



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2019/A/6597 International Association of Athletics Federations (IAAF) v Jacob Kibet Chulyo Kendagor

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr André Brantjes, Attorney-at-Law, Amsterdam, The Netherlands

Arbitrators: Mr Ken E. Lalo, Attorney-at-Law, Gan-Yoshiyya, Israel

Dr Isabelle Fellrath, Attorney-at-Law, Lausanne, Switzerland

in the arbitration between

International Association of Athletics Federations (IAAF), Monaco

Represented by Mr Ross Wenzel, Attorney-at-Law, Kellerhals Carrard, Lausanne, Switzerland, and
Mr Tony Jackson, The Athletics Integrity Unit (AIU), Monaco

Appellant

and

Jacob Kibet Chulyo Kendagor, Kenya

Represented by Mr Reece M. Mwani, Attorney-at-Law, Tunoi & Company Advocates, Eldoret,
Kenya

Respondent

I. PARTIES

1. The International Association of Athletics Federations (now known as World Athletics) (the “IAAF” or “Appellant”) is the international governing body for the sport of athletics recognized as such by the International Olympic Committee. It has its seat and headquarters in Monaco. The IAAF is a signatory to the World Anti-Doping Agency’s World Anti-Doping Code (“WADC”).
2. Mr Jacob Kibet Chulyo Kendagor (the “Athlete” or “Respondent”) is an International-level athlete from Kenya, born on 24 August 1984.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence as presented before and at the hearing. Additional facts and allegations found in the parties’ written submission, 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.
4. On 21 November 2018, the Doping Control Officer (“DCO”), Mr Marko Petric, and the Blood Collecting Office (“BCO”), Mr Cornelius Magut, arrived in Eldoret, Kenya to collect samples from several athletes.
5. The DCO and BCO acted under Mission Order M-869198641 (“Mission”). The Mission involved the collection of blood samples from several Kenyan athletes for the purposes of the IAAF Athlete Biological Passport programme. The identities of the athletes, identified only through their respective postal address and licence number were not known to the DCO and BCO.
6. Upon arrival to the postal address supplied for the Athlete (the “Premises”), the DCO and BCO met an individual they believed to be the Athlete and notified him of a requirement to provide a sample in accordance with the Mission. This person refused to submit to sample collection and stated that he had retired from the sport of athletics three years prior.
7. After the DCO and BCO informed this person about the consequences of not providing a sample and asked him to confirm his identity, this person replied that his surname was “Chepkwony”. This person asked the DCO and BCO to leave the Premises. The DCO and BCO left the Premises and sought instructions from the IAAF and returned to the premises some minutes later. The person they had just spoken to had subsequently disappeared.
8. The DCO and BCO tried to locate the person, made inquiries with others on the Premises or in the surroundings, tried to find out the owner of the Premises’ identity and waited for an hour for him to return. They then proceeded to collect a sample from another athlete living in the vicinity. The DCO and BCO returned afterwards to the Premises and noticed that a woman had started throwing small stones over the fence towards the house next door to the Premises.
9. The DCO and BCO could not locate the person again. However, on inquiry with neighbours driving to a nearby estate in the same street, the DCO and BCO received confirmation that the Athlete resided at the Premises.

10. Thereafter, the DCO and BCO searched for images of the Athlete on the Internet and established that the person they saw and spoke to earlier, was the Athlete.

B. IAAF Disciplinary Panel

11. On 6 March 2019, the Athletics Integrity Unit (“AIU”) informed the Athlete that it was investigating whether he violated the 2018 IAAF Anti-Doping Rules (“ADR”) and requested him to provide a written account for the events of 21 November 2018.

12. On 8 March 2019, the Athlete responded as follows:

“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 neighbour 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 Chepkwony. He also informed me that they were only taking samples randomly and they did not ask for me.

According to all this allegation [sic] 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 neighbour Mr Chepkwony and I am innocent. I have been co-operating in giving my samples since I become an athlete.”

13. On 5 July 2019, the AIU sent the Athlete a Notice of Charge, alleging an Anti-Doping Rule Violation (“ADRV”) pursuant to the ADR. This Notice of Charge provides *inter alia*:

“2. Charge

2.1. You are hereby charged with committing the following anti-doping rule violation (the “Charge”):

2.1.1. Without compelling justification, refusing or failing to submit to sample collection after notification as authorised in these [the IAAF] anti-doping rules on 21 November 2018.

2.2. The documents enclosed with this Notice of Charge constitute the evidence that the AIU relies upon in support of the Charge. However, the AIU reserves its right to introduce further evidence in support of the Charge if it is deemed to do so, in particular, within the context of any proceedings before the Disciplinary Tribunal.”

14. On 5 July 2019, the AIU provisionally suspended the Athlete pending the determination of the charge.

“3. Provisional Suspension and Public Disclosure

3.1. In accordance with Article 7.10.4 ADR, you are hereby subject to a Provisional Suspension effective immediately. This means that you are barred temporarily from participating in any Competition or activity until this matter is fully determined.

3.2. Pursuant to article 14.3.1 ADR, the AIU shall also Publicly Disclose the details of your Provisional Suspension by way of notice on the AIU website.”

15. On 23 and 24 July 2019, the Athlete argued that he had not been present at the address on 21 November 2018 and that he travelled that day to his rural home and potato farm in Elgeyo-Marakwet County. The Athlete stated that he returned to his Kimumu Estate on 22 November 2018 and had a meeting that day with his neighbour Mr Gilbert Chepkwony.
16. The Athlete relied on affidavits of the Athlete himself, Mr Chepkwony, Mr Leonard Wanjala, Mr Samuel Cheptuiya and Mr Daniel Kanda.
17. The IAAF relied on written statements of the DCO and BCO.
18. On 22 October 2019, the AIU Disciplinary Tribunal found that the Athlete had not committed an ADRV (the “Appealed Decision”). The Disciplinary Tribunal explained the grounds to its award, *inter alia*:

“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 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”

19. The operative part of the Appealed Decision provided:

“22. The charge is dismissed.”

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 20 November 2019, in accordance with Articles R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”), the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (the “CAS”). In its statement of appeal, the Appellant nominated Mr. Ken Lalo, attorney-at-law in Gan-Yoshiyya, Israel as arbitrator.
21. On 13 December 2019, following an extension of time as granting under Article R32 of the Code, the Appellant filed its Appeal Brief in accordance with Article R.
22. On 15 January 2020, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division and further to Articles R36 and R54 of the Code (and following the Athlete’s failure to nominate an arbitrator), that the arbitral tribunal for the present matter was constituted and comprised as follows:

President: Mr André Brantjes, Attorney-at-Law, Amsterdam, the Netherlands
Arbitrators: Mr Ken Lalo, Attorney-at-Law, Gan-Yoshiyya, Israel
Dr Isabelle Fellrath, Attorney-at-Law, Lausanne, Switzerland
23. On 18 January 2020, the Respondent filed his Answer in accordance with Article R55 of the Code.
24. On 7 February 2020, the CAS Court Office informed the parties that the Answer was filed untimely and asked the Respondent to clarify the situation by 11 February 2020.
25. On 10 February 2020, the Respondent argued that the courier services had difficulties in serving the Appeal Brief, his counsel only resumed office on 16 January 2020 and responded immediately, thus requesting the Panel to admit the Answer.
26. On 17 February 2020, following an inquiry from the Panel, the Respondent indicated that he wanted an Award to be issued on the basis of the written submissions.
27. On 20 February 2020, the Appellant indicated that it did not object to the untimely filing of the Answer and requested the Respondent to supplement his Answer with a list of witnesses and additional evidence to support his position in appeal. The Appellant further indicated that a hearing would be needed given that the parties’ cases rely primarily on witness evidence and that “*in view of the de novo nature of CAS proceedings, it is difficult to envisage how such a case could be properly decided without an oral hearing.*”
28. On 21 February 2020, the CAS Court Office requested the Respondent to respond to the Appellant’s comments by 26 February 2020.
29. The Respondent failed to respond to that request.
30. On 13 March 2020, the CAS Court Office, on behalf of the Panel, informed the parties that the Panel, having deliberated, deemed a hearing necessary, proposed 30 June 2020 as a hearing date subject to the parties’ confirmation of their availability, and requested the Respondent to make available the witnesses: Mr Gilbert Chepkwony, Mr Daniel Kanda, Mr Leonard Wanjala and Mr Samuel Cheptuiya.

31. On 16 March 2020, Appellant confirmed his availability for a hearing on 30 June 2020. The same day, counsel to Respondent informed the CAS Court Office of his impossibility to liaise with Respondent's witnesses due to sanitary concerns in Kenya.
32. On 18 March 2020, the CAS Court Office, on behalf of the Panel, proposed 8 July 2020 as an alternative date for the hearing, balancing the concerns over the sanitary crisis in Kenya with the obligation to proceed with the procedure and reserving attendance via video or telephone conference.
33. On 19 March 2020, the Appellant confirmed his availability for a hearing on 8 July 2020.
34. On 20 March 2020, counsel to Respondent confirmed his availability for a hearing on 8 July 2020 via video conference, indicating that Respondent "*waived his right to call witnesses and/or to testify during the CAS proceedings set for 8/7/2020*".
35. The hearing was eventually deferred to 14 July 2020 upon the Appellant's request and without Respondent objecting.
36. On 29 June 2020, the CAS Court Office, on behalf of the Panel, informed the parties that the hearing would be held by video-conference due to travel restrictions and health concerns.
37. On 30 June and 3 July 2020, respectively, the Appellant and the Respondent signed the Order of Procedure.
38. On 3 July 2020, the CAS Court Office, on behalf of the Panel, reminded the Respondent of the letter of 13 March 2020 in which the Panel requested him to make available his four witnesses.
39. On 13 July 2020, the CAS Court Office, on behalf of the Panel, reiterated the request to the Respondent to make the four witnesses available and advised the Parties that, to the extent these individuals are not made available for questioning during the hearing, the Panel intends to take an adverse inference against their refusal to participate.
40. On 13 July 2020, the Respondent responded *inter alia* that he could not be forced to call witnesses and that the right to remain silent is a fundamental right. He appreciated the *de novo* character of the appeal and objected to a decision of the Panel to take an adverse inference if he did not make the four witnesses available.
41. In accordance with Article R57 of the Code, the parties and witnesses, to the extent set out below, participated at the hearing which was held by video-conference on 14 July 2020. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel at the CAS, and joined by the following:

For the Appellant:

- Mr Tony Jackson, case manager AIU
- Mr Ross Wenzel, Counsel

For the Respondent:

- Mr Reece M. Mwani, Counsel

42. The Panel heard evidence from the following persons:
- Mr Marco Petric, DCO (called by the Appellant);
 - Mr Cornelius Magut, BCO (called by the Appellant).
43. At the outset of the hearing both parties confirmed that they had no objection to the composition of the Panel and that their right to be heard on an equal basis had been thus far fully respected.
44. The parties had full opportunity to examine and cross-examine, direct and redirect the witnesses attending the hearing, present their case, submit their arguments and answer the questions posed by the Panel.
45. Before the hearing was concluded, the parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.
46. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the parties, even if these have not been specifically summarised or referred to in the present arbitral Award.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

47. The Appellant's Appeal Brief contained the following requests for relief:
1. *"The Appeal of World Athletics is Admissible.*
 2. *The decision dated 22 October 2019 rendered by the IAAF Disciplinary Committee in the matter of Jacob Chulyo Kendagor is set aside.*
 3. *Jacob Chulyo Kendagor is found to have committed an anti-doping rule violation.*
 4. *Jacob Chulyo Kendagor is sanctioned with a period of ineligibility of four years starting on the date of which the CAS award enters into force. Any period of provisional suspension effectively served by Jacob Chulyo Kendagor before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
 5. *Any results obtained by Jacob Kibet Chulyo Kendagor between 21 November 2018 and the date of entry into force of the CAS award are disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points, prize and appearance money, unless it considers that fairness requires otherwise.*
 6. *World Athletics is granted an award for costs."*
48. The IAAF's submission, in essence, is as follows.
- The DCO and BCO both indicated to have spoken to the Athlete on 21 November 2019.

- The DCO and BCO are experienced persons conscious of the need to actually identify the person to be subjected to sample collection and with neither self-interest, nor other motivation nor bias.
- The interactions between the DCO and BCO and the individual on 21 November 2019 occurred in clear daylight and without interruption.
- The DCO and BCO had a full visual image of the individual on 21 November 2019.
- The DCO noted the distinct characteristics of the Athlete's face, such as a flat left ear, an oval shaped head and a distinctive smile.
- Mr Chepkwony do not resemble the Athlete as is clear from photographs.
- There were less than two hours between the first observation and the identification based on images from the internet.
- The following circumstances support the finding that the individual on 21 November 2019 was the Athlete and not Mr Chepkwony:
 - Had it been Mr Chepkwony, there was no reason for him to refuse to give his first name and inform the BCO and DCO that the Premises belonged to the Athlete.
 - As Mr Chepkwony says he knew that the Athlete was supposedly in Marakwet, there was no reason why he would not have informed the DCO and BCO of this when questioned.
 - The workers on the property supposedly knew that the Athlete was in Marakwet; there was no reason why they would not have informed the DCO and BCO when questioned.
 - A young girl was noticed by the DCO and BCO hanging around the property and clinging to the individual's legs on 21 November 2018. Mr Chepkwony does not have a daughter. The Athlete has a daughter whose age matched the DCO's assessment of the young girl's age. The only plausible conclusion is that the young girl was the Athlete's daughter.
- The testimonies of the Athlete and his witnesses before the World Athletics' Disciplinary Tribunal were inconsistent and not convincing, based on these examples:
 - The timing in the Athlete's statement was inconsistent with Mr Chepkwony's timing of events. After confronting him with this, the Athlete adjusted his statement.
 - The Athlete stated that he returned to Eldoret on 22 November at 5pm. Mr Chepkwony stated that the Athlete returned around midday. Mr Wanjala stated that they were still working when the Athlete returned and they normally finish at 5pm.
 - The Athlete only arranged the workers for the potato harvest on his rural farm the evening before.

- The defence of the Athlete that because his car was not at his home's car port on 21 November 2018 he could not have been home, is in contradiction with the photographs provided by the Athlete.
- Mr Chepkwony had no recollection of the young girl.
- Mr Chepkwony testified that he did not refuse to give his name, but the Athlete stated that Mr Chepkwony told him that he had refused to give his name on 21 November 2018.
- At the hearing Mr Chepkwony stated that only his wife and children were at home but in his witness statement he said he had visitors.
- The date of the witness statement of Mr Kanda has been altered.
- Mr Kanda said at the hearing that he had a merely professional relationship with the Athlete, but confirmed in his witness statement that he had known the Athlete for 30 years.
- Mr Cheptuiya revised his statement about the duration of the Athlete's stay.
- There is no contemporaneous evidence that supports the Athlete's submissions.

49. The IAAF submits that the Panel can be comfortably satisfied that the Athlete was properly notified that he was required to provide a sample on 21 November 2018.

B. The Respondent

50. The Respondent's Answer contained the following request for relief:

- *"We therefore submit that due to the overwhelming evidence in support of Mr. Kendagor's defense we now pray that this case be dismissed and he be awarded costs of this case and damages as wrong information in relation to this case was leaked to both local and international media houses hence tarnishing his name, he has also not been allowed to practice his profession since his suspension.*
- *There is no allegation that the trial allegation erred in any way to warrant this court to deviate from its findings. We therefore pray that the appeal be dismissed and the respondent be awarded costs."*

51. The Respondent's submission, in essence, is as follows:

- It is strange that the DCO and BCO did not establish who lived/owned the adjacent house.
- It is not clear why the DCO and BCO decided not to take photographs of Mr Chepkwony on 21 November 2018.
- The motor vehicle of the Athlete was not captured in the photographs taken by the DCO and BCO on 21 November 2018. As this was not reported by the DCO and BCO, there is a lack of due diligence.

- The DCO and BCO failed to inquire from all people they interacted on 21 November 2018 as to whether the Athlete had another home. They failed to contact the Athlete himself through his mobile phone.
- There are statements of Mr Wanjala, Mr Kanda and Mr Cheptuiya about the presence of the Athlete and his car in Marakwet.
- There was lack of due diligence by the DCO and the BCO on 21 November 2018 because they did not take pictures of the individual during their visit.
- The photographs of the DCO and BCO submitted by World Athletics show the absence of the Athlete's car. This was because he used his car to drive to Marakwet.
- The Athlete was not in Eldoret on 21 November 2018, so he could not be notified by the DCO and BCO and did not refuse to provide samples.
- This is a case of mistaken identity and lack of due diligence of the DCO and BCO.

V. JURISDICTION

52. Article R47 of the Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

53. Pursuant to Article 13.2.1 of the ADR, a decision that no ADRV has been committed may be appealed under the ADR.

54. Article 13.2.2 of the ADR provides that in cases: *“[...] involving International-level Athletes or Athlete Support Persons or involving International Competitions, a decision may be appealed exclusively to CAS”.*

55. In accordance with Article 13.2.4 of the ADR, the IAAF has the right to appeal to CAS.

56. Both the Athlete and the IAAF accept that the Athlete is an International-Level Athlete and that CAS has jurisdiction under the ADR. The Respondent has not made any representations effectively contesting CAS jurisdiction in relation to this matter, subject to the below qualification. Both the Athlete and the IAAF confirmed CAS jurisdiction by signing the Order of Procedure. In these circumstances, the Panel is satisfied that CAS has jurisdiction to hear this appeal.

VI. ADMISSIBILITY

57. Article R49 of the CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After

having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

58. In accordance with Article 13.7 of the ADR, an appellant has 30 days within which to file a statement of appeal with CAS, starting from the date of communication of the written reasons of the decision to be appealed.
59. The Appealed Decision is dated 22 October 2019 and was received by the IAAF on the same day.
60. World Athletics lodged its Statement of Appeal on 21 November 2019, i.e. within the timeframe of 30 days.
61. On 12 December 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, granted the Appellant’s request in accordance with Article R32 of the CAS Code and extended the deadline to file the Appeal Brief until 13 December 2019.
62. The Appeal Brief was filed on 13 December 2019.
63. The Respondent objected to the admissibility of the appeal arguing that there is no provision justifying an extension pursuant to Article 13.9.4 of the ADR which states that CAS is bound to all IAAF Rules and Regulation including the ADR.
64. In his Answer, the Respondent submitted that Article R32 of the Code does not provide for an extension, hence the Appeal Brief was not filed timely. The Respondent argued that for that reason CAS does not have “jurisdiction”.
65. The Panel finds that the issue raised by the Respondent has to be qualified as an argument against admissibility and not jurisdiction, the Panel having already established that CAS has jurisdiction.
66. According to Article R32 of the Code, the President of the Appeals Arbitration Division may extend time limits, with the exception of the time limit for the statement of appeal. Thus, the President of the Appeals Arbitration Division was allowed to extend the time limit to 13 December 2019 provided that the time limit of the Statement of Appeal had not expired, which it did not.
67. As the Statement of Appeal was filed on 21 November 2019, therefore within 30 days after receipt of the Appealed Decision, and because the Appeal Brief was filed within the extended deadline granted by the President of the CAS Appeals Arbitration Division, it follows that the appeal is admissible.

VII. APPLICABLE LAW

68. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

69. Article 13.9.4 of the IAAF ADR provides:

“In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti Doping Regulations)...”.

70. Article 13.9.5 of the ADR provides:

“In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise”.

71. Accordingly, in deciding this appeal the Panel will apply the IAAF’s Constitution, Rules and ADRs and, subsidiarily, Monegasque law.

VIII. MERITS

72. The IAAF appealed the Appealed Decision on the basis of the allegation that the charges of the ADRV have been sufficiently proven. The Athlete disputes to have committed an ADRV by relying on affidavits and by submitting that the way in which the investigation by the DCO and BCO was conducted and executed, was flawed and that there was a lack of due diligence on their behalf. The Athlete argues that this case was about *mistaken identity* and that he was not notified on 21 November 2018 by the DCO and BCO and that, accordingly, no ADRV can be established. The Athlete did not submit any arguments (subsidiarily) to the sanctions requested by the IAAF in its Statement of Appeal and in its Appeal Brief.

73. Before discussing the substance of the case, the Panel will first analyse which standard of proof it must apply in this case.

A. The Standard of Proof

74. Article 3.1 of the ADR provides:

“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.”

75. The Panel observes that – in principle – legal commentators have held that CAS has consistently upheld the validity of sport-governing bodies choosing to impose their own concept of the applicable standard of proof (Rigozzi/Quinn, International Sports Law and jurisprudence of the CAS, Bern, 2014, pp. 1-55).

76. As the Respondent did not challenge the applicable standard of proof applied by the IAAF, the Panel sees no reason to deviate in this case from the standard of proof set out in the

ADR, which is one of comfortable satisfaction, being greater than a mere balance of probability standard but less than proof beyond a reasonable doubt.

77. The Appellant, therefore, has the burden of proof to establish the commitment of an ADRV.

B. Overview over the Charge and the evidence

78. Article 2.3 of the ADR provides as follows:

“Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification as authorized in these Anti-Doping Rules or other applicable anti-doping rules”.

79. The IAAF submits that the Athlete committed an ADRV based on Article 2.3 of the ADR.

80. The Panel has to ascertain, on a basis of comfortable satisfaction, whether the IAAF has established that the Athlete committed an ADRV and, if so, to determine what sanction would be appropriate.

81. The Athlete is right about his analysis in his Answer, that this case is about the personal identity of the individual that was questioned by the DCO and BCO on 21 November 2018 in Eldoret, Kenya.

82. The Panel agrees with the position of the IAAF and the reasoning in the Appealed Decision that if the Panel were to find, on the basis of comfortable satisfaction, being greater than a mere balance of probability standard but less than proof beyond a reasonable doubt, that the IAAF established that the Athlete himself was notified by the DCO and BCO, this would automatically lead to the conclusion that the Athlete evaded sample collection by wilfully and intentionally misleading the DCO and BCO hence is guilty of ADRV, hence that the Appealed Decision should be overturned. If this cannot be established, this will automatically lead to the conclusion that there was no ADRV and that the Appealed Decision should be upheld.

83. Accordingly, the IAAF is required to establish the identity of the individual who was visited and notified by the DCO and BCO on 21 November 2018. In order to do so and to obtain a full picture of what happened on 21 November 2018, it is relevant to hear the key witnesses called in the procedure before the World Athletics' Disciplinary Tribunal, in view of the *de novo* nature of CAS appeals proceedings pursuant to Article R57 of the Code. The *de novo* nature of this appeal was accepted and confirmed by the Respondent.

84. For this reason, the Panel requested on several occasions that the Athlete make available the witnesses - the statements of whom formed part of the first-instance case file.

85. The Appellant even accepted the admissibility of the Answer regardless of the fact that it was clearly filed late, but stating that in return the Respondent should make his witnesses available.

86. The Respondent made it clear at the hearing that, as the burden of proof is with the Appellant and since the Respondent believes that this burden has not been met by the Appellant, he preferred not to present any witnesses nor present the Athlete himself and that he cannot be forced to call witnesses and he may rely on the record.
87. After careful consideration, the Panel has decided not to draw any adverse inferences. The Appellant has the burden of proof and the Panel understands that the Respondent may present his case in a way which he deems most appropriate. Nevertheless, if the Respondent were to rely on witness statements or testimonies presented before the Disciplinary Tribunal, the Panel may allocate a lesser weight to such evidence, given that neither the Appellant nor the Panel could pose questions to and cross examine such witnesses, due to their absence at the hearing.
88. The Appellant has to therefore establish on the standard of proof basis of Article 3.1 of the ADR, that the Athlete was indeed the individual the DCO and BCO had spoken to, questioned and notified.
89. In the Appellant's favour are the witness statements and testimonies of the DCO and BCO. At the hearing, they both confirmed their written statements submitted in this case. The Panel finds that their statements, as well as testimonies, were sincere, consistent, convincing and highly detailed. They both stated that the individual they met on 21 November 2018 was the Athlete. Their statements were corroborated by the following:
- The fact that the interview with the individual was held at the premises of the Athlete.
 - A young girl was noticed by the DCO and BCO on 21 November 2018. The girl was hanging around the property and clinging to the individual's leg. This was not contested by the Respondent.
 - As Mr Chepkwony does not have a daughter, the Panel concurs with the position of the Appellant that the most plausible conclusion is that this was the Athlete's daughter and that the most likely reason she was clinging to the leg of the individual who was being interviewed was that he was her father.
 - The Panel finds that the DCO and BCO are trained professionals and did not have any interest in not being honest about their findings on 21 November 2018.
 - The statements of the DCO and BCO are detailed about the identity of the Athlete. It would have made the case easier had the DCO and BCO taken pictures of the individual, but the details provided by them about specific features of the individual's face, teeth, smile and ears, makes it highly unlikely that they made a mistake about the identity of the individual they have met on 21 November 2018.
90. The Panel finds, on the basis of comfortable satisfaction, that the IAAF has proven that the DCO and BCO had interviewed the Athlete on 21 November 2018.
91. Conversely, the Panel finds that the defence raised by the Athlete and the affidavits he relied on were not consistent and did not corroborate the position of the Athlete. As the Athlete did not attend the hearing, the Panel did not have the benefit of examining and questioning him further. Likewise, the inconsistencies and other questions raised in regard to the affidavits could not be addressed by the parties or by the Panel at the hearing, as these witnesses have not been made available by the Respondent notwithstanding the

Panel's request. In this respect, after careful consideration, the Panel has decided not to draw any adverse inferences. Nevertheless, and considering the *de novo* nature of CAS appeals proceedings pursuant to Article R57 of the Code, the Panel may allocate a lesser weight to those witness statements or testimonies that were presented before the Disciplinary Tribunal and are being re-used as evidence in the appeal proceeding when the relevant witnesses are not made available for questioning, examination and cross-examination at a hearing.

92. The following shows the inconsistencies in the submissions of the Athlete and in affidavits and testimonies made before the Disciplinary Tribunal:
- The Athlete stated that he returned to Eldoret on 22 November at 5pm. Mr Chepkwony stated that the Athlete returned around midday.
 - Mr Wanjala stated that they were still working when the Athlete returned while they normally finish work at 5pm.
 - The Athlete stated he only arranged the workers the evening before, which makes no sense in scheduling and organising a potato harvest. The Panel finds that it would have been more logical if the Athlete had arranged this way well the harvest.
 - Mr Chepkwony testified that he did not refuse to give his name, but the Athlete stated that Mr Chepkwony told him that he had refused to give his full name on 21 November 2018.
 - There were discrepancies in Mr Chepkwony's statement. At the hearing he stated that only his wife and children were at home but in his statement, he confirmed that he had visitors.
 - The date of the statement of Mr Kanda has been altered.
 - Mr Kanda stated at the hearing that he had a merely professional relationship with the Athlete, but in his statement he confirmed that he had known the Athlete for 30 years.
 - Mr Cheptuiya revised his statement about the duration of the Athlete's stay at his rural farm.
93. The Panel also notes, without it being in itself decisive, that the persons whose affidavits were submitted by the Respondent before the Disciplinary Tribunal, were friends, neighbours or otherwise closely related to him.
94. The Panel acknowledges that the DCO and BCO could have taken pictures of the individual and other persons they met at the site of Eldoret in order to confirm more readily and easily the identity of the Athlete. However, the Panel does not concur with the submission of the Athlete that the complete investigation was flawed and lacked due diligence because no pictures were taken. The DCO and BCO, checked pictures on the internet at the first available instance and in close proximity to the meeting with the individual at the Premises, and tried to support their findings through the discussions with the persons at the Premises and on the street leading to the Premises. The Panel finds that their statements and testimonies about the identification of the Athlete convincing.
95. The Panel finds, therefore, that the Appellant established to its comfortable satisfaction, beyond a mere balance of probability standard, that the DCO and BCO had interviewed

and notified the Athlete on 21 November 2018 and that the Athlete has committed an ADVR pursuant to Article 2.3 ADR by intentionally misleading the DCO and BCO about his identity and failing or refusing to submit to sample collection.

C. Sanction

96. Article 10.2.3 of the ADR provides:

“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 a 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-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.”

97. Article 10.3.1 of the ADR provides:

“For an Anti-Doping Rule Violation under Article 2.3 or 2.5 that is the Athlete or other Person’s first anti-doping offence, the period of Ineligibility imposed shall be four years unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years.”

98. Article 10.8 of the ADR provides:

“Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation.

In addition to the automatic Disqualification, pursuant to article 9, of the results in the Competition that produced the Adverse Analytical Finding (if any), all other competitive results of the Athlete obtained from the date the Sample in question was collected (whether In-Competition or Out-of-Competition) or other Anti-Doping Rule Violation occurred through to the start of any Provisional Suspension or Ineligibility period shall be Disqualified (with all of the resulting consequences, including forfeiture of any medals, titles, ranking points and prize and appearance money), unless the Disciplinary Tribunal determines that fairness requires otherwise.”

99. Article 10.10.2 of the ADR provides:

“The period of Ineligibility shall start on the date that the decision is issued provided that:

(a) any period of Provisional Suspension served by the Athlete or other person (whether imposed in accordance with Article 7.10 or voluntarily accepted by the Athlete or other Person in accordance with Article 7.10.6) shall be credited against the total period of Ineligibility to be served. To get credit for any period of voluntary Provisional Suspension, however, the Athlete or other Person must have

given written notice at the beginning of such period to the Integrity Unit, in a form acceptable to the Integrity Unit (and the Integrity Unit shall provide a copy of that respected the Provisional Suspension in full. No credit against a period of Ineligibility shall be given for any time period before the effective date of the Provisional Suspension or voluntary Provisional Suspension, regardless of the Athlete or other Person's status during such period. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility that may ultimately be imposed on appeal;

(b) where the Athlete or other Person promptly (which for an Athlete means, in any event, before he competes again) admits the Anti-Doping Rule Violation after being confronted with it by the Integrity Unit, the period of Ineligibility subsequently imposed on him/her may be back-dated so that it is deemed to have commenced as far back as the date of last occurrence of the Anti-Doping Rule Violation (which, in the case of an article 2.1 Anti-Doping Rule Violation, would be on the date of Sample collection). However, this discretion to back-date is subject to the following limit: the Athlete or other Person must actually serve at least one-half of the period of ineligibility, i.e., the commencement date of that period of Ineligibility cannot be back-dated such that he actually serves less than one-half of that period. This Article 10.10.2 (b) shall not apply where the period of Ineligibility has already been reduced under Article 10.6.3; and

(c) where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date the Anti-Doping Rule Violation last occurred (e.g., under Article 2.1, the date of Sample Collection). All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.”

100. As the Panel has found that the Athlete (who was notified on 21 November 2018) did not establish that his ADRV was not intentional, the period of ineligibility to be imposed has to be four years pursuant to Article 10.3.1 of the ADR.
101. The ineligibility shall have effect from the date of this Award but the period between the commencement of the provisional suspension, 5 July 2019, and the date of the Appealed Decision at which point the suspension ended, 22 October 2019, shall be credited against the period of ineligibility, in accordance with Article 10.10.2 of the ADR.
102. In addition to the period of ineligibility, all results obtained by the Athlete between the date of the ADRV - 21 November 2018 - and the date of the Appealed Decision shall be disqualified, with all of the consequences, including forfeiture of any medals, points and prizes in accordance with Article 10.8 of the ADR. While the Panel accepts that in accordance with the wording of Article 10.8 of the ADR the disqualification of results between the ADRV and the date of a decision regarding that violation is the norm and not the exception, the Panel notes that the Appealed Decision cleared the Athlete from the violation and the Athlete had a legitimate right to continue and compete from that point onwards.

IX. COSTS

103. This proceeding falls under Article R65.2 of the Code, which provides:

“Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.— without which CAS shall not proceed and the appeal shall be deemed withdrawn.

[...]”

104. Article R65.3 of the Code reads as follows:

“Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.”

105. Article R65.4 of the Code provides as follows:

“If the circumstances so warrant, including whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel.”

106. Having taken into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties, the Panel rules that each party shall bear its/his own costs, but that the Respondent shall pay a contribution of CHF 1,000 towards the Appellant’s legal fees and other expenses incurred in connection with the present arbitration proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the International Association of Athletics Federations on 21 November 2019 against the decision rendered by the IAAF Disciplinary Tribunal on 22 October 2019 is upheld.
2. The decision rendered by IAAF Disciplinary Tribunal on 22 October 2019 is set aside.
3. Mr Jacob Kibet Chulyo Kendagor is sanctioned with a period of ineligibility of four years with effect from the date of this Award but the period between 5 July 2019 and 22 October 2019 shall be credited against the period of ineligibility.
4. All competitive results obtained by Mr Jacob Kibet Chulyo Kendagor between 21 November 2018 and 22 October 2019 shall be disqualified, with all of the consequences including forfeiture of any medals, points and prizes.
5. Mr. Jacob Kibet Chulyo Kendagor shall pay to the IAAF a contribution in the amount of CHF 1,000 (one thousand Swiss Francs) toward its legal fees and expenses incurred in connection with the present proceedings.
6. All other and further motions or prayers for relief are dismissed.

All other motions or prayers for relief are dismissed.

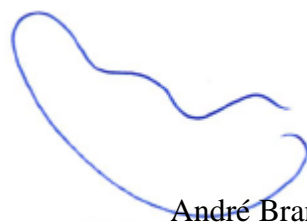
Seat of arbitration: Lausanne, Switzerland

Date: 19 January 2021

THE COURT OF ARBITRATION FOR SPORT



Ken E. Lalo
Arbitrator



André Brantjes
President of the Panel



Isabelle Fellrath
Arbitrator