

## DECISION OF THE ATHLETICS INTEGRITY UNIT IN THE CASE OF MR NICHOLAS KIPTOO KOSGEI

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### Introduction

1. In April 2017, World Athletics<sup>1</sup> established the Athletics Integrity Unit ("AIU") whose role is to protect the integrity of the sport of Athletics, including fulfilling World Athletics' obligations as a Signatory to the World Anti-Doping Code. World Athletics has delegated implementation of the World Athletics Anti-Doping Rules ("ADR") to the AIU, including but not limited to the following activities in relation to International-Level Athletes: Testing, Investigations, Results Management, Hearings, Sanctions and Appeals.
2. Ms. Nicholas Kiptoo Kosgei is a 26-year-old Kenyan road runner who is an International-Level Athlete for the purposes of the ADR (the "Athlete").
3. This decision is issued pursuant to Article 8.4.7 ADR which provides that:

*8.4.7 "[i]n the event that [...] the Athlete or Athlete Support Person admits the Anti-Doping Rule Violation(s) charged and accedes to the Consequences specified by the Integrity Unit, a hearing before the Disciplinary Tribunal shall not be required. In such a case, the Integrity Unit...shall promptly issue a decision confirming...the commission of the Anti-Doping Rule Violation(s) and the imposition of the Specified Consequences (including, if applicable, a justification for why the maximum potential sanction was not imposed)".*

### The Athlete's commission of an Anti-Doping Rule Violation

4. On 31 December 2019, the Athlete provided a urine Sample In-Competition at the 'Corrida Internacional de São Silvestre' held in Sao Paulo (Brazil), which was given code 6376009 (the "First Sample"), pursuant to Testing conducted by World Athletics.
5. On 2 February 2020, the Athlete provided another urine Sample In-Competition at the 'Meia Maratona do São Paulo' held in Sao Paulo (Brazil), which was given code 6374500 (the "Second Sample"), pursuant to Testing conducted by the Autoridade Brasileira de Controle de Dopagem ("ABCD").
6. On 3 February 2020, the World Anti-Doping Agency ("WADA") accredited laboratory in Rio de Janeiro (Brazil) (the "Laboratory") reported an Adverse Analytical Finding ("AAF") for the presence of Prednisone<sup>2</sup> in the First Sample.
7. Prednisone is a Prohibited Substance under the WADA 2020 Prohibited List under the category S9 (Glucocorticosteroids). It is a specified substance prohibited In-Competition only in circumstances

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<sup>1</sup> Formerly the International Association of Athletics Federations ("IAAF")

<sup>2</sup> The following metabolites were also detected: Prednisolone, 6beta-hydroxy-prednisolone and 20beta-dihydroxy-prednisolone.

where they have been administered orally, rectally, or by intravenous or intramuscular methods. The Athlete did not have a Therapeutic Use Exemption (“TUE”) permitting the use of Prednisone.

8. On 4 February 2020, the AIU attempted for the first time to notify the Athlete of the AAF in the First Sample in the context of an initial review and to request his explanation for the presence of Prednisone in the First Sample. The Athlete could not be located at that time and subsequent further attempts by the AIU to notify the Athlete, including via Athletics Kenya, also proved unsuccessful.
9. On 19 June 2020, having still not been able to contact the Athlete, the AIU issued a Notice of Allegation in relation to the First Sample and suspended him provisionally.
10. On 7 and on 15 July 2020, the Athlete acknowledged receipt of the Notice of Allegation and provided his explanation to the AIU in relation to the AAF in the First Sample. The Athlete accepted the AAF in the First Sample and explained that he had visited a Clinic in Kenya on 25 December 2019 because he was experiencing joint pain and stiffness in his left knee. He was treated with oral medication, including Prednisone in the form of 5mg tablets, prescribed to be taken twice a day, for a period of 5 days.
11. On 13 August 2020, the Laboratory reported another AAF for the presence of Prednisone<sup>3</sup> in the Second Sample.
12. On 17 August 2020, ABCD transferred the result management of the AAF in the Second Sample to the AIU.
13. On 20 August 2020, the AIU wrote to the Athlete and notified him of the AAF in the Second Sample and requested his explanation for the presence of Prednisone in the Second Sample.
14. By emails dated 3 and 9 September 2020, and during an interview with the AIU on 15 December 2020, the Athlete provided his explanation to the AIU in relation to the AAF in his Second Sample. In summary, he accepted the AAF in the Second Sample and stated that he had been suffering from recurring pain in the same knee and had therefore taken one leftover prednisone 5mg tablet the evening before the São Paulo half marathon.
15. The Athlete has therefore admitted the Anti-Doping Rule Violation (i.e., the presence of Prednisone in his First and Second Sample) following the AIU's notifications of the AAFs on 19 June and 20 August 2020 respectively.

## **Consequences**

16. Article 10.7.4(a) ADR provides that an Anti-Doping Rule Violation shall only be considered a second Anti-Doping Rule Violation if the AIU can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after receiving notice, or the AIU made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation.
17. The Athlete first received notice of the presence of Prednisone in the First Sample on 4 February 2020, which is after he provided the Second Sample (on 2 February 2020). Consequently, the presence of Prednisone in the Second Sample shall be treated together with the presence of Prednisone in the First Sample as one single violation of the ADR.
18. This constitutes the Athlete's first Anti-Doping Rule Violation.

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<sup>3</sup> The same metabolites were also detected: Prednisolone, 6beta-hydroxy-prednisolone and 20beta-dihydroxy-prednisolone.

19. Article 10.2.1 ADR provides that the period of ineligibility to be imposed for the presence of a prohibited substance in an Athlete's sample shall be determined as follows:

**“10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method  
[...]**

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 establishes 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.*

10.2.3 *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term therefore requires that the Athlete or other Person engaged in conduct that he knew constituted an Anti-Doping Rule Violation or knew that there was significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition (a) shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that it was Used Out- www.athleticsintegrity.org 3 of-Competition; and (b) shall not be considered "intentional" if the Substance is not a Specified Substance and the Athlete can establish that it was Used Out-of-Competition in a context unrelated to sport performance.*

20. Prednisone is classified as a 'Specified Substance' i.e., as a substance that is more likely to have been consumed for a purpose other than enhancement of sport performance. Article 10.2.1 ADR specifies that a violation for such a substance carries a 4-year ban if the AIU is able to prove that the violation was "intentional". Article 10.2.3 ADR explains that, in the context, the term "intentional" is meant to identify those who cheat. The term therefore requires that the Athlete engaged in conduct that he/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. The jurisprudence is clear that what counts in this context is what the Athlete actually knew, not what he/she should have known.
21. The AIU has no evidence that the Anti-Doping Rule Violation was intentional within the meaning of Article 10.2.3 ADR, therefore, the mandatory period of ineligibility to be imposed in this case is two (2) years, subject to potential reduction pursuant to Article 10.4 ADR or Article 10.5 ADR based upon the Athlete's level of Fault.<sup>4</sup>

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<sup>4</sup> **Fault:** Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's

22. It is a precondition of any mitigation of sanction for an Article 2.1 ADR violation based on No (or No Significant) Fault or Negligence that the Athlete must be able to establish (on the balance of probabilities) how the prohibited substance entered his system.
23. As described above, the Athlete's explanation is that Prednisone entered his system through the ingestion of the Prednisone 5mg tablets. Upon consultation with its scientific advisor, the AIU accepts the Athlete's explanation.

### Mitigation of Sanction

24. To sustain a plea of No Fault or Negligence (Article 10.4 ADR), the Athlete must show that he did not depart from the duty imposed on him under the ADR to use 'utmost caution' to ensure that no prohibited substance entered his body. Alternatively, to sustain a plea of No Significant Fault or Negligence, (Article 10.5 ADR), he must show that his departure from the strict standard of care was not significant (objective analysis) and/or that there are legitimate reasons why he failed to take all the steps required (subjective analysis) such that his overall fault should not be regarded as significant.
25. A finding of No Fault or Negligence eliminates the period of ineligibility completely (Article 10.4 ADR) and a finding of No Significant Fault or Negligence triggers a discretion under Article 10.5.1(a) to impose a sanction between a reprimand and a two-year period of ineligibility, depending on the degree of Fault of the Athlete. The decisions of the Court of Arbitration for Sport ("CAS") in CAS 2013/A/3327 *Marin Cilic v. ITF*<sup>5</sup> and in CAS 2017/A/5301 *Sara Errani v. ITF* provides helpful guidance on where an athlete's fault lies within that range. An athlete's 'objective fault' is first assessed to determine into which category their fault falls – 'light' (0-12 months) or 'normal' (12-24 months) – and then their 'subjective' fault is assessed to move them up or down within that category (or into a different category).
26. In assessing the 'objective' fault, the CAS Panel in *Cilic* stated<sup>6</sup> that, in ordinary circumstances (including when using in-competition a product that is banned in-competition), Athletes should (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label against the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure that the product is reliably sourced, and (v) consult appropriate experts in such matters and instruct them diligently before consuming the product.
27. Applying the above to the facts of the Athlete's case:
  - i. The AIU notes that, although the Prednisone 5mg tablets were reliably sourced on prescription from a qualified medical doctor, there is no evidence to suggest that the Athlete made any enquiries about the medication and he admitted that he did not inform the Doctor that he was an athlete. He also failed to check whether or not the medication was prohibited and did not request a Therapeutic Use Exemption.<sup>7</sup>
  - ii. Moreover, with respect to the Second AAF, the Athlete effectively self-medicated by taking the residual prednisone medication that he had left over from his previous prescription in order to treat what he believed were the same symptoms he was experiencing in February. He seemingly did so (i) without reference to the doctor that previously treated and

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departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2

<sup>5</sup> See CAS 2013/A/3327 *Marin Cilic v. ITF* and CAS 2013/A/3335 *ITF v. Marin Cilic*.

<sup>6</sup> See paragraphs 74-75 of the CAS award.

<sup>7</sup> In *Cilic*, the Panel noted that in circumstances involving medicines designed for therapeutic use, a particular danger arises that calls for a higher duty of care because medicines are known to have prohibited substances in them.

prescribed the Prednisone tablets and (ii) without seeking any qualified medical opinion or advice as to his ongoing symptoms or the Prednisone medication.

- iii. The AIU notes at the same time that the Athlete only used Prednisone out-of competition and might not have understood that the Prohibited Substance would still be present in his body during the competition.
28. It is therefore clear on the facts that the Athlete cannot establish that he bears No Fault or Negligence, and the AIU considers that that his objective level of fault is normal.
  29. The Athlete is a relatively young elite-Level Athlete who has only competed in a few races since 2016 and has been subject to Testing a total of 5 times since 2018. He is not part of the World Athletics Registered Testing Pool or the AIU's Monitoring Pool. He is not very experienced in terms of anti-doping and the AIU considers that he should be afforded some form of mitigation on account of his inexperience and lack of education.
  30. In weighing up all the factors in this case, in particular, that the Athlete ingested a medicine that was expressly prescribed to him by qualified medical personnel but did not otherwise conduct any of the checks required and that he effectively self-medicated using previously prescribed medication in relation to the AAF in the Second Sample, the AIU has determined his level of Fault to be in the low-middle range of the normal degree of Fault category and therefore that the period of ineligibility should be set at 16 months.
  31. In light of the above, the AIU considers that a 16-month period of ineligibility is appropriate in the Athlete's case and the Athlete has accepted the sanction.
  32. Given the Athlete's timely admission of the Anti-Doping Rule Violation once the AIU had finally been able to notify him, there is discretion under Article 10.10.2(b) ADR to back-date the commencement of the period of ineligibility to the date of sample collection. The AIU agrees to exercise its discretion in the Athlete's case such that the period of ineligibility should run for 16 months from the date of the Second Sample collection on 2 February 2020, i.e., until 1 June 2021.
  33. The Athlete's results from 31 December 2019 are disqualified pursuant to Article 10.8 ADR, with all resulting consequences, including forfeiture of any titles, medals, points and prize and appearance money.

## Decision

34. On the basis that the Athlete has admitted to committing Anti-Doping Rule Violations under Article 2.1 ADR, the AIU confirms by this decision the following consequences for a first Anti-Doping Rule Violation:
  - 34.1. a period of ineligibility of 16 months pursuant to Article 10.2.2 and 10.5.1(a) ADR, commencing on 2 February 2020; and
  - 34.2. disqualification of the Athlete's results since 31 December 2019 with all resulting consequences, including forfeiture of any titles, medals, points and prize and appearance money pursuant to 10.8 ADR.
35. The Athlete has accepted the above consequences for his Anti-Doping Rule Violations and has expressly waived his right to have those consequences determined by the Disciplinary Tribunal at a hearing.

### Publication

36. In accordance with Article 8.4.7(b) ADR, the AIU shall publicly report this decision on the AIU's website<sup>8</sup>.

### Rights of Appeal

37. This decision constitutes the final decision of the AIU pursuant to Article 8.4.7 ADR.
38. Further to Article 13.2.4 ADR, WADA and the Anti-Doping Agency of Kenya (“**ADAK**”) have a right of appeal against this decision to the Court of Arbitration for Sport in Lausanne, Switzerland, in accordance with the procedure set out at Article 13.7.2 ADR.
39. If an appeal is filed against this decision by WADA or ADAK, the Athlete will be entitled to exercise his right of cross-appeal in accordance with Article 13.9.3 ADR.

**Monaco, 12 February 2021**

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<sup>8</sup> <https://www.athleticsintegrity.org/disciplinary-process/first-instance-decisions>