

Decision Number 03/2016

PANEL OF THE IAAF ETHICS BOARD

24 March 2016

The Honourable Michael J Beloff QC (Chairman)

Mr Akira Kawamura

Mr Thomas Murray

**In the matter of: a Challenge by Isaac Mwangi Kamande to his Provisional Suspension under the IAAF Code of Ethics and Procedural Rules of the IAAF Ethics Board**

## DECISION

### Introduction

- 1) On 22 February 2016 after consultation with other members of the Ethics Board (the "EB") (and with their concurrence) in exercise of the power granted by Rules 13(27)-(30) of the Ethics Board's Procedural Rules (the "Rules") the Chairman of the EB Michael J Beloff QC provisionally suspended Mr Mwangi, CEO of Athletics Kenya, from any office or position in the IAAF or Athletics Kenya which he then held, and enjoined him from assuming any new office or position in either organization, for a period of 180 days pending investigation of the *prima facie* case against him. The provisional suspension took effect at 3pm UK time on 22 February 2016.
- 2) Under Rule 13(28) a suspended person has the right to challenge his suspension:
  - a) By letter dated 8 March 2016 ("the TOK letter") Triple OK Law, Mr Mwangi's lawyers, indicated that he wished to challenge that suspension;
  - b) By email dated 9 March 2016 Triple OK Law indicated that Mr Mwangi was content to have the challenge determined on the basis of written statements (as permitted by Rule 13(28));
  - c) By email dated 15 March 2016, pursuant to the directions of the Chairman of the EB, Triple OK Law submitted written statements of Mr Mwangi himself, Ms

Charlotte Kurgoy, the Executive Assistant to Mr Mwangi, Ms Viola Chepchumba, the Administrative Assistant in his office, Mr Emmanuel Kipyator Rerimoi, Athletic Kenya's accountant, Ms Karen Gachahi, who works on the front desk at Athletics Kenya and a Ms Glotilda Cheruto, in support of his challenge.

- d) The Chairman appointed himself, Mr Akira Kawamura and Mr Thomas Murray as a Panel to rule on the challenge.

### Background

- 3) The evidence relied on for the imposition of the provisional suspension was contained in an article published by The Associated Press on 10 February 2016 ("the Article"), the central elements of which were that:
  - a) On 16 October 2015 two Kenyan athletes, Joy Sakari and Francisca Koki Manunga attended a meeting with Mr Mwangi;
  - b) The two athletes said that during the course of that meeting Mr Mwangi asked them for 2.5 million Kenyan shillings each in return for influencing the penalties that they would receive for their positive doping results;
  - c) Neither athlete paid him that, or any other sum of money in order to influence their penalties;
  - d) On 27 November 2015 both athletes received notice that they would be banned from competing for four years.<sup>1</sup>
- 4) The provisions of the IAAF Code of Ethics (the "Code") of which Mr Mwangi would be in breach, if that evidence were correct, are as follows:
  - a) Article C1 (Integrity) (11) (applicable to all members of the IAAF Family) "*Persons subject to the Code shall not act in a manner likely to affect adversely the reputation of the*

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<sup>1</sup> The Panel has been provided with signed written statements from the two athletes dated 23 March 2016 in which they state that the accounts that they gave The Associated Press, and the content of The Associated Press article dated 10 February 2016, are true, in particular that on 16 October 2015 Mr Mwangi asked each of them for the sum of 2.5 Million Kenyan Shillings to reduce their doping bans.

*IAAF, or the sport of Athletics generally, nor shall they act in a manner likely to bring the sport into disrepute."*

- b) Article C1 (Integrity) (12) (applicable to all members of the IAAF Family) *"Persons subject to the Code shall act with the utmost integrity, honesty and responsibility in fulfilling their respective roles in the sport of Athletics."*
  - c) Article C1 (Integrity) (14) (applicable to all members of the IAAF Family) *"Persons subject to the Code shall not participate in betting on Athletics, nor manipulate the results of competitions nor engage in other corrupt conduct in accordance with the Rules against Betting, Manipulation of Results and Corruption."*
  - d) Article C1 (Integrity) (15) (applicable to all members of the IAAF Family) *"Persons subject to the Code, shall not offer, promise, give, solicit or accept any personal or undue pecuniary or other benefit (or the legitimate expectation of a benefit irrespective of whether such benefit is in fact given or received) in connection with their activities or duties in Athletics."*
  - e) Article C4 (Good Faith) (20) (applicable to all members of the IAAF Family) *"Members of the IAAF Family shall act in good faith towards each other with mutual trust and understanding in all their dealings."*
- 5) The Chairman of the EB was satisfied that (i) The Associated Press is a sufficiently reputable news agency, (ii) the Article, which is based on a filmed interview conducted by The Associated Press with the two athletes in question, contained sufficient detail, and (iii) the athletes had no apparent motive to fabricate an account of this nature. Accordingly he imposed the provisional suspension notwithstanding Mr Mwangi's denial of the athletes' account of the alleged meeting, on the basis that, in the absence of such suspension, the integrity of the sport could otherwise be seriously undermined, having regard to amongst other factors, the seriousness of the *prima facie* breaches, which involve potential subversion or attempted subversion of the doping control process, endangering both the integrity of the sport and the health of Kenyan athletes, as well as significant financial corruption.

## The Challenge

- 6) Mr Mwangi relies on the fact that the athletes have been found guilty of violating anti-doping rules, and are, in his words “cheats” and “liars” and hence their evidence should not be trusted (Mwangi Statement, §36).
- 7) Mr Mwangi also suggests that the athletes “admitted to doping by waiving their right to a ‘B’ sample analysis” and that as such they could not possibly have been assisted to avoid the penalty prescribed under the IAAF rules (Mwangi Statement, §25) i.e. where there is no defence of absence of (significant or any) fault or negligence being 4 years. He also notes that his role was “akin to that of a prosecutor” (Mwangi Statement, §17).
- 8) Mr Mwangi also notes the omission of the athletes to complain about the alleged bribe to Athletics Kenya (Mwangi Statement, §27) and/or to appeal the sanction actually administered on grounds of the alleged solicitation of a bribe (Mwangi Statement, §28) and/or to arrest him in their capacity as police officers and/or to bring criminal charges (Mwangi Statement, §36).
- 9) Mr Mwangi repeats the point (originally set out in the TOK letter) that he has voluntarily stepped aside; that the Anti-Doping Agency of Kenya (“ADAK”) are investigating the complaint and that ADAK is a well qualified body whose seisin of the case justifies abstention from action by the EB (Mwangi Statement, §§2, 36.)
- 10) Mr Mwangi also addresses possible motivation behind the athletes’ allegations; to preserve their jobs; to conceal a doping cartel; to attack collaterally the IAAF anti-doping procedures; and participation in political pressures from potential successors to Mr Mwangi (Mwangi Statement, §36, pp18-19).
- 11) Mr Mwangi also contrasts the failure of the EB to take action against, *inter alios*, IAAF President Sebastian Coe for allegedly giving untrue evidence to the United Kingdom Parliament (Mwangi Statement, §36, pp15-16) and the absence of provisional suspension of Nick Davies who, like Mr Mwangi voluntarily stepped down from his position as IAAF Deputy General Secretary (Mwangi Statement, §36, p15). These are said to evidence double standards.

## Approach

- 12) The criterion for provisional suspension is that set out in Rule 13(27): i.e. **could** (not 'would' - a more demanding standard than 'could') the integrity of the sport be seriously undermined if it were not imposed. Although the power to suspend is located in the part of the rules dealing with discipline, the suspension of Mr Mwangi is not punitive - no charges under the Code have to date been brought, still less found proven - but precautionary. Imposing a suspension on a precautionary basis involves consideration of *inter alia* the nature of the allegations (including how serious they are), whether the person against whom the allegations are made is in a position of authority and what, as a result, is the likely risk to the integrity of the sport of allowing the person to continue in office during the pendency of the investigation.
- 13) The issue which the present case requires us to consider is on what basis a challenge under Rule 13(28) can succeed. It is relevant that under the rules (i) a person will not be suspended (prior to any charge being brought) unless also under investigation (ii) an investigation will not be instituted unless there is a *prima facie* breach of the Code; and (iii) the purpose of the investigation is to determine whether that *prima facie* case remains intact (or is enhanced or diminished) and whether in the light of the outcome of the investigation a disciplinary case should proceed to adjudication. Neither a *prima facie* case, a provisional suspension nor a decision to proceed to adjudication of a disciplinary case abrogates the principle of the presumption of innocence.
- 14) We consider that it would be inconsistent with the language, purpose and policy of the rules (subject to the proviso set out below) that a panel seized of such challenge should usurp the function of the investigator and purport to determine the strength of the case against the person suspended, especially when it could not resolve disputed issues of fact without a hearing involving both the accusers and accused (i.e. the suspended person) which the rules do not contemplate.<sup>2</sup>

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<sup>2</sup> By analogy the Court of Appeal of England and Wales held in *GMC v Hiew* [2007] EWCA Civ 369; [2007] 1 WLR 2007 that it was not the function of a court reviewing an interim suspension order (in that case an interim suspension imposed by the Interim Orders Panel of the General Medical Council) to make findings of fact or resolve disputes (§42). Similarly, it is not for the IOP itself to make findings of fact or resolve disputes of fact. We say by analogy in recognition of the fact that the rules are governed by Monegasque, not English law.

- 15) The proviso is this. There may be a case where the person suspended can show dispositively (or possibly all but so) that the complaint is false e.g. in a case such as this, compelling alibi evidence. However unless such person can go that far, the case against him remains a *prima facie* case based on exactly the same (**and no less**) material as has been previously held to warrant suspension. That it is disputed does not mean it is less of a *prima facie* case. The rights and wrongs of the dispute are precisely that which the appointed Investigator must seek to resolve.<sup>3</sup>
- 16) A person suspended could also, in our view, argue, *inter alia*, that (i) the analysis of the evidence said to constitute the *prima facie* case was in some material way flawed (ii), even if a complaint were made out, it would not amount to a breach of the Code, or (iii) even if it were a breach of the Code, it would not be sufficiently grave to warrant suspension at all.
- 17) This analysis does not deprive the right of challenge of any utility or render it a *brutem fulmen* (see paragraphs 15 - 16 above).

#### Application

- 18) Applying that approach to the present case we do not consider that Mr Mwangi has identified anything (by way of evidence or analysis) which sufficiently undermines the *prima facie* case - i.e. which in effect acts as a 'knock out blow'. Mr Mwangi has stated that he could not, even if so desired, have met the two athletes due to the very tight schedule of activities he had on that particular day (Mwangi Statement, §31). He and the other persons who have provided statements in support of his challenge to his provisional suspension provide evidence of his schedule of activities. Given that a meeting of the kind and with the content testified to by the athletes i.e. an attempted extortion, would not be likely to feature on the official agenda, and could well have been brief, we are unpersuaded that it could not have occurred. It is for the

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<sup>3</sup> Also by analogy, in *Abdullah v GMC* [2012] EWHC 2506 (Admin) the High Court of England and Wales upheld a decision of the Interim Orders Panel of the General Medical Council that a practitioner should be suspended while allegations of sexual misconduct were investigated, despite the fact that the police had investigated and concluded that there was insufficient evidence to proceed and that the PCT had concluded that suspension was not justified. The Court concluded that given the seriousness of the allegations the decision to suspend was both necessary and proportionate, despite the fact that there were some deficiencies in the GMC's evidence (§§97 - 99).

Investigator in due course to determine whether the evidence is such that the case should proceed to adjudication.

- 19) It is to be noted that Mr Mwangi accepts that both he and the athletes were indeed present in the Athletics Kenya offices in Riadha House on the day in question (Mwangi Statement, §§32-33 and §36) so he cannot rely on alibi.
- 20) Nor do we consider that Mr Mwangi's hypotheses as to possible motivation for the athletes to lie (Mwangi Statement, §36, pp18ff) come close to establishing at this point that they must have lied. The hypotheses are at present speculative, un evidenced and, at least ostensibly, inconsistent with each other. One or more of those hypotheses may be well founded but it will be for the Investigator to weigh this issue; likewise it is for him to accept or reject Mr Mwangi's exposition of what steps the athletes would have taken, but did not, if their account were true (Mwangi Statement, §36, pp11-13). At the moment these are no more than arguments.
- 21) We recognize that the athletes have been convicted of anti doping rule violations, but that does not mean that they are necessarily lying. A disciplinary panel of an EB determined, after a full hearing, that the allegations of a certain (non Kenyan) athlete which were of a similar kind to those of the athletes in this case were credible and correct.<sup>4</sup> It will be again for the Investigator to consider the veracity or otherwise of the athletes' accounts.
- 22) Mr Mwangi's submission that he would not have been able to influence the outcome of the athletes' cases is not wholly convincing. As (in his self-description) a prosecutor he might well have been able to persuade the Kenyan tribunal that there was some relevant mitigation (even were that not the case) and a point in time between the two hearings (held on 28 September 2015 and 9 November 2015) is precisely when, if so minded, he might have made the offer to exercise such influence in return for improper payments. We emphasise that we are not to be taken as saying that he did do any such thing; only that he has not convinced us that he would not have been able to.
- 23) As for Mr Mwangi's suggestion that he is being treated more harshly than other senior persons within the IAAF (Mwangi Statement, §36, pp15-17) we emphasise that it

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<sup>4</sup> IAAF Ethics Board Decision Number 02/2016, 7 January 2016.

would be unacceptable to treat Mr Mwangi more harshly than other more senior individuals within the IAAF Family,<sup>5</sup> a fortiori on grounds of race,<sup>6</sup> but we are content to state unequivocally that each case to which he refers was dealt with on its own merits. Different circumstances axiomatically lead to different conclusions.

- 24) As to Mr Mwangi's proposition that for various reasons the fact that the Kenyan authorities are dealing with his case disables us from maintaining the suspension in place (TOK Letter), the rule relied on by him i.e. Rule 13(5) relates on its face to delay/stay of an investigation, but not of a suspension. In any event we do not consider that the Chairman would sensibly conclude that it would be appropriate in this case to stay an independent investigation in favour of one by a national body into the acts of a very senior national official, especially when the governance of athletics in Kenya in relation to anti-doping is currently so controversial.
- 25) Nor do we consider that the holding of two simultaneous investigations itself amounts to double jeopardy (Mwangi Statement, §36, pp15-17). Mr Mwangi is not being tried twice for the same offence; indeed he is not being tried at all. We neither need to nor do pronounce further at this point on the interrelationship between the actions *quoad* Mr Mwangi by the EB and any possible future actions against him by an Athletics Kenya disciplinary tribunal.
- 26) Finally it is to be noted that in his challenge Mr Mwangi does not dispute that (i) he is subject to the Code (ii) the Associated Press article and filmed interview accurately described the athletes' accounts or (iii) the athletes' accounts, if accurate, would establish breaches of the Code identified in paragraph 4 above.
- 27) Given then our conclusion that there is still a *prima facie* case, and one fit for further investigation against Mr Mwangi we pose ourselves the question whether, given the subsistence of that case, the integrity of the sport could be seriously undermined if we did not maintain a provisional suspension in the light of (i) the gravity of the allegations and (ii) the risk to the sport if the complaint, based on such evidence, was well founded of Mr Mwangi being able to recommence his role as CEO of Athletics Kenya while the investigation continued.

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<sup>5</sup> Although as an aside we note that Mr Mwangi is himself a very senior figure within the sport.

<sup>6</sup> See Paragraph C2 'Equality' of the Code.

- 28) We remind ourselves again that a provisional suspension is imposed as a precautionary measure, and is not intended to be punitive. We bear in mind on the one hand the risk that the Investigator may recommend charges which may in the fullness of time be proven, in which case the lifting of the suspension would be shown to have been ill judged and someone who had no business being CEO of a major athletics federation would have wrongly continued in office. We bear in mind on the other hand the risk that no charges are brought, or, if brought are dismissed in which case Mr Mwangi will, if he remains suspended, have suffered unnecessary loss of office.<sup>7</sup> In our judgement the former risk outweighs the latter. We note, in any event that, given the precautionary nature of the suspension, even if no charges were ultimately brought, or charges were brought but not proven, this would not of itself mean that the provisional suspension should not have been imposed, provided that it was correctly imposed by reference to the relevant principles at the outset.
- 29) In summary the position, as far as the measuring stick of the integrity of sport is concerned, has not changed since the interim suspension was itself imposed. Furthermore any damage to Mr Mwangi's reputation is mitigated by our restatement of the precept that he continues to enjoy the presumption of innocence unless and until an EB disciplinary panel were to find him guilty of a breach of the Code.
- 30) For all those reasons Mr Mwangi's challenge to his provisional suspension is dismissed.

**The Honourable Michael J Beloff QC (Chairman)**

**Mr Akira Kawamura**

**Mr Thomas Murray**

**24 March 2016.**

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<sup>7</sup> It is not without interest that Mr Mwangi has stepped aside pending the national investigation and appears himself to accept that this was the proper course to take while such serious matters were being investigated notwithstanding his denials ("The investigations are ongoing" (Mwangi Statement §36 p13)). He is therefore in any event, whatever the outcome of his challenge, not presently acting as CEO.