

Decision Number: 01/2015

PANEL OF THE IAAF ETHICS COMMISSION

20 August 2015

Mr Lauri Tarasti (Chairperson)

Mr Akira Kawamura

Mr Tafsir Ndiaye

IN THE MATTER OF A COMPLAINT AGAINST ATHLETICS KENYA

Complaint

1. On 23 December 2014, Mr Wilson Kipsang Kiprotich, a Kenyan top-level runner, sent a letter to the IAAF Ethics Commission including a complaint against Athletics Kenya and the IAAF. On analysis, this complaint only concerns Athletics Kenya, a member federation of the IAAF, and this is therefore a decision against Athletics Kenya only.
2. In his complaint and associated appendices, Mr Kiprotich has complained that on 16 December 2014 Athletics Kenya disclosed to the media, including international media, that Mr Kiprotich had missed a doping test.
3. Mr Kiprotich complains that this disclosure was made before the period for him to request an review of a decision of the IAAF in respect of a missed test had expired, where he had put forward an explanation for the missed doping test. Although this explanation had not been accepted by the IAAF, Mr Kiprotich retained a right of review as at the date of disclosure.
4. A missed test in itself is not a violation of the IAAF's Anti-Doping Rules. A combination of three missed tests or failures to file Whereabouts information within a twelve-month period by an athlete in a Registered Testing Pool is such a violation.
5. Mr Kiprotich claims that Athletics Kenya's disclosure is a violation of the IAAF Code of Ethics (Article C7) and contrary to the IAAF Anti-Doping Regulations (Articles 6.2 and 6.3). As the complaint is not an arguable "violation" under the IAAF Anti-Doping Regulations as defined therein, the Ethics Commission has jurisdiction to determine this matter notwithstanding that it is also an alleged breach by Athletics Kenya of the Anti-Doping Regulations. Article C7 of the IAAF Code of Ethics in force at the relevant time provides materially as follows:

"C7 Confidentiality

Persons subject to the Code shall not at any time disclose information entrusted to them in confidence in connection with their role or activities in Athletics unless required to do so by the Code or by law..."

6. Articles 6.2 and 6.3 of the Anti-Doping Regulations in force at the relevant time provide as follows:

“6.2(g) If the Athlete does not request an administrative review of the alleged Missed Test by the relevant deadline, or if the administrative review leads to the conclusion that all of the requirements of paragraph 2.28 have been met, then IAAF Anti-Doping Administrator [or his designee] shall record an alleged Missed Test against the Athlete and shall notify the Athlete and (on a confidential basis), his National Federation, WADA and all other relevant ADOs (including the IAAF if the Filing Failure is recorded by another ADO) of that alleged Missed Test and the date of its occurrence.”

“6.3 The IAAF and any other ADO that declares, or that receives notice of, a Whereabouts Failure in respect of an Athlete shall not disclose that information beyond those persons with a need to know unless and until that Athlete is found to have committed an anti-doping rule violation under Rule 32.2(d) based on [among other things] such Whereabouts Failure. Such persons who need to know shall also maintain the confidentiality of such information until the same point.”

7. In his complaint, Mr Kiprotich asks the IAAF Ethics Commission to investigate Athletics Kenya’s alleged violations of the provisions set out above and requests that Athletics Kenya be sanctioned with a more severe sanction than a caution or censure.

Investigation

8. In accordance with Rules 13.4 and 13.5 of the Ethics Commission’s Procedural Rules (the “PR”), if the evidence submitted with the complaint is found by the Chairperson of the Ethics Commission to establish a prima facie case on a violation, the Chairperson shall cause an investigation to be commenced. In a determination of 13 February 2015, Mr Michael Beloff QC, the Chairperson of the Commission, concluded that there is a prima facie case of breach of Article 6.3 of the IAAF Anti-Doping Regulations and hence Article C7 of the Code of Ethics against Athletics Kenya and appointed Mr Sharad Rao, an advocate in Nairobi, as Investigator to investigate the alleged breach.
9. Following his appointment, Mr Rao requested Athletics Kenya provide him with a short statement as to the circumstances of the disclosure to the media and referred in particular to Article 6.3 of the IAAF Anti Doping Regulations and hence to Article C7 of the IAAF Code of Ethics.
10. In its statement of 13 March 2015, Athletics Kenya stated, inter alia, that by a notification dated 10 December 2014, Athletics Kenya was informed by the IAAF by copy of letters that Mr Kiprotich had been notified of an apparent Missed Test on 13 November 2014, in accordance of with IAAF Rule 35.18. The Investigator noted these letters were sent to Athletics Kenya marked confidential. Mr Kiprotich subsequently filed an explanation with the IAAF, which was recorded and duly reviewed by IAAF. The IAAF considered the explanation provided by Mr Kiprotich not to be a sufficient explanation under the IAAF Anti-Doping Regulations as concluded that Mr Kiprotich had not shown the due diligence required from an athlete in the Registered Testing Pool.
11. Athletics Kenya has long been accused by the Ministry of Sports of Kenya and many other stakeholders of not taking the issue of doping cases seriously and being overly secretive in respect

of matters concerning doping. As a result of this, Athletics Kenya made a policy decision to be more transparent in disseminating information relevant to anti-doping which it deems important for athletes and other stakeholders in the country. It is now the established practice of Athletics Kenya to communicate important information to athletics branches and athletes through periodic press releases.

12. One such press release was issued by Athletics Kenya following Mr Kiprotich's missed doping test. It was directed at athletes and other stakeholders in athletics whom Athletics Kenya honestly deemed to be persons with a need to know that Registered Testing Pool athletes are obligated to give complete and accurate Whereabouts information as three repeated Missed Test Findings constitute an anti-doping rules violation. In this press release, Athletics Kenya used Mr Kiprotich's recent Missed Test Finding to illustrate its point so as to sensitize athletes within the Testing Pool and their representatives of the need to provide up to date Whereabouts information.
13. Finally, Athletics Kenya has stated that it was also aware of the requirement under Article C7 of the IAAF Code of Ethics (see above) but that the national values set out under Article 10 of the Kenyan Constitution require that Athletics Kenya conducts itself and its business in a transparent and accountable manner. Athletics Kenya states that it was in the pursuit of the constitutional and statutory mandates that it issued the press release, that it was never targeted against an individual (Mr Kiprotich) and was accurately reported. Furthermore, it was not issued for any personal gain or benefit, nor was the information in the Press Release maliciously used to damage the reputation of any person or organization.
14. The Investigator, Mr Rao, organized in the course of his investigation of the case a short hearing in Nairobi 23 March 2015 where both Mr Kiprotich and Athletics Kenya were present, although there is no necessary requirement under the Ethics Commission rules for an investigator to do so. The minutes of this hearing consisting of 43 pages have been referred to by this Panel.
15. In accordance with Rule 13.9 of PR the Investigator shall provide the Chairperson of the Ethics Commission with a final report of the investigation containing inter alia all relevant facts and evidence and shall set out the possible violations of the Code and make a recommendation as to whether the matter should proceed to adjudication. Mr Rao has made his report of the investigation 31 March 2015.
16. The Panel repeats here the last part of the report of the Investigator as follows:

“ With respect I do not accept that the Article 10 of the Constitution of Kenya assists Athletics Kenya. It does not absolve Athletics Kenya from the express prohibition in Article 6.3 of the IAAF Anti Doping Regulations referred to earlier in specifically naming the Athlete in the said Press Release.

Both parties attended a hearing in my office on Monday 23rd March, 2015. Both were given full opportunity to ask questions and make observations which they duly did.

Athletics Kenya concede that with hindsight they should not have named Wilson Kipsang in their Press release but it was not intended to defame Kipsang nor was it malicious. They hold Kipsang in great respect.

I am of the view and so find that the press release by Athletics Kenya was not intended to defame Kipsang nor was it malicious. However, naming him in the press release when no anti doping violation had and indeed has not been committed is a violation of the IAAF Anti Doping Regulations and I so find. I find that the Press release was issued by Mr Isaac Kamande – the CEO of Athletics Kenya, that it was for and on behalf of Athletics Kenya, and that Athletics Kenya and in particular the CEO Mr Isaac Kamande and the Secretary General Mr David Okeyo must be held responsible for the same. Further that the said publication was in breach of the IAAF Anti Doping Regulations. I will forward my finding to that effect...”

17. In an addendum to his report, the Investigator highlighted the comment made by Mr Elias Masika, Counsel for Athletics Kenya, that the press release in question was issued not by the CEO Mr Isaac Kamande but by the Executive Council of Athletics Kenya, which included its Chairman Mr Isaac Kiplagat through its Communication Department. He submitted that Mr Kamande and Mr David Okeyo should not be singled out as the ones responsible for its release and that the press release was that of the Executive Council of Athletics Kenya.

Commencement of adjudicatory proceedings

18. According to Rules 13.10 and 13.12 of the PR, the Chairperson of the Ethics Commission shall appoint a member of the Commission to review the Investigator’s report and if the member deems that there is sufficient evidence to proceed, he shall send his recommendation to the Chairperson, who shall direct that adjudicatory proceedings be commenced.
19. This has taken place. The appointed Commission Member, Mr Carlos Nuzman, recommended in a statement of 28 April 2015 that this case proceed to adjudication and the Chairperson, Mr Michael Beloff QC has so directed.
20. Mr Nuzman explained his conclusions as follows:

“1. Although it is important that Athletics Kenya sensitizes Kenyan athletes about anti-doping, it does not need to use the name of any athlete to disclose that warning – which has been accepted by Athletics Kenya during the proceedings of formal inquiry held by the Investigator.

2. It is even more inadequate to have used as example a case of an athlete who still had the right to appeal, which means that there had not been a definitive decision by IAAF yet.

3. The information has not been disclosed only to athletes – which would be enough to sensitize them – but to the media through press release.

4. The principle of transparency provided by Article 10 of Kenya Constitution does not exempt Athletics Kenya from complying with the confidentiality obligations stated by IAAF Anti-Doping Regulations and IAAF Code of Ethics. The breach of confidentiality through the issuance of a press release has apparently damage Kiprotich’s reputation without any fair

reason, violating the Article 10 of Kenya Constitution itself, as it establishes the human dignity as one of the national values – and Athletics Kenya has ignored this principle when disclosing the press release.

5. Considering all reasons above, there is evidence that the Article 6.3 of the IAAF Anti-Doping Regulations and the Article C7 of the IAAF Code of Ethics have been breached by the issuance of the press release.

6. According to AK's Counsel, the press release has been issued on behalf of Athletics Kenya by its Executive Council, whose chairman is Mr. Isaac Kiplagat."

21. According to Rules 13.14 – 13.16 of the PR, the Panel for the case has been appointed. The notification of charge has been sent to Athletics Kenya informing it *inter alia* of the possibility to send a response and to request a hearing, by latest 5 July 2015. Athletics Kenya has not sent any written response or requested any hearing.
22. The Panel has convened in Beijing on the 20 August 2015, in the absence of attendance by Athletics Kenya or any other party (no attendance or hearing having been requested), and has made the following decision.

Conclusion of the Panel

23. The facts of this Athletics Kenya Case have been presented above in this decision. The evidence is clear and the facts are not disputed.
24. At the outset, the Commission confirms that it is of the utmost importance that Member Federations of the IAAF make concerted efforts to ensure that the athletes within their respective federations are aware of their anti-doping obligations and the consequences of any use of prohibited substances or methods.
25. However, in undertaking these important tasks the Member Federations remain subject to the applicable rules guaranteeing confidentiality of athlete's personal data other than as provided for in the rules. As counsel for Athletics Kenya accepted in the hearing before the Investigator, in this case Kenyan athletes could have been reminded of their anti-doping obligations by reference to the fact of a missed test without naming Mr Kiprotich.
26. The disclosure of the missed test of Mr Kiprotich has taken place. Athletics Kenya has admitted it. It is a violation against Rule 6.3 of the IAAF Anti Doping Regulations and hence against Article C7 of the IAAF Code of Ethics.
27. The Panel is of the view that the federation Athletics Kenya is therefore guilty of a violation of Article C7 of the Code of Ethics. It has made a policy decision in order to improve the transparency in its doping affairs and its officials have followed this proper policy without regrettably taking into account the required confidentiality. The complaint is only against Athletic Kenya as a Federation and not against the Chairman personally as described above. In these circumstances the sanction must be directed to the Federation.

Sanction

28. The Panel has taken into account the following factors:

- a. the six grounds identified in the review of Mr Nuzman above;
- b. the fact that as far as the Panel is aware this is a single incident which has not been repeated;
- c. the fact that no malicious intent of Athletics Kenya has been shown and the general policy of publicizing anti-doping rules is to be welcomed and supported;
- d. the fact that Mr Kiprotich is a world renowned international athlete and the President of the Professional Athletes Association of Kenya and the press release was therefore likely to be widely reported.

29. Taking into account that the Panel has in this decision stated that such disclosure is contrary to the IAAF's rules and must not therefore happen again in the future, the Panel determines to:

- a. Caution Athletics Kenya;
- b. Require Athletics Kenya to publish this decision on its website; and
- c. Require Athletics Kenya to publish on their website an apology to Mr Kiprotich and to issue this apology as a press release.

30. The procedural costs of this case, amounting to US\$7250.00, shall be borne by Athletics Kenya and paid without delay to the IAAF in accordance with Rule 16 of the PR.

31. This decision is final subject to any appeal lodged with the Court of Arbitration for Sport CAS according to its Rules, pursuant to Articles F35-38 of the IAAF's Code of Ethics.

Lauri Tarasti

Chairperson of the Panel