



Arbitration CAS 2017/A/5175 International Association of Athletics Federations (IAAF) v. Anti-Doping Agency of Kenya (ADAK), Athletics Kenya (AK) & Benjamin Ngandu Ndegwa, award of 2 November 2018 (operative part of 17 November 2017)

Panel: Mr Jeffrey Benz (USA), President; Mr Lars Hilliger (Denmark); Mrs Blondel Thompson (United Kingdom)

Athletics (long-distance)

Doping (19-norandrosterone and 19-noretiocholanolone)

Results management under 2015 IAAF Competition Rules

Consequences of breach of terms of provisional suspension

- 1. Rule 38.3 2015 IAAF Competition Rules foresees that the National Federation of an athlete accused of having committed an anti-doping rule violation is responsible for the results management. However, Rule 38.5 2015 IAAF Competition Rules provides that the hearing may be conducted by another tribunal by delegation from the member and that in such circumstances, the decision of the tribunal in question will be deemed to be a decision of the member.**
- 2. Where an athlete breaches a period of provisional suspension, he or she loses the entirety of the credit for such suspension, *i.e.* both the period before and after any breach; to permit otherwise would undermine the purposes of the provisional suspension rule.**

I. PARTIES

1. IAAF (“the Appellant”), is the International Olympic Committee (“IOC”) recognized international federation for the sport of athletics.
2. ADAK (or “the First Respondent”) is the World Anti-Doping Agency (“WADA”) recognized national anti-doping agency for the country of Kenya.
3. AK (or “the Second Respondent”) is the governing body for the sport of athletics in Kenya and a member of the IAAF.
4. Mr. Ndegwa (“the Athlete” or “the Third Respondent”) is a long-distance runner from Kenya. He has participated in a number of elite international events around the world in athletics, competing in the 5,000 meters, 10,000 meters, 20k, half marathon, and marathon events, including but not limited to the Tokyo Marathon, the Osaka Marathon, and the Fukuoka International Marathon.

II. FACTUAL BACKGROUND

5. On 6 June 2015, Mr. Ndegwa underwent an in-competition doping control on the occasion of the “Mattoni Ceske Budejovice Half Marathon” in the Czech Republic.
6. The analysis of the A sample revealed the presence of 19-norandrosterone and 19-noretiocholanolone, which are metabolites of nandrolone, in excess of the Decision Limit of 2.5 ng/mL. Nandrolone is an exogenous Anabolic Androgenic Steroid prohibited under S1.1.1 of the 2015 WADA Prohibited List (and prior and future versions of that list).
7. Pursuant to a letter from the IAAF dated 30 June 2015, the IAAF notified Mr. Ndegwa of the Adverse Analytical Finding (“AAF”) and offered him the opportunity to provide an explanation by 6 July 2015.
8. The IAAF letter to Mr. Ndegwa also informed him of his right to request the analysis of the B sample. The IAAF proposed three possible dates for the B sample analysis, 7, 9, and 10 July 2015. The IAAF letter provided Mr. Ndegwa with a deadline of 6 July 2015 to advise whether he requested the B sample analysis and, if so, which one of the dates he preferred.
9. On 3 July 2015, Mr. Ndegwa sent an email to the IAAF advising that he “was under treatment from January 23-March 27 for Anaemic [*sic*] condition” and that he would “scan the doctor’s description in the course of the day and forward [*sic*] them”. On the same day, he sent a further email attaching a medical certificate from the Ministry of Public Health and Sanitation dated 24 March 2015.
10. The 24 March 2015 medical certificate stated as follows:

*“The above named has been visiting our facility since 23/01/2015 to 24/03/2015 and was diagnosed of renal insufficiency, anaemia, osteoporosis and nerve problems which resulted to loss of weight [*sic*], joint pains, swollen [*sic*] limbs, chest pain and jaundice.*

He has been using the following drugs to stabilize and restore his health

RX

- ./ Syrup ranferon 10mls BD for 2 months*
- ./ Tabs cartel forte 1 OD for 2 months*
- ./ Tabs neurobin forte 1 OD for 2 months*
- ./ Tabs relief MR 1 BD for 2 weeks*
- ./ Caps phytosome 1 OD for 1 month*

He is due for check up after every 2 weeks for follow up. Any assistance offered to ease his prevailing situation will be highly appreciated”.

11. Later on 3 July 2015, the Athlete sent yet a further email to IAAF, requesting the B sample analysis. He did so in the following terms:

“Hi sir, am preffering B sample analysis. i was kindly requesting [sic] if you can give me some more time to collect all medical description in the hospital where i was been treated during that period. Thank u in advance”.

12. On 6 July 2015, the IAAF requested that the Athlete clarify his intention with respect to the B sample analysis and, in particular, his preferred date. The Athlete responded by email on the same day, confirming his wish for the B sample analysis, selecting 10 July 2015 as the preferred date and requesting that the IAAF represent him during the analysis, as follows:

“Hallo sir, i appreciate. i accept B sample analysis on 10 july 2015. secondly am humbly asking if you can represent me during the analysis”.

13. On the same day, *viz.* 6 July 2015, the IAAF acknowledged receipt of the Athlete’s email and the fact that he had selected 10 July 2015 as the date for the analysis. The IAAF advised the Athlete that an independent observer would be designated to attend the opening of the B sample.

14. The Athlete sent a signed copy of the Acceptance of Provisional Suspension Form to the IAAF on the same day, 6 July 2015.

15. On 7 July 2015, the Athlete sent the IAAF an email attaching a further medical certificate from the Ministry of Public Health and Sanitation dated 6 June 2015.

16. On 17 July 2015, the IAAF wrote to the Athlete to inform him that the B sample analysis conducted at the WADA-accredited laboratory in Dresden had confirmed the AAF. In the same letter, the IAAF also advised the Athlete that the explanations he had provided were not adequate. In particular, the IAAF:

- noted that none of the medications contained nandrolone (even though one of them, *viz.* sustanon, contained testosterone);
- expressed some surprise that the Athlete had been able to compete in international marathons during the same period in which he was allegedly suffering from a whole plethora of severe conditions and ailments; and
- confirmed that the Athlete’s provisional suspension was maintained and gave the Athlete a deadline of 14 days to request a hearing.

17. Whereas the Athlete was apparently heard by the AK Medical and Anti-Doping Commission in September 2015, his case was never determined and no decision was ever rendered by AK.

18. Pursuant to Kenyan law, ADAK has results management authority over all anti-doping matters to the exclusion of all other organs that may have previously had such jurisdiction, including AK. Moreover, the jurisdiction for the hearing and determination of disputes was conferred on

the Sports Disputes Tribunal (“SDT”). In accordance with a letter from IAAF to ADAK dated 27 September 2016, the results management authority for all IAAF cases (including those cases pending before AK) was transferred to ADAK and, by extension, to the SDT.

19. A hearing was held on 24 January 2017 before the SDT, resulting in a decision in the matter of the Athlete on 13 April 2017. The SDT decided that (i) the Athlete had committed an anti-doping rule violation, (ii) he should be sanctioned with a period of ineligibility of 20 months, (iii) that period of ineligibility should start on the date of the provisional suspension *visz.* 6 July 2015 and (iv) that his results in the Mattoni Ceske Budejovice Half Marathon be disqualified.
20. The IAAF was notified of the Appealed Decision on 19 April 2017.
21. This appeal followed.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 2 June 2017, the Appellant filed its Statement of Appeal, serving as its Appeal Brief, with the CAS Court Office against the Appealed Decision, in accordance with Articles R47 and R48 of the Code. Within the Statement of Appeal, the Appellant requested that the arbitration be submitted to a Panel of three arbitrators and nominated Mr. Lars Hilliger, Attorney-at-law, Copenhagen, Denmark, as its arbitrator.
23. By letter dated 9 June 2017, the CAS Court Office acknowledged receipt of the Statement of Appeal serving as Appeal Brief and informed the Respondents that an appeal had been filed by the Appellant.
24. On 3 July 2017, the First Respondent filed its “statement in support of appeal”.
25. On 11 July 2017, the Third Respondent filed his statement of defense.
26. On 15 July 2017, the Second Respondent filed its statement of defense.
27. By letter dated 18 July 2017, the CAS Court Office acknowledged receipt of the First, Second and Third Respondent’s answers/statements of defense.
28. On 14 August 2017, the Parties were informed that pursuant to Article R53 of the Code, the President of the CAS Appeals Arbitration Division had decided to nominate Ms. Blondel Thompson as arbitrator *in lieu* of the Respondents.
29. On 16 August 2017, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide on the procedure was constituted by:

President: Mr. Jeffrey Benz, Attorney-at-law in Los Angeles, USA;

Arbitrators: Mr. Lars Hilliger, Attorney-at-law in Copenhagen, Denmark; and

Ms. Blondel Thompson, Barrister in Birmingham, United Kingdom.

30. On 19 September 2017, the IAAF filed a submission adducing new evidence that it did not previously dispose of and stated as follows:

“The IAAF filed its combined Statement of Appeal/ Appeal Brief on 2 June 2017. In that Brief, the IAAF challenged the Athlete’s contention that the Adverse Analytical Finding resulted from his ingestion of sustanon, which had allegedly been prescribed to him by a Dr. Songol of the Uasin Gishu County Hospital in connection with a whole plethora of ailments and symptoms.

In essence, the objection of the IAAF to the Athlete’s explanations was two-fold:

Firstly, the IAAF cast doubt on the authenticity of the relevant medical certificates produced as Exhibits 7 and 12 to the IAAF Brief (see paragraph 56 of the same); and

Secondly, the IAAF pointed out that sustanon contained testosterone, which could not have produced the metabolites detected in the Athlete’s sample in any event (see paragraphs 57 and 58 of the IAAF Brief).

The IAAF has now received further evidence that the medical certificates produced by the Athlete are not authentic. ADAK wrote to the the [sic] Head of the Records Department of the Uasin Gishu County Hospital on 23 August 2017 in order to seek verifications with respect to the medical certificates (see attached). On 29 August 2017, the Uasin Gishu County Hospital responded to the ADAK letter, confirming inter alia that (i) there was no record of the Athlete having been treated at the hospital, (ii) there was no physician by the name of Dr. Songol at the hospital, (iii) neither the stamp nor letterhead corresponded to those used by the hospital (see attached).

In view of the above and also the elements set out in the IAAF Brief - e.g. the many spelling mistakes, the mismatch of the dates and the disparities in terms of the medication - the IAAF submits that it is clearly established that the medical certificates are not authentic. This further supports the IAAF’s position in these appeal proceedings that the Athlete has failed to establish the origin of the prohibited substances in his system and must therefore be sanctioned with a four-year period of ineligibility.

Separately to these CAS proceedings, the IAAF of course reserves its right to pursue a Tampering violation against the Athlete in due course”.

31. On 20 September 2017, the CAS Court Office informed the Parties that the Panel had decided to admit the Appellant’s unsolicited submission of 19 September 2017, and granted the other parties the possibility to comment on the submission in question, by 4 October 2017.
32. On 29 September 2017, the Second Respondent commented that it associated itself with the Appellant’s submission of 19 September 2017.
33. On 4 October 2017, both the First and Third Respondent provided their comments. The First Respondent essentially declared having no objection to the admission of the Appellant’s submission as the same had emanated from a further inquiry by the First Respondent. That

therefore it associated itself to the same. The Third Respondent commented by providing an affidavit by himself. By means of that affidavit the Athlete essentially claimed not having received, until the submission by the Appellant of 19 September 2017, any information on the investigations into the medical documents he had handed in in the course of the instance below. That for various reasons, no fault whatsoever had been established in his medical documents and that therefore, they remained authentic and no fault on his part had been established. Accordingly, the Athlete requested that the Appellant's submission of 19 September 2017 be "expunged from the record".

34. On 30 October 2017, the Third Respondent declared that he will not be participating in the hearing via Skype, as initially proposed, but shall be seeking to be supplied with copies of the Panel's proceedings after the hearing for his information and records. That he would also be seeking time to file further submissions after the hearing if the Panel so directs.
35. On 31 October 2017, the Parties, save for the Athlete, appeared for a hearing before the Panel at the Lausanne Palace Hotel in Lausanne, Switzerland. The Athlete never appeared to present evidence at the hearing. The attendees presented evidence and made their oral submissions. The hearing attendees, in addition to the members of the Panel as well as Ms. Carolin Fischer, CAS Counsel, were
 - Mr. Ross Wenzel and Mr. Nicolas Zbinden, counsel of the Appellant
 - Mr. Erick Omariba and Ms. Damaris Ogama Alukwe, counsel of the First Respondent
 - Mr. Elias Masika, counsel of the Second Respondent.

At the end of the hearing and upon request by the Panel, the Parties attending the hearing explicitly confirmed that their procedural rights and their right to be heard had been fully observed throughout the arbitration proceedings. Also at the end of the hearing the Panel announced that it will render a decision regarding the issue of post-hearing submissions following the hearing.

36. On 2 November 2017, the Panel sent a letter to the Parties in which the Panel declined the request of the Third Respondent to make post-hearing submissions.
37. On 13 November 2017, the IAAF, in follow up of questions raised during the hearing, confirmed that Mr. Ngandu had not been subject to any further provisional suspension (imposed or voluntary accepted) subsequent to the decision of the SDT of 13 April 2017. Further that given that pursuant to the Appealed Decision, Mr. Ngandu was rendered ineligible for a period of 20 months from the date of his provisional suspension *i.e.* 6 July 5, his period of ineligibility expired on 5 March 2017 (*i.e.* prior to the issuance of the Appealed Decision). The IAAF further underlined, relying on its written submissions and explanations provided at the hearing, that Mr. Ngandu should not be eligible to compete but should rather be imposed a four-year ineligibility period with no credit for any period of provisional suspension.
38. On 17 November 2017, the Panel issued its Partial Operative Award in this matter awarding as

follows:

- “1. *The appeal filed by the International Association of Athletics Federations on 2 June 2017 is upheld.*
2. *The Decision rendered by the Sports Dispute Tribunal of the Republic of Kenya on 13 April 2017 is set aside.*
3. *Mr Benjamin Ngandu Ndegwa is sanctioned with a four-year period of ineligibility starting on the date of this Partial Award.*
4. *All competitive results obtained by Mr Benjamin Ngandu Ndegwa from and including 6 June 2015 to the date of this Partial Award are disqualified with all resulting consequences, including forfeiture of any medals, points and prizes.*
5. *The costs of the arbitration, the parties’ legal and other costs incurred in connection with the present proceedings shall be determined in a further Award”.*

IV. SUMMARY OF THE PARTIES SUBMISSIONS

39. The IAAF submitted, in its Statement of Appeal serving as Appeal Brief in summary as follows:

- That the Athlete was given notice of his right to be represented at the B sample testing and he never availed himself of that right;
- That the presence violation has been established here and in the Appealed Decision and that such violation is intentional and should be subject to a sanction of four years;
- That if the Athlete is to receive a reduction he must establish lack of intention in part by establishing the origin of the substance, which the Athlete has been unable to do in part because the medical documentation is replete with inconsistencies and errors, the number of ailments from which the Athlete was allegedly suffering were ongoing even while he was competing in international distance running events, and the sustanon the Athlete claims to have taken contains testosterone, but not nandrolone;
- That the Athlete competed in various competitions after the date of his provisional suspension and before the date of the Appealed Decision, ranging from at least 28 February 2016 through 26 February 2017; as a result he should lose the entirety of any credit for any provisional suspension and therefore the sanction must commence on the date of the CAS award herein with no credit for any period of provisional suspension; and
- That in relief the IAAF seeks that the appeal be upheld, the SDT decision be set aside, the period of suspension be four years, the start date for such sanction shall be when this award is issued, that all competitive results obtained by the Athlete from and including 6 June 2015 to the date of the CAS award be disqualified with all resulting

consequences, and that all respondents be ordered to pay the IAAF a contribution to its legal and other costs in connection with these appeal proceedings.

40. The First Respondent, ADAK, submitted in summary as follows:

- That the SDT found that there was an anti-doping rule violation (“ADRV”) but *“failed to appreciate”* that the burden of establishing that the violation was not intentional rests with the Athlete and not the anti-doping agency;
- That in making its finding the SDT did not consider the inconsistencies in documentation and evidence submitted in its proceeding;
- That the SDT failed to appreciate that the Athlete’s denial was insufficient and that he was required to *“demonstrate non intention”*;
- That ADAK diligently discharged its duties under the law and it does not have a budget for paying legal costs of third parties and it will be impossible to make a contribution of any legal costs to the IAAF; and
- That, as its relief, the Panel finds that the appeal of the IAAF is admissible, the decision of the SDT is set aside, the results attained by the Athlete in the Mattoni Ceske Budejovice Half Marathon be disqualified, the Athlete be sanctioned with a suspension of more than 20 months, all competitive results obtained by the Athlete from 6 June 2015 be disqualified with all resulting consequences, and all parties bear their own legal and other costs related to this appeal.

41. The Second Respondent, AK, submitted in summary as follows:

- That the fact that the Athlete tested positive for a prohibited substance means that he must establish that he bore no fault or negligence to have the period of ineligibility eliminated;
- That the Athlete needed to have a Therapeutic Use Exemption (“TUE”) to support his assertion that the prohibited substance was not intentionally taken to enhance his performance or *“violate the spirit of the sport of Athletics”*. The Athlete did not have a TUE for the substance in question;
- That AK supports the appeal but asserts that it should bear no portion of the arbitration costs or pay a significant contribution to the legal and other costs incurred by the Appellant in these appeal proceedings because, in its view, it 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”*. AK also argues that the failure to conclude these proceedings arose from the suspension of its official by the IAAF Ethics Commission thereby depriving it of the requisite quorum to discharge its mandate.
- That as its relief it requests that the appeal be allowed but only to the extent that no

order of costs should be made as against it with respect to this appeal.

42. The Third Respondent, the Athlete, submitted, on the merits, in summary as follows:

- That he was never informed of his right to be present or be represented during the opening and testing of his B sample and that the IAAF “*ought to have appointed an independent observer to represent him during the opening*” thereof;
- That he suffered from a medical condition and was “*diagnosed with a condition known as renal insufficiency due to a chronic kidney disease*”; and he was suffering from other ailments “*including but not limited to anemia as a result of iron deficiency, osteoporosis, arthritis, ulcerative colitis, asthma and chest congestion as well as nerve problems*” and the Athlete produced before the SDT copies of all medical documents related thereto as well as of prescriptions;
- That he was prescribed several drugs including “*IM sustanon 250mg, IV venofar 20mg and tabs deca Medrol 80mg*”;
- That he was unaware that any of the drugs prescribed to him included 19-norandrosterone but came to discover after the proceedings had commenced before AK that that substance “*was one of the components/esters of testosterone which is found in Sustanon*” and that as result he should be found to have no fault or negligence;
- That he was charged with an ADRV arising from the presence of 19-norandrosterone and not of nandrolone and only responded on the basis of the former, believing he did not have to establish the presence of the latter in his specimen. The Athlete also makes the point that nandrolone “*is a synthetic anabolic-androgenic steroid derived from testosterone which is contained in sustanon*” and he was using sustanon under prescription for a documented medical condition; and
- That as his relief the appeal be dismissed, that the decision of the SDT be upheld, and that the Athlete be awarded his costs of this appeal, though he acknowledges that should a period of ineligibility be imposed on him then it should be two years, backdated to start running from 6 July 2015, the date of his suspension, because of the considerable delays in hearing the matter.

V. JURISDICTION AND ADMISSIBILITY

A. Applicable rules

43. According to Article R58 of the CAS Code of Sports-related Arbitration (“the Code”), the Panel shall decide the dispute according to the applicable regulations and, on a subsidiary basis in the event that there is a lacuna, 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.

44. The doping control giving rise to the AAF was initiated by IAAF. Indeed, by signing the Doping Control Form, the Athlete explicitly accepted that any disputes arising out of the doping control would be subject to the IAAF Competition Rules.
45. This explicitly reflects the principle set out at Article 7.1 of the World Anti-Doping Code (WADC) that the applicable rules are those of the entity that initiated and directed sample collection.
46. Indeed, the SDT explicitly found that it was the IAAF Competition Rules that were applicable to this matter (see paragraph 6.11 of the Appealed Decision).
47. The IAAF Competition Rules are therefore the applicable rules in this matter. All Parties are in agreement on this point.

B. IAAF's Right of Appeal

48. The IAAF regulations currently governing anti-doping matters are the IAAF Anti-Doping Rules entered into force on 3 April 2017. However, these rules only apply to anti-doping rule violations committed after 3 April 2017.
49. Pursuant to Article 21.3 of the IAAF Anti-Doping Rules, anti-doping rule violations committed prior to 3 April 2017 are subject to the rules (including procedural rules) in place at the time of the alleged anti-doping rule violation.
50. The anti-doping rules in force at the time of the anti-doping rule violation were the IAAF Competition Rules (and, more particularly, Chapter 3 thereof) that entered into force on 1 January 2015 (the "2015 IAAF Competition Rules").
51. In accordance with the 2015 IAAF Competition Rules, the responsibility to conduct the hearing process lies with the Member federation of the IAAF to which the Athlete is affiliated, *viz.* AK (see Rule 38.3).
52. However, Rule 38.5 of the 2015 IAAF Competition Rules provides that the hearing may be conducted by another tribunal by delegation from the Member and that, in such circumstances, the decision of the tribunal in question, will be deemed to be a decision of the Member.
53. In this case, the Appealed Decision, although rendered by the SDT, is attributed to AK for the purposes of the IAAF Competition Rules.
54. Rule 42.3 of the IAAF Competition Rules provides as follows:

"In cases arising from an International Competition or involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further

review at national level and shall be appealed exclusively to CAS in accordance with the provisions set out below”.

55. The Mattoni Ceske Budejovice Half Marathon is an International Competition for the purposes of the IAAF Competition Rules.
56. In view of the foregoing, the IAAF has a right of appeal against the Appealed Decision to CAS pursuant to Rule 42.3 of the IAAF Competition Rules.
57. The Athlete took a different view of this arguing that - what in the Panel’s view was obviously a minor clerical error on the part of counsel for IAAF - the signing of the Statement of Appeal and Appeal Brief in counsels’ name, “*For the World Anti-Doping Agency*”, was dispositive on the issue, arguing that as a result the IAAF did not ever appeal the decision of the SDT. The Panel is of the view that this argument is misplaced. It is clear from the case caption on the cover of the Statement of Appeal/Appeal Brief, from the contents of the same, and from the source of payment of the CAS filing fee that the IAAF is the party making this appeal, notwithstanding a minor clerical error in the signature line of the Statement of Appeal/Appeal Brief. No other party took issue with the admissibility of the appeal and in fact conceded it.

C. Compliance with the deadline to appeal

58. Rule 42.15 of the 2015 IAAF Competition Rules provides as follows:

“Unless stated otherwise in these Rules (or the Doping Review Board determines otherwise in cases where the IAAF is the prospective appellant), 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 receipt of the decision to be appealed (or where the IAAF is the prospective appellant, from the day after the date of receipt of both the decision to be appealed and the complete file relating to the decision, in English or French) [...]”.

59. Therefore, the IAAF has 45 days to appeal following its receipt of the complete case file (including the decision) in either English or French.
60. As the IAAF received the Appealed Decision on 19 April 2017, this Statement of Appeal is lodged in a timely fashion in accordance with Rule 42.15 of the IAAF Competition Rules.
61. All Parties participated in the proceedings in terms of filing the required documents. While the Athlete chose not to attend the hearing, there were no further objections to jurisdiction or admissibility by any party and the other respondents participated fully in the proceedings, including the hearing.
62. As a result, the Panel finds that it has jurisdiction over this appeal and that this appeal is admissible.

VI. ANALYSIS

63. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced for and at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Establishing the ADRV

64. In accordance with Rule 40.2 of the IAAF Competition Rules, a four-year period of ineligibility must be imposed for a (first) anti-doping rule violation not involving a specified substance unless the Athlete can establish that the violation was not intentional.

65. There is no dispute that the AAF for nandrolone of the A sample was confirmed by the B sample analysis. As nandrolone is not – as alleged by the Athlete – a specified substance, this is sufficient to shift the burden of proof to the Athlete to reduce the length of the claimed four year sanction if the use was not intentional. In this context the Panel has taken note of the Athlete's allegation in his Defence that in front of the first instance, he had only been charged with an ADRV arising from the presence of 19-norandrosterone, and not of nandrolone. However, the Panel also takes note that 19-norandrosterone is a metabolite of nandrolone, and both 19-norandrosterone and nandrolone are specifically listed by name on the 2015 WADA Prohibited List. Furthermore, in light of the *de novo* hearing and review by the CAS Panel, any potential flaws that occurred during the first instance proceeding are healed.

B. Intention or Lack Thereof

66. Rule 40.3 of the IAAF Competition Rules sets out that the term "intentional" is meant to *"identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*.

67. The CAS cases establish that to meet this burden the Athlete must establish how the substance entered his/her body. There is a wide range of CAS cases on this point and they vary in the amount or quality of evidence of source that must be established, but as will be seen below for reasons relating to proof in this case this Panel need not analyze these cases or this issue with a fine eye. The Panel accepts that the Athlete must demonstrate the source with some form of colorable evidence.

68. If the Athlete is able to establish that the ADRV was not intentional, then the Athlete may benefit from a reduction in sanction to two years, or even less if the Athlete can demonstrate no fault or no significant fault on his part for the ADRV.

69. Even though the Athlete did not have a TUE for the substance in question, in an effort to attempt to meet his burden, the Athlete provided a variety of medical related “evidence”, including purported doctor’s notes and hospital records. This evidence is referenced in detail above.

C. Purported Source of Nandrolone

70. Based on submissions made at the hearing by IAAF and the First Respondent, some medical records of a physician and hospital in Kenya appeared to have been falsified. For example:

- The submitted medical certificates are replete with spelling errors, including with respect to the names of certain medicines, mistakes physicians in a country where English is the official language would be unlikely to make;
- One of the medical certificates bears two different dates, 6 June 2016 and 6 July 2016;
- The 24 March 2015 certificate does not mention certain products (such as the sustanon claimed to have been taken by the Athlete), despite the fact that, according to the handwritten clinical notes submitted dated 2 March 2015, the Athlete was already allegedly taking them;
- There was evidence submitted at the hearing that the hospital stationary used for the medical records was also incorrectly addressed; and
- The medical certificates describe the Athlete as suffering from a wide variety of ailments and serious conditions, any one of which would have created substantial issues with athletic accomplishment or performance, and none of which were mentioned in the Athlete’s 14 October 2014 medical check-up in Japan. The list of claimed ailments is truly exceptional:
 - (a) renal insufficiency resulting from chronic kidney disease,
 - (b) anaemia,
 - (c) osteoporosis,
 - (d) arthritis,
 - (e) ulcerative colitis,
 - (f) asthma;
 - (g) chest congestion, and
 - (h) *“nerve problems which resulted to [sic] loss of weight [sic], joint pains, swollen [sic] limbs, chest pain and jaundice”*.

That the Athlete is able to function in normal life with this list of maladies would be extraordinary but to try to convince anyone that as an elite international distance runner he was able to compete at a high level with any one of these chronic conditions is simply unbelievable.

71. In this context the Panel has taken note of Athlete's allegation, contained in his affidavit submitted on 4 October 2017, that the authentication and investigations conducted by ADAK and the Uasin Gishu County Hospital are not conclusive and that the letter of 29 August 2017 by the Uasin Gishu County Hospital (provided by the IAAF on 19 September 2017) is not proof of the lack of authenticity of the Athlete's medical records. However, apart from his own word, the Athlete has not provided the Panel with any evidence at all in support of his allegations. Furthermore, neither of AK or ADAK have questioned the veracity or authenticity of the 29 August 2017 letter. Accordingly, the Panel has no doubts about the veracity/authenticity of the respective letter, with the consequence that indeed, the documents initially provided by the Athlete to establish the source of the positive finding are considered non-reliable.
72. In addition, the Panel is comfortably satisfied, based on evidence submitted by IAAF and not rebutted by the Athlete, that using the claimed source of the nandrolone, the sustanon, could not result in a nandrolone positive. This argument of the Athlete is rejected.
73. The Panel is comfortably satisfied that the Athlete undertook extraordinary and intentional, albeit at times comical, efforts to mislead the IAAF and relevant tribunals reviewing his case regarding the true basis for his ADRV.

D. The B Sample Issue

74. The Panel notes that there was no evidence to support the Athlete's claim that the IAAF failed to notify him of the opening or undertake testing of the B sample. In fact, there was ample evidence to the contrary. The IAAF sent a letter to the Athlete on 30 June 2015 informing the Athlete of his right to request analysis of the B sample and proposing three possible dates, giving him until 6 July 2015 to respond. The Athlete responded with a variety of other correspondence and eventually on 3 July 2015 wrote that "[I] am preferring [sic] B sample analysis". On 6 July 2015, the IAAF requested that the Athlete clarify his intention with respect to the B sample analysis and the Athlete responded by email the same day confirming his wish for the B sample analysis to be conducted selecting 10 July 2015 as the preferred date and requesting the IAAF to represent him during the analysis. In other words, the IAAF informed the Athlete of his right to be present during the B sample analysis or to have a representative present, and the Athlete corresponded and expressed his desire to have the IAAF represent him at the analysis. In other words, the Athlete's argument is completely misplaced here.

E. The Sanction

75. Against this backdrop, the Panel is comfortably satisfied that the IAAF has met its burden of proof in establishing an ADRV and that the Athlete has not demonstrated lack of intention or

provided any defense.

76. Accordingly, the proper punishment under the IAAF Competitions Rules is a 4 year period of ineligibility.

F. Start Date

77. Pursuant to the Appealed Decision, the period of ineligibility commenced on the day on which the Athlete accepted a voluntary provisional suspension, 6 July 2015. This effectively amounts to a credit being given to the Athlete for time served.
78. Evidence was presented, and the Panel accepts, that the Athlete, contrary to his agreement to voluntarily accept a provisional suspension, competed in at least nine high level events between 28 February 2016 and 26 February 2017, including in two Tokyo Marathons, the Osaka Marathon, and the Fukuoka International Marathon, along with several other championships in Japan.
79. The CAS cases have made clear that, where an athlete breaches a period of provisional suspension, he loses the entirety of the credit for such suspension (*i.e.*, both the period before and after any breach) (CAS 2014/A/3820, para. 111):

“Accordingly, even though Mr. Robinson respected approximately half of the provisional suspension, he did not respect it in its entirety and the Panel therefore concludes that he cannot receive credit for the provisional suspension”.

To permit otherwise, would undermine the purposes of the provisional suspension rule.

80. Given his violation of his own agreement to be provisionally suspended and the relevant rules (in particular Rule 40.11 of the IAAF Competition Rules), the Athlete’s suspension must commence on the date of the operative award in this case, 17 November 2017, with no credit for any time he claimed to have been provisionally suspended.

G. Disqualification of Results

81. In addition, Rule 40.9 of the IAAF Competition Rules provides that in addition to automatic disqualification of results in the competition that produced the positive sample

“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 anti-doping 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”.

82. The fundamental principle here is that the results are disqualified from the time of the commission of the anti-doping rule violation until the relevant sanction is served. The Panel

sees no reason to disturb this principle in this case.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the International Association of Athletics Federations on 2 June 2017 is upheld.
2. The Decision rendered by the Sports Dispute Tribunal of the Republic of Kenya on 13 April 2017 is set aside.
3. Mr. Benjamin Ngandu Ndegwa is sanctioned with a four-year period of ineligibility starting on the date of the Partial Award.
4. All competitive results obtained by Mr. Benjamin Ngandu Ndegwa from and including 6 June 2015 to the date of the Partial Award are disqualified with all resulting consequences, including forfeiture of any medals, points and prizes.
5. The costs of the arbitration and the Parties' legal and other costs incurred in connection with the present proceedings shall be determined in a further Award.