagat
MEMBER