

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

Before:
Charles Hollander QC (Chair)

BETWEEN:

International Association of Athletics Federations (IAAF)

Anti-Doping Organisation

-and-

Jacob Kibet Chulyo Kendagor

The Athlete

DECISION OF THE DISCIPLINARY TRIBUNAL

1. On 5 July 2019, the AIU sent the Athlete a Notice of Charge for a violation of Article 2.3 for Refusing or Failing to Submit to Sample Collection after notification as authorised under the IAAF Anti-Doping Rules (the "ADR") on 21 November 2018. The Athlete denied the charge.
2. I was appointed Chair of the Disciplinary Panel and the parties agreed that I should hear the case as sole arbitrator.

3. The IAAF was represented by Mr Ross Wenzel (counsel) and Mr Tony Jackson (on behalf of the AIU), and the athlete was represented by Mr Reece Mwani (counsel).
4. I heard the matter by video link on 4 October 2019, when seven witnesses were called, two by the IAAF (through the Athletics Integrity Unit, acting on its behalf¹) and five on behalf of the Athlete. Closing submissions were made by telephone hearing on 8 October 2019.
5. At approximately midday on 21 November 2018, the Doping Control Officer ("DCO"), Marco Petric and the Blood Control Officer ("BCO") Cornelius Magut, arrived at a location in Eldoret, Kenya to collect samples from several athletes, ("the Mission"). The purpose of the Mission was to collect blood samples from a number of Kenyan athletes located in and around the towns of Eldoret and Iten for the purposes of the IAAF's Athlete Biological Passport programme.
6. From a previous occasion, the BCO knew that the particular address that they attended in Eldoret on 21 November 2018 was that of an athlete. Upon arrival at the address, the DCO and BCO met an individual at premises known to belong to an athlete and notified him of a requirement to provide a sample in accordance with the Mission. The individual did not deny being an athlete but failed to submit to sample collection stating that he had retired from the sport of Athletics three years ago and the details of his retirement could be verified with the IAAF. The individual would only provide his surname, Chepkwony. The DCO and BCO left the address and sought instruction from the IAAF on how to proceed in the circumstances. Having done so, the DCO and the BCO returned to where the notification had taken place a few minutes earlier, but the individual had since disappeared. The DCO and the BCO took steps to locate the individual whom they had notified, including asking other persons present at the address if they had seen anyone leave the property. They also made attempts to confirm the identity of the person who lived at the address where they were present. No one was prepared to assist them with their enquiries.

¹ I refer to the Athletics Integrity Unit and the IAAF interchangeably throughout this decision.

7. Subsequently they asked and were told that an individual called Jacob Kendagor lived there. The DCO and the BCO immediately searched for images of an athlete called Jacob Kendagor using the Internet. They formed the view that the person who had identified himself to them as Chepkwony was in fact Jacob Kendagor and that Chepkwony was someone different.
8. Mr Kendagor's case is summarised in his letter dated 9 March 2019:

"I am the above named athlete, currently an active athlete, a resident in Eldoret. I can remember very well on 21st November 2018, I went to my rural home at Marakwet. I spent the night there and came back the next. When I arrived near my home I met Mr Chepkwony who is my neighbor and he informed me that when you left yesterday two people from the IAAF came to your home and met him there. They requested for his sample and he refused to cooperate and informed them that he is no longer an active athlete since he has not participated for the last three years and he added that he had retired from athletics. He also said he was asked his full names and he only gave them one name namely Chepkwony. He also informed me that they were only taking samples randomly and they did not ask for me. According to all this allegations I have read, I am not the one who was in my home on that day being the 21st day of November 2018 but it was my neighbor Mr. Chepkwony and I am innocent. I have been co-operating in giving my samples since I become an athlete."

9. The Athlete was subject to the imposition of a Provisional Suspension effective from 5 July 2019 pending the determination of the Charge.
10. It is not disputed that at the relevant time the Athlete was subject to doping control. Article 2.3 ADR specifies that the following conduct shall constitute an anti-doping rule violation:

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 under these Anti-Doping Rules or other applicable anti-doping rules.

11. To sustain a charge that the Athlete failed without compelling justification to submit to Sample collection after notification as authorised under the ADR in violation of Article 2.3, the IAAF must prove that:

- a. the Athlete was properly notified that he was required to provide a Sample for drug testing purposes;
- b. that notification was authorised under the ADR;
- c. he failed to submit to Sample collection as required, and;
- d. his failure to do so was either intentional or negligent.

12. Article 3.1 ADR provides that:

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.

13. If I was satisfied to this standard of proof that the individual whom Mr Petric and Mr Magut met was in fact the Athlete, then I would have no hesitation in finding the charge proved. If I was not so satisfied, the charge must be dismissed.

14. So the key issue in this case is whether the individual whom Mr Petric and Mr Magut met, and who claimed to be Mr Chepkwony, was in fact Mr Kendagor. If so, then Mr Kendagor must be treated as having refused to submit to doping control by falsely pretending that he was someone else, namely a former athlete who was not subject to doping control.

15. Mr Petric was an excellent witness. He gave careful and precise evidence. He said it was clear to him when he looked at pictures of Mr Kendagor, and then Mr Chepkwony, that it was Mr Kendagor he had met with. He pointed to the distinctive left ear, oval head shape, and his smile. Mr Magut supported this

evidence, both were obviously truthful and believed it was Mr Kendagor they had seen.

16. Five witnesses gave evidence for Mr Kendagor: The Athlete himself, Mr Chepkwony, Mr Daniel Banda, Mr Samuel Cheptuiya, and Mr Leonard Wanjala. All supported what the Athlete had said.
17. This is not a case in which it is helpful to analyse the evidence for the witnesses called on behalf of the Athlete in detail. The question is whether the IAAF have shown to the level of comfortable satisfaction that it was Mr Kendagor who met the DCO and BCO.
18. In order to be so satisfied, it seems to me I must find that all five witnesses called on behalf of the Athlete were telling a pack of lies, and in essence were guilty of what amounted to a criminal conspiracy to defraud. I do not consider I have the material to make such a finding.
19. Counsel for the IAAF did a decent job of highlighting every possible discrepancy in the accounts of the various witnesses for the Athlete. Perhaps the most striking was the inconsistencies as to when and how the Athlete's car became stuck in mud whilst on his way to (or coming from) his potato farm. The IAAF pointed out that the witness statements evidenced a measure of collaboration between the witnesses, that there was no documentary evidence to support Mr Kendagor, and that the contemporaneous evidence (matters such as the young girl clinging to the legs of the person the DCO and BCO were speaking to) were all consistent with their identification. But I remind myself that the relevant events were almost a year ago, there are inevitable language barriers, and the individuals in question are unlikely to be very familiar with the nuances of cross-examination.
20. Moreover, looking for pictures of Mr Kendagor and Mr Chepkwony on the Internet would not normally comply with criminal standards required in court for positive identification and give rise to obvious possibility of error. I do not criticise Mr Petric or Mr Magut at all for this: Mr Petric said he did not think it was appropriate to take a photo of the individual claiming to be Mr Chepkwony without his consent,

and this case hardly presented a usual situation. But it means that the identification evidence was less compelling than might have been the case.

21. In the event, I merely say that I am not satisfied to the level of comfortable satisfaction that the individual seen by the DCO and BCO was the Athlete and thus dismiss the charge.

AWARD

22. The charge is dismissed.

23. Under Article 13 This Decision may be appealed to CAS by the parties in this proceeding in accordance with Article 13 of the ADR.

A handwritten signature in black ink, reading "Charles Hollander". The signature is written in a cursive style with a large initial 'C'.

Charles Hollander QC
Chair, IAAF Disciplinary Panel

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