

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

Before:

Charles Hollander QC (Chair)

Anna Smirnova

Philipp Kotlaba

BETWEEN:

International Association of Athletics Federations (IAAF)

Anti-Doping Organisation

-and-

Lucy Kabuu Wangui

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

1. The Claimant, the International Association of Athletics Federations (“**IAAF**”), is the international federation governing the sport of Athletics worldwide. In accordance with Article 1.2 of the IAAF Anti-Doping Rules (the “**ADR**”), IAAF is represented by the Athletics Integrity Unit (“**AIU**”).
2. The Respondent, Ms Lucy Kabuu Wangui (the “**Athlete**”) is a 34-year-old long-distance runner from Kenya.
3. This matter concerns the presence of morphine in a urine sample collected from the Athlete on 8 April 2018, for which the Athlete has been charged with violations of the ADR.

A. Factual Background

4. On 8 April 2018, the Athlete underwent an In-Competition doping control test in Milan, Italy following the EA7 Milan Marathon 2018. The Athlete provided a urine sample with reference number 3593155 (the “**Sample**”).
5. The Sample was analysed by the WADA-accredited laboratory in Rome, Italy and revealed the presence of morphine greater than WADA's specified Decision Limit (“**DL**”) for the substance and with a ratio of total morphine to total codeine equal or higher than 2.0 and a concentration of total codeine not higher than 5µg/mL (the “**Adverse Analytical Finding**”). This constituted an Adverse Analytical Finding in accordance with the WADA Technical Document TD2018 DL “**Decision Limits for the Confirmatory Quantification of Threshold Substances**”.¹
6. In fact, the Sample contained morphine at a concentration of 2µg/mL (greater than the DL of 1.4µg/mL, corrected for Specific Gravity). Codeine was detected with a concentration of 0.317µg/mL. This resulted in a ratio of total morphine to total codeine of 6.3. Morphine is listed in S7, Narcotics of the WADA 2018 Prohibited List. It is a Specified Substance and is prohibited In-Competition only.

¹ Available at https://www.wada-ama.org/sites/default/files/resources/files/td2018dl_v1_en.pdf.

7. On 5 June 2018, the AIU notified the Athlete of the Adverse Analytical Finding, informed her of her right to have the B Sample analysed, and invited the Athlete to provide an explanation by no later than 12 June 2018.
8. On 12 June 2018 the Athlete provided her initial response to the notice from the AIU. The Athlete stated that she had not used any prohibited substances before or during the Milan Marathon, but that she *"was issued with the ethic sport drink by my manager FEDERICO ROSA MANAGEMENT"* and that she had consumed Lucozade. The Athlete also confirmed that she had been prescribed medication by her doctor on 30 March 2018 and enclosed a copy of a prescription sheet. The prescription sheet provided that the Athlete presented at the Nova Champions Medical Centre (the **"Clinic"**) on 30 March 2018, with *"upper respiratory infection"* and that she was prescribed with *"Tab Zithromax 500mg [...]"*. The second page of the prescription list dated and stamped on 30 March 2018 provided that the Athlete was prescribed with *"Tab Zithromax 500mg [...]"*.
9. On 19 June 2018 and 20 June 2018, the Athlete provided further scanned documents:
 - 9.1. The first page stamped and dated 30 March 2018, provided that the Athlete had attended the Clinic on 30 March 2018 *"feeling unwell"* and following medical examination and laboratory investigation, was prescribed with *"Zithromax 500mg [...] (Arithromyocin tab)";*
 - 9.2. The second page stamped and dated 18 June 2018 provided that the Athlete had been prescribed with *"Cefuroxime 500mg [...]"* to treat pneumonia.
10. By e-mail on 20 June 2018, the Athlete confirmed that she had not yet used the prescription given to her to treat pneumonia.
11. On 3 July 2018, the AIU confirmed that none of the medications indicated on the prescriptions contained morphine. The AIU requested that the Athlete organise a

meeting with Mr Erick Omariba from the Anti-Doping Agency of Kenya (“**ADAK**”) to discuss the matter further. The Athlete met with Mr Omariba on 4 July 2018.

12. On 10 July 2018, the Athlete wrote to the AIU by e-mail with details of a dental treatment received in March 2018. The Athlete enclosed correspondence from Bulbul Dental Clinic (the “**Dental Clinic**”) stamped 13 March 2018 and confirming that the Athlete had attended the Dental Clinic for root canal surgery. The Athlete had been treated under a local anaesthetic (lignocaine) and prescribed with “caps” [capsules] including “Amoxic 500mg” [amoxicillin], “Flagyl 400mg” [metronidazole, marketed under the brand name Flagyl] and “Brofen 400mg” [ibuprofen].

13. In the cover e-mail to the dental records, the Athlete also stated:

“[I] have sen[t] this prescription of [M]arch, which I was thinking might have the morphine content, unfortunately the doctor told me that the above medicine is the only [one] they used in my root canal. [I] am totally confused how morphine [was] found in my urine because this year the only sickness I had [was a] cold and fever twice and [a] root canal.”

14. On 13 July 2018, the Athlete sent an e-mail to the AIU. In this e-mail, the Athlete referred to medical treatment that she had received in October 2014 and queried if that treatment could explain the finding of morphine in the Athlete’s sample on 8 April 2018.

15. On 29 July 2018, the Athlete provided the AIU with a copy of a final in-patient bill printed on 3 November 2015. This document detailed the medicines given to the Athlete during an in-patient stay at The Nairobi Hospital between 27 October 2015 and 3 November 2015;

16. On 1 August 2018, the AIU issued the Athlete with a Notice of Charge for violations of Articles 2.1 and 2.2 ADR pursuant to Article 8.4.2 ADR (the “**Charge**”).

17. On 10 August 2018, the Athlete wrote to the AIU by e-mail and enclosed a scanned copy of a detailed account of her efforts to explain the Adverse Analytical Finding. On page 3 of the detailed account, the Athlete stated:

"I thought my room mate must be[] the one who [] put it in my lucozade I was having in the room because I was going to church and le[ft] it in the room".

18. The Athlete also stated on pages 3 and 4 of the detailed account:

"I then wrote a SMS to [my] Federico manager and I asked him whether in his management or ADAK there is a person who may be trying to tarnish his name because I have not used any painkiller. It's only on 30th March I used Anthromyocin and he told me there is nobody.

[...]

My running mate number two Vivian was having [a] cold thus I thought may be she was positive and because I have just joined management may be they have changed it and stated [it was] mine."

19. On 13 August 2018, the AIU wrote to the Athlete confirming receipt of her response and enclosed account of 10 August 2018, and conveyed its understanding that she accepted the validity of the Adverse Analytical Finding and did not deny the Charge. The AIU requested that the Athlete confirm how she wished the matter to proceed.
20. On 16 August 2018, the Athlete provided the AIU with a copy of a letter dated 15 August 2018, which confirmed that she denied the charges and wished for the matter to be determined by the Tribunal. This letter also set out that the Athlete had mistakenly drunk the water of a competitor ("Sheila Chepkech/Kipkoech") during the Milan Marathon on 8 April 2018. The Athlete explained that she had not realised her mistake until she was confronted by her competitor and that she had attempted to "make peace" by calling the competitor's coach to explain on the day after the competition, 9 April 2018.

B. The Oral Hearing

21. The Athlete requested an oral hearing. A hearing with the parties took place by video and telephone link on 20 December 2018. The Athlete did not put in a witness statement. The IAAF made available its medical expert, Mr Pierre-Yves Garnier, M.D., a medical doctor qualified in Sports Medicine, for the purpose of answering any questions on his witness statement; the Athlete did not seek to ask him any questions.

22. At the invitation of the Tribunal, the Athlete explained her case. She referred to two possible explanations for the Adverse Analytical Finding, both of which she had referred to in previous correspondence and are mentioned above. One was the possibility of a contaminated Lucozade bottle. However, her evidence principally focused on the incident involving Sheila Chepkech, and in particular the possibility of contamination through drinking the wrong water bottle. The Athlete was adamant that she had never taken any banned substance in her long career, that she was well aware of the anti-doping rules, that she took care to ensure that any substances she ingested were not prohibited, and that she acted as a mentor to young athletes, including by teaching them about the dangers of doping. The IAAF informed us (although the material was not in our papers) that Ms Chepkech had tested negative after a test at the Milan Marathon.

C. Jurisdiction and Applicable Rules

23. Article 1.2 ADR states as follows:

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

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

24. The application of the ADR to Athletes, Athlete Support Personnel and other Persons is set out in Article 1.7 ADR, including:

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

- a) all Athletes Athlete Support Personnel and other Persons who are members of a National Federation or of any affiliate organisation of a National Federation (including any clubs, teams associations or leagues);*
- b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held;*
- c) all Athlete Support Personnel and other Persons working with, treating or assisting an Athlete participating in his sporting capacity; and*
- d) any other Athlete, Athlete Support Person or other Person who, by virtue of an accreditation, licence or other contractual arrangement, or otherwise, is subject to the jurisdiction of the IAAF, of any National Federation (or any member or affiliate organization of any National Federation, including any clubs, teams, associations or leagues) or of any Area Association, for purposes of anti-doping.*

25. The applicable rules are the ADR, which apply to all athletes who are members of a National Federation and to all athletes participating in competitions organised, convened, authorised or recognised by the IAAF.

26. At the material time, the Athlete was a member of Athletics Kenya, an IAAF Member Federation and was participating in the EA7 Emporio Armani Milano Marathon 2018, which is an IAAF Silver Label Road Race, a competition that is authorised and recognised by the IAAF.

27. Article 7.2 ADR confers jurisdiction for results management on the AIU in certain circumstances, including:

7.2 The Integrity Unit shall have results management responsibility under these Anti-Doping Rules in the following circumstances:

7.2.1 For potential violations arising in connection with any Testing conducted under these Anti-Doping Rules by the Integrity Unit, including investigations conducted by the Integrity Unit against Athlete Support Personnel or other Persons potentially involved in such violations.

28. The Sample was collected pursuant to Testing undertaken by the AIU on behalf of the IAAF. The AIU therefore has jurisdiction for results management in this matter.

29. The IAAF has established the Tribunal in accordance with Article 1.5 ADR, which provides that the Tribunal shall determine Anti-Doping Rule Violations committed under the ADR.

30. Article 8.2(a) ADR sets out that the Tribunal shall have jurisdiction over all matters in which:

(a) An Anti-Doping Rule Violation is asserted by the Integrity Unit against an International-Level Athlete or Athlete Support Person in accordance with these Anti-Doping Rules;

31. Article 1.9 ADR specifies those athletes that are classified as international-level athletes for the purpose of the ADR as follows:

*1.9 Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, each of the following Athletes shall be considered to be an International-Level Athlete (“**International-Level Athlete**”) for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes:*

[...]

(b) An Athlete who is entered for or is competing in any of the following International Competitions:

[...]

vi. IAAF Label Road Races.

32. As set out above, the EA7 Emporio Armani Milano Marathon 2018 which took place on 8 April 2018 is an IAAF Silver Label Road Race. It follows, therefore, that by participating in this Event, that the Athlete is an International-Level Athlete pursuant to Article 1.9(b)(vi) ADR.

33. As the Athlete qualifies as an International-Level Athlete, the Tribunal has the requisite jurisdiction to hear and determine Anti-Doping Rule Violation alleged against the Athlete pursuant to Article 8.1(a) ADR.

34. Article 2 ADR specifies the circumstances and conduct that constitute Anti-Doping Rule Violations. This includes Article 2.1 ADR, which specifies:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample

2.1.1 It is each Athlete’s duty to ensure that no Prohibited Substance enters his body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. 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 under Article 2.1.

35. Article 2.1.1 ADR provides that it is each Athlete's personal duty to ensure that no prohibited substance enters his body. Athletes are strictly responsible for any Prohibited Substance or its Metabolites or Markers found in their samples, and it is not necessary that intent, Fault, negligence or knowing use on the Athlete's part be demonstrated to establish an Anti-Doping Rule Violation.

36. With regard to the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample, Article 2.1.2 ADR states:

2.1.2 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

37. The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample is therefore sufficient to establish that an Athlete has committed an Anti-Doping Rule Violation pursuant to Article 2.1 ADR.

38. Article 2.2 ADR also states that the following shall constitute an Anti-Doping Rule violation:

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 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.

39. Article 3.1 ADR provides that the IAAF shall have the burden of establishing that an Anti-Doping Rule Violation has occurred to the comfortable satisfaction of the Tribunal:

3.1 The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

40. Article 3.2 ADR states that facts relating to Anti-Doping Rule Violations may be established by any reliable means.

41. In that regard, Article 3.2 ADR also states:

3.2.2 Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.

3.2.3 WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in compliance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding. In such an event, the IAAF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.4 Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse Analytical Finding) shall not invalidate such facts or evidence. If

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

D. Anti-Doping Rule Violations

42. The Athlete is charged with the following Anti-Doping Rule Violations:

- 42.1. **Presence of a Prohibited Substance in an Athlete's Sample** pursuant to Article 2.1 ADR, more particularly, the presence of morphine in a urine Sample provided by her on 8 April 2018 with a concentration greater than the DL for morphine and with a ratio of total morphine to total codeine higher than 2.0 and a concentration of total codeine not higher than 5µg/mL; and
- 42.2. **Use of a Prohibited Substance**, namely morphine, pursuant to Article 2.2 ADR.

43. Morphine is prohibited In-Competition under S7 of the 2018 WADA Prohibited List. It is a Specified Substance.

44. As explained above, on 8 April 2018, the Athlete provided a Sample In-Competition in Milan, Italy after she finished first in the EA7 Emporio Armani Milan Marathon 2018. Analysis of the Sample revealed an Adverse Analytical Finding for the presence of morphine with a concentration greater than the DL and with a ratio of total morphine to total codeine higher than 2.0 and a concentration of total codeine not higher than 5µg/ml.

45. The presence of morphine in these circumstances therefore constitutes an Adverse Analytical Finding. The AIU has reviewed the Adverse Analytical Finding in accordance with Article 7.3 ADR. The review did not reveal a valid Therapeutic

Use Exemption (“**TUE**”) that would justify the presence of morphine in the Athlete’s Sample. Furthermore, no apparent departures from the International Standard for Testing and Investigations (“**ISTI**”) or International Standard for Laboratories (“**ISL**”) were identified. In accordance with Article 3.2.3 ADR, it is presumed that the laboratory has conducted all analysis procedures in compliance with the ISL.

46. It is each athlete’s personal duty to ensure that no Prohibited Substance enters their body or is used. An athlete is strictly liable for the presence of any Prohibited Substances.
47. The Tribunal is comfortably satisfied that the Athlete has committed an Anti-Doping Rule Violations under Article 2.1 ADR and Article 2.2 ADR based on the presence of morphine greater than the DL and with a ratio of total morphine to total codeine higher than 2.0 and a concentration of total codeine not higher than 5µg/mL in a Sample collected on 8 April 2018.
48. The Tribunal thus confirms that the Athlete has committed Anti-Doping Rule violations pursuant to Article 2.1 ADR and Article 2.2 ADR as set out in the Charge. The next question is whether the period of Ineligibility can be reduced or eliminated in consequence of the Athlete demonstrating No Fault or Negligence or No Significant Fault or Negligence.

E. Consequences for the Anti-Doping Rule Violations

I. Period of Ineligibility

49. Article 10.2 ADR provides the sanction to be imposed for Anti-Doping Rule Violations under Articles 2.1 and 2.2 ADR as follows:

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility to be imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person’s first anti-

doping rule violation shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.

(b) The Anti-Doping Rule Violation involves a Specified Substance and the Integrity Unit establishes that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

50. As morphine is a Specified Substance and the IAAF has not argued that the anti-doping rule violation was intentional, the prescribed period of Ineligibility is two years pursuant to Article 10.2.2 ADR, subject to any applicable reduction as set out below.

II. Reduction in the Period of Ineligibility

51. In circumstances where the AIU is unable to demonstrate, or does not seek to demonstrate, that the Anti-Doping Rule Violation was intentional, the Athlete may seek a reduction in the applicable period of Ineligibility of two years pursuant to Article 10.4 ADR or Article 10.5 ADR, which provide as follows:

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete establishes in an individual case that he/she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 *Reduction of Sanctions for Specified Substances or Contaminated Products for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6:*

(a) *Specified Substances*

Where the Anti-Doping Rule Violation involves a Specified Substance, and the Athlete can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the degree of fault of the Athlete or other Person

(b) *Contaminated Products*

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance involved a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the degree of Fault of the Athlete or other Person.

52. The definitions of No Fault or Negligence and No Significant Fault or Negligence are pertinent to the above provisions:

No Fault or Negligence: *The Athlete's or other Person's establishing that he did not know or suspect, and could not reasonably known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, **for any violation of Article 2.1, the Athlete must establish how the Prohibited Substance entered his system.***

No Significant Fault or No Significant Negligence: *The Athlete's or other Persons establishing that his Fault or Negligence, when viewed in the totality of the circumstances, and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation. Except in the case of a Minor, **for any violation of Article 2.1, the Athlete must establish how the Prohibited Substance entered his system.***

(emphasis added)

53. Pursuant to the above definitions, the Athlete must establish (on a balance of probabilities) how the prohibited substance, morphine, entered her system for either Article 10.4 ADR or Article 10.5 ADR to be applied.^{2 3}

54. In **WADA v. Damar Robinson & JADCO** CAS 2014/A/3820, the CAS panel also confirmed that an Athlete must be able to corroborate the origin of a Prohibited Substance:

"80. In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide **actual evidence** as opposed to mere speculation;"

55. In **José Paulo Guerrero v FIFA** CAS 2018/A/5546 and **WADA v. FIFA & José Paulo Guerrero** CAS 2018/A/5571, award dated 30 July 2018, the CAS panel stated at paragraph 65:

"(iv) It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and accordingly assert that there must be an innocent explanation for its presence in his system;"

56. The CAS panels in both CAS 2014/A/3820 and CAS 2018/A/5546_CAS 2018/A/5571 relied upon the *ratio decidendi* of the Sole Arbitrator in **International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs**, CAS 2010/A/2230, award dated 22 February 2011, which provided:

"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy

² See eg **Alex Schwazer v. IAAF & NADO Italia & FIDAL & WADA**, award dated 30 January 2017, para. 103 *"The finding of the Panel that the Appellant could not demonstrate how the prohibited substance entered his system, automatically excludes any elimination of the sanction based on No Fault or Negligence or a reduction of the sanction based on No Significant Fault or Negligence"*.

³ The applicable standard being the balance of probabilities pursuant to Article 3.1 ADR:

3.1 Burdens and Standards of Proof

Where these Anti-Doping Rules places the burden of proof upon the Athlete or other Person alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability

to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body" (para 11.12)

57. Therefore, if the Athlete is unable to provide actual evidence to demonstrate the origin of morphine in her urine sample by a balance of probability, then the period of Ineligibility to be imposed shall be two years (unless the AIU can demonstrate that the violation was intentional).

III. Discussion

58. The Athlete has sought to explain the origin of morphine in her sample in a number of different ways.

59. First, the Athlete has sought to explain the presence of morphine by reference to various medications that she claims to have ingested since October 2015:

- 59.1. a photocopy of a document (and a scanned copy of a document) from the Clinic detailing treatment with Zithromax 500mg dated 30 March 2018;
- 59.2. a scanned document from the Clinic detailing treatment with Cefuroxime 500mg dated 18 June 2018;
- 59.3. a scanned document from the Dental Clinic detailing root canal treatment under local anaesthetic (lignocaine) and treatment with "*caps*" [capsules] including "*Amoxic 500mg*" [amoxicillin], "*Flagyl 400mg*" [metronidazole, marketed under the brand name Flagyl] and "*Brofen 400mg*" [ibuprofen], stamped and dated 13 March 2018; and
- 59.4. a scanned copy of an in-patient bill from The Nairobi Hospital detailing treatment and medicines given to the Athlete during an in-patient stay between 27 October 2015 and 3 November 2015.

60. The Tribunal finds that none of these treatments can explain the presence of morphine in the Athlete's Sample on 8 April 2018.
61. The statement of Mr Pierre-Yves Garnier, the AIU's Scientific and Medical Senior Advisor, states that none of the medications identified by the Athlete contains morphine and that the historical medical treatment received by the Athlete cannot explain the presence of morphine in the Athlete's Sample on 8 April 2018.
62. Based on Mr Garnier's evidence, the Tribunal concludes that the Athlete's asserted medical treatment cannot assist her in establishing how morphine entered her system on 8 April 2018 and that she is therefore unable to rely on these treatments in order to reduce the period of Ineligibility prescribed under Article 10.4 ADR or Article 10.5 ADR.
63. The Athlete has also submitted several other hypotheses for the presence of morphine in her Sample, which include:
- 63.1. that her roommate spiked her Lucozade drink, which was kept in her hotel room and left unattended whilst she went to church;
 - 63.2. that her "*running mate*" Vivian [Jerono Kiplagat] was experiencing a cold and her management swapped an Adverse Analytical Finding for Ms. Kiplagat and attributed it to the Athlete instead; and
 - 63.3. that the Athlete mistakenly drank from her competitor Sheila Chepkech's water bottle between 10km and 30km of the Milan Marathon.
64. The Athlete, in the Tribunal's view, has presented no evidence to corroborate any of these hypotheses. We should refer specifically to the hypothesis concerning Ms Chepkech's water bottle, which was the principal matter to which the Athlete's evidence related. In the Tribunal's view, no facts were asserted, much less proven on a balance of probabilities, which would link the episode (assuming Ms Chepkech's water bottle was mistakenly drunk) to the presence of morphine in the Athlete's system. The Athlete failed to provide the Tribunal with the actual

evidence in support of her statements and rather referred to the speculative allegations which cannot be followed by the Tribunal. Indeed, the Tribunal notes that neither Ms Chepkech's contemporaneous Doping Control Form, nor the results of her doping control test, which the Tribunal requested and received from the IAAF, indicate the presence of any prohibited substance in Ms Chepkech's system.

65. Notwithstanding its certain sympathy towards the Athlete, there is simply no basis on which this Tribunal could conclude, on the material before it, that this was how the Adverse Analytical Finding occurred.
66. In these circumstances, the Tribunal concludes that the Athlete has not established how morphine came to be present in her system and she cannot therefore justify a reduction in the period of Ineligibility pursuant to Article 10.4 ADR or Article 10.5 ADR.
67. The Tribunal therefore imposes a period of Ineligibility of two years pursuant to Article 10.2.2 ADR.

IV. The Athlete's Position

68. We appreciate the sincerity with which the Athlete has put her case. In reality, her case is that she does not know how the Adverse Analytical Finding occurred, and she has sought to identify a variety of possible (albeit speculative) explanations. We note that the AIU did not seek to allege that the doping was intentional.
69. The strictness of the anti-doping rules can in individual cases give rise to harsh results, in particular where an athlete who protests her innocence is unable to explain the reason for an Adverse Analytical Finding, and is thus unable to meet the burden on the athlete to show No Fault or Negligence or No Significant Fault or Negligence. The anti-doping rules are formulated as they are because of the inherent difficulty in the regulatory body disproving what an athlete says and

regard the presence of the adverse analytical sample as the starting point for analysis. The rules impose, in effect, a regime of Strict Liability, with mitigation from prescribed sanctions conditioned on an Athlete's ability to assert an eligible affirmative defence.

70. The community of sport regards it as important to frame the rules in this way to protect sport from doping. The legal regime may give rise to hard cases. That is particularly striking in a case where, as here, an athlete credibly protests her innocence and the regulator does not allege deliberate doping. These difficulties notwithstanding, our task remains to enforce these rules, whose synthesis reflects deliberate policy choices which balance competing interests and, in the final instance, serve to sustain the integrity of sport.

V. Disqualification of Results and Other Consequences

71. Pursuant to Article 9.1 ADR, the Athlete's result (1st place) in the EA7 Emporio Armani Milano Marathon 2018 shall be disqualified with all resulting Consequences, including forfeiture of any medals, titles, awards, points and prize and appearance money.
72. Additionally, pursuant to Article 10.8 ADR, any other competitive results obtained by the Athlete between the date the Sample was collected (8 April 2018) and the date of her provisional suspension (1 August 2018) shall be disqualified with all resulting Consequences, including the forfeiture of any medals, titles, ranking points and prize and appearance money (unless the Disciplinary Tribunal determines that fairness requires otherwise).

F. Relief

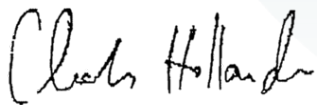
73. Thus, the Tribunal:

- (i) finds that the Athlete committed Anti-Doping Rule Violations pursuant to Article 2.1 ADR and Article 2.2 ADR;

- (ii) imposes a period of Ineligibility of two years upon the Athlete, commencing on the date of the Tribunal's Decision. The period of provisional suspension imposed on the Athlete from 1 August 2018 until the date of the Tribunal's Decision shall be credited against the total period of Ineligibility;
- (iii) determines that the period of Ineligibility shall end at midnight on 31 July 2020;
- (iv) orders the disqualification of the Athlete's result in the Milan Marathon 2018 with all resulting Consequences, including forfeiture of any medals, titles, awards, points and prize and appearance money in accordance with Article 9 ADR, and;
- (v) orders the disqualification of any results obtained by the Athlete between 8 April 2018 and 1 August 2018 with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Article 10.8 ADR.

G. Appeal Process

74. This decision is subject to the Athlete's right of appeal pursuant to Article 13 ADR.



Charles Hollander QC (Chair)

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04 January 2019



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