

**DOES THE PUNISHMENT FIT THE OFFENCE? AN EXAMINATION OF THE
EFFECTIVENESS OF PENALTIES FOR ANTI-DOPING INFRACTIONS BY
ATHLETES IN KENYA**

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TABLE OF CONTENTS

DEDICATION	iii
ACKNOWLEDGEMENT	iv
DECLARATION.....	v
ABSTRACT.....	vi
LIST OF ABBREVIATIONS	vii
CHAPTER ONE.....	1
1.1 BACKGROUND	1
1.2 STATEMENT OF PROBLEM.....	3
1.3 RESEARCH QUESTIONS	4
1.4 RESEARCH OBJECTIVES	4
1.5 HYPOTHESIS	4
1.6 JUSTIFICATION OF STUDY	5
1.7 CONCEPTUAL FRAMEWORK: Doping as cheating.....	6
1.8 LITERATURE REVIEW	7
1.9 METHODOLOGY	11
1.10 CHAPTER BREAKDOWN	11
CHAPTER TWO	13
2.1 Introduction.....	13
2.2 The modern anti-doping movement.....	13
2.3 Doping Defined.....	14
2.4. Understanding Cheating.....	15
CHAPTER THREE:	17
3.1. The Anti-Doping Act of Kenya.....	17
3.2 The Procedures for anti-doping violations.....	17
3.3. The sanctions imposed and their appropriateness.....	18

3.4. Performance enhancing drugs and their impact on health.	19
CHAPTER FOUR:.....	21
4.1. The elements of a crime.	21
4.2 Doping as a crime in other jurisdictions: Austria, Italy, and Spain.....	21
4.3. Doping as crime within the existing legal framework on ‘fraud’	22
CHAPTER FIVE:	24
5.1 Introduction.....	24
5.2 Findings.....	24
5.3 Recommendations.....	25
5.4 Conclusion	27



DEDICATION

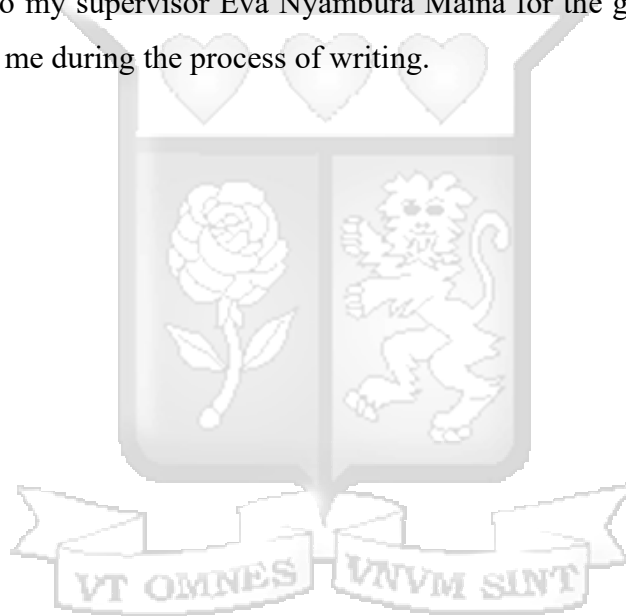
To all the honest and hardworking athletes in Kenya.



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DECLARATION

I declare that this research is my original work and has not been submitted to any other university for a degree or diploma.

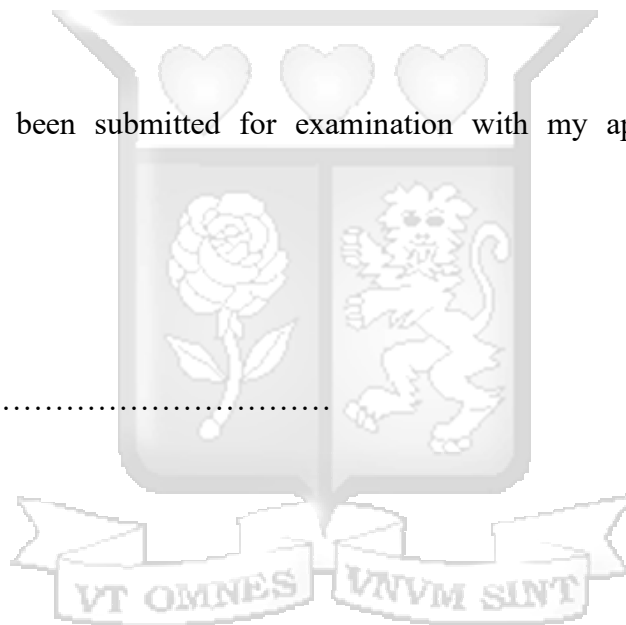
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ABSTRACT

All athletes must follow the anti-doping regulations the same way that all people in a particular jurisdiction are required to follow the laws. Kenya has found itself in an increasingly unique position each year as the number of doping cases it has to deal with are rapidly rising. This continuing trend runs the risk of bringing about a great deal of disrepute to Kenyan athletics, and particularly for middle and long-distance running which the country has been known to produce the best athletes of all time. It seems that there is a reluctance to deal with this string of doping cases which might be linked to top names within the various sports governing bodies under the Ministry of Sports. This cartel of top-level individuals is behind ensuring that doped athletes make it to the international stage and compete for big winnings. Athletes, motivated by these “big winnings” and the backing of their coaches and doctors, are therefore willing to put their health and reputation at risk by taking performance enhancing drugs. Although it might seem “non-progressive” to suggest that criminal sanctions be tied to anti-doping offences, this strict approach might be best suited towards the disciplining of athletes who intentionally violate these anti-doping rules. Furthermore, the government should be careful to protect various classes of the public, particularly the consumers of sport from investing time, energy, and efforts into fraudulent, unclean, and corrupt schemes. Kenya runs a risk of being viewed as an untrustworthy country in the field of athletics which in the long run might have longstanding effects on future athletes. Therefore, it is paramount that a more robust legal framework on anti-doping is adopted - one which threatens a great deal of consequences for doping athletes such that doping is not a path one would ordinarily consider. There is also a need to realize two key tools that could be beneficial in the fight against doping. First, the full extent of the powers that the Anti-Doping Agency of Kenya has with regards to conducting investigations on anti-doping offences and prosecuting them; and second, that of sport governing bodies to assist it on the same quest.

LIST OF ABBREVIATIONS

ADAK	ANTI DOPING AGENCY OF KENYA
WADA	WORLD ANTI DOPING AGENCY
WADC	WORLD ANTI DOPING CODE



CHAPTER ONE

1.1 BACKGROUND

The use of performance-enhancing substances in athletics is an ancient practice that has been traced as far back as over 3,000 years ago in Ancient Greece where athletes would ingest mushrooms and plant seed extracts or stimulating potions before stepping up to the starting line.¹ The ultimate goal for athletes was to gain an advantage over one's competitors because achieving victory resulted in praise, admiration, and rewards. In a similar thread, during the first official Olympic games,² cyclists were using wine, cocaine, cocoa leaves, and other substances in order to enhance their performance.³ Doping, until 1998 had been ambivalently accepted as a behind the scenes activity by the international sporting community. The well-publicized high-profile series of doping scandals within the sport of professional cycling 'the Festina affair' caused a shift in public opinion towards a greater condemnation of doping.⁴ The following year, the World Anti-Doping Agency (WADA) was established in order to lead a collaborative worldwide movement for doping-free sport based on partnership between the sport movements, and governments of the world.⁵ WADA created the World Anti-Doping Code (WADC/the Code) which is the core document that puts together global anti-doping policies, rules and regulations within sport organizations and public authorities.

Kenya is internationally recognized for demonstrating sporting prowess especially in track and field athletics where the country has achieved numerous gold medals and set record times at the Olympic games and World Championships. In the 2020 Olympic games, Kenya ranked third in the track and field medal table marking the most wins of any African team at the games. Middle and long-distance runner Faith Kipyegon currently holds the world record for the 1500m and 5000m races all achieved within one month of each other.⁶ Long distance runner

¹ Connolly R, 'Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes' 5(2) *Virginia Sports and Entertainment Law Journal*, 2006, 42.

² Held in Athens, Greece in 1896.

³ Strulik H, 'Riding High: Success in Sports and the Rise of Doping Cultures' 114(2) *The Scandinavian Journal of Economics* 2012, 540.

⁴ Smith C, 'Tour du dopage: Confessions of doping professional cyclists in a modern work environment' 52(1) *International Review for the Sociology of Sport* 2017, 98.

⁵ -<<https://www.wada-ama.org/en/who-we-are> >-on 25 February 2023.

⁶ She broke the 1,500m barrier of 3minutes 50 seconds in Florence Italy in June 2023 and seven days later the 5,000m record. In July 2023, she took 5 seconds off the world mile record in the Monaco Diamond League meet.

Eliud Kipchoge in 2019 brought the world to a standstill when he became the first human to run a marathon (26.2 miles) in under two hours which has since then been broken by Kevin Kiptum who ran a marathon in under two hours in a record-eligible race. Despite the vast achievements in the field of athletics, Kenya still faces serious allegations and undergoes investigations for anti-doping violations. In 2016, Parliament enacted the Anti-Doping Act (the Act) in order to give effect to the WADC which is the document that provides for consistency of anti-doping policies across sports and international boundaries.⁷ It further created the Anti-Doping Agency of Kenya (ADAK) which has the authority to enforce the Act by carrying out anti-doping activities in Kenya.⁸ In spite of these creations, gross violations to the Act still occur amongst Kenya's athletes. For example, in the year of the enactment of the Act, Team Kenya's field and track manager during the Rio Olympics was returned back to Kenya over allegations that he had been involved in subverting the doping procedure.⁹ The International Association of Athletics Federations found him guilty of dishonest and corrupt conduct after discovering that he had agreed to give advance notice of drug tests to athletes and coaches in return for money.¹⁰

When an athlete wishes to participate competitively in a sport, they accept the regulations of the governing body which are imposed upon them. The athlete submits to these rules and agrees to follow them and accepts the consequences of failing to abide by them. Therefore, this means that a contractual relationship is created between the athlete and the governing body.¹¹ Following this understanding, one would reasonably expect the outcome of breach of any terms such as committing a doping infraction by the athlete, is equal to a breach of contract. Therefore, the athlete is subjected to the punishments that are dictated by the governing body for that particular breach.¹² In Kenya, all disputes between sport governing bodies and athletes with respect to anti-doping infractions are to be brought before the Sports Tribunal,¹³ which was established under the Sports Act of 2013. The Act makes a distinction between the

⁷ Hughes D, 'The World Anti-Doping Code in Sport' 38(5) *National Library of Medicine* 2015, 167.

⁸ Section 5, *Anti-Doping Act* (Act No. 5 of 2016).

⁹ Withnall A, 'Rio 2016: Olympics hit by new doping scandal over bribery allegations against Kenya track and field chief' *The Independent*, 07 Aug 2016 -< <https://www.independent.co.uk/sport/olympics/rio-2016-olympics-doping-kenya-drugs-major-michael-rotich-sunday-times-ard-track-and-field-running-latest-a7177176.html>>- on 13 Feb 2023.

¹⁰ *Michael Rotich v Republic* (2016) eKLR.

¹¹ Ioannidis G, 'The criminalisation of doping in sport: the case for the prosecution' *World Sports Advocate*, 2017, 13.

¹² Connolly R, 'Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes' 55.

¹³ Section 31, *Anti-Doping Act* (Act No. 5 of 2016).

penalties for athletes and athlete support personnel, and those for any other person when a violation of the provisions thereunder occurs. It recommends sanctions as the appropriate penalty for athletes and athlete support personnel for non-compliance with the Act,¹⁴ while other persons violating the provisions thereunder face penalties that range from a fine to imprisonment upon conviction¹⁵. There is no justification as to why athletes are subjected to the administrative process under the Sports Tribunal while any other person involved in the violation of the Act is to face harsher penalties such as imprisonment or payment of a fine. The Anti-Doping (Amendment) Bill 2020 was introduced in order to change the Act to comply with WADC.¹⁶ However, the proposed amendments remain silent as to the potential criminalization of doping infractions committed by athletes.

Cognizant of this glaring fact, the current Sports Minister Ababu Namwamba has publicly stated that believes in the need to criminalise doping and elevate handling of doping substances to the same level as narcotics. This was in response to the high number of athletes that were banned by the Athletics Integrity Unit for violations that cause the country to face high sanctions from the governing body of World Athletics.¹⁷

1.2 STATEMENT OF PROBLEM

There has been a significant transformation in sporting events that has led the sports sector to take the shape of a business with various stakeholders. The transformation of international sporting competitions into highly politicized global sporting festivals has created unhealthy competition among athletes. The result has become a heightened regularity of anti-doping violations. The creation of anti-doping legislation has been a positive step toward its eradication but unfortunately the continuing spread of doping among Kenyan athletes is yet to be properly addressed and suggests that the existing tools are inadequate to eradicate this problem. In January 2023 for example, the Athletics Integrity Unit,¹⁸ released its Global List of Ineligible

¹⁴ Section 42(5), *Anti-Doping Act* (Act No. 5 of 2016).

Section 42(6), *Anti-Doping Act* (Act No. 5 of 2016).

¹⁵ Section 42(1)(2)(3)(4), *Anti-Doping Act* (Act No. 5 of 2016).

¹⁶ The Anti-Doping (Amendment) Bill, 2020 is the most recent change made to anti-doping regulatory framework in Kenya. Its aim however is to ensure compliance with the 2021 World Anti-Doping Code by also putting in place an enhanced results management system for anti-doping rule violations and for connected purposes.

¹⁷ Katami M and Stevens R 'Kenya looks to criminalise doping in athletics after string of cases' BBC Sport, 07 December 2022, -<<https://www.bbc.com/sport/africa/63834527>>-on 7 December 2023.

¹⁸ The Athletics Integrity Unit founded in 2017 was a creation of the International Association of Athletics Federations whose aim is to combat doping in the field of athletics.

Persons which contained 473 athletes currently serving sanctions for doping activity. Kenya has 55 persons on the list which puts it well into the spotlight of doping activity among runners, as the third most banned athletes of any nationality. The current penalty that athletes who commit anti-doping infractions face, is suspension or disqualification from competitions, or payment of sanctions after a hearing in the tribunal. This approach fails to take into consideration the wrongfulness of doping as a means of cheating and fraudulent activity. In addition, it allows athletes who commit doping infractions to quite literally pay for their sins and potentially take part in competition again.

This research seeks to study whether anti-doping offences committed by athletes should be criminalized due to their nature as fraudulent activity, and consequently prosecuted in the courts.

1.3 RESEARCH QUESTIONS

1. How anti-doping legislation developed and its impact on the current sanctions for doping violations.
2. Why the current penalties of suspension, disqualification and sanctions have been adopted as the only suitable punishment for athletes violating anti-doping legislation and their appropriateness?
3. Whether the criminalisation of doping offences would lead to a more effective outcome?

1.4 RESEARCH OBJECTIVES

1. To find out the history of the development of anti-doping legislation and its impact on the current sanctions for doping legislation.
2. To assess why suspension, disqualification and sanctions have been adopted as the only suitable punishment for athletes violating anti-doping legislation and investigate their appropriateness.
3. To determine whether the criminalisation of doping offences would lead to a more effective outcome.

1.5 HYPOTHESIS

The purpose of the Anti-Doping Act of Kenya is to ensure coordinated and effective mechanisms are implemented, in order to detect, deter and prevent doping.¹⁹ The use of the Sports Tribunal as a means of dealing with anti-doping infractions made by athletes in Kenya adopts the view that the relationship between the sporting body and the athlete is contractual in nature. Therefore, the state has no place to interfere with any resolution of disputes thereunder. However, given that doping in sporting competitions affects the public, it is reasonable that athletes who take part in doping be dealt with as offenders against the public, under the criminal justice system. In addition, the fact that other facilitators of doping who are not athletes stand to face criminal sanctions, it is in my view, only reasonable that athletes too face the same. In that respect, my hypothesis is that the current sanctions against doping athletes in Kenya are disproportionate for two reasons. First, that there is a discrepancy between the processes and the penalties for athlete support personnel and athletes, and other persons who commit anti-doping rule violations. Secondly, that doping in its nature is fraudulent activity and therefore must be viewed as more than a breach of a contractual relation between athletes and sport governing bodies, and instead as a public offence capable of being prosecuted.

1.6 JUSTIFICATION OF STUDY

Anti-doping laws are critical in maintaining the integrity of sport through fairness of competition. Current anti-doping efforts have indicated the inability of sports bodies such as ADAK to curb the use of doping substances amongst athletes. I attribute this failure to the ineffectiveness of the penalties attached to the offence on the doping athletes. Therefore, I propose a harsher punishment for the offence doping through the revision of the anti-doping regulatory framework and enforcement of criminal liability on doping athletes. It is not enough that the legislation allows for the imprisonment or fining of individuals found to be aiding doping athletes. Athletes must also be held accountable for their actions in the same way as those individuals who help them to breach anti-doping legislation.

The uniqueness of this study is that it initiates a new and different perception of dealing with the rising cases of doping infractions by Kenyan athletes given that the current approach seems to be ineffective. This research is relevant to the athletics sporting bodies as well as ADAK because it introduces an efficient way of punishing athletes for taking part in doping activity.

¹⁹ Section 4(b), *Anti-Doping Act of Kenya* (Act No. 5 of 2016).

It is also relevant for athletes in that the proposed approach of criminalizing doping infractions will act as a deterrent to those who may want to use performance enhancing substances for competitions. This is because the current possible penalties, which are suspension disqualification or payment sanctions, are much easier on the athlete to undergo, as opposed to imprisonment for a certain period of time for example. Finally, the public benefits by knowing that the integrity of the sport and competition is jealously guarded and breach of such through doping is a serious offence against the community and will be dealt with according to its gravity.

1.7 CONCEPTUAL FRAMEWORK: Doping as cheating.

This concept envisions doping activity as a form of cheating and therefore the measures taken against athletes who take part in anti-doping activity should be harsher given that the athlete stands to benefit unfairly, at the detriment of their competitors.

In its nature, cheating has two key elements: first, that a person (the cheater) must violate a prescriptive, mandatory, regulative and conduct governing rule which is fair and enforced even-handedly. Then secondly, such cheating must be done with the intention of obtaining an unfair advantage over some party with whom the cheater is in a cooperative rule-bound relationship.²⁰ In the context of doping, the athlete is the cheater, the rules are the policies and anti-doping legislation, and the advantage gained is over the other competing athletes. This concept of cheating in sport has been applied to other circumstances that depict corruption in sport such as match fixing and money laundering but not to doping. The act of doping has been considered a threat to the integrity of sports competitions and therefore can fall under the classification of corruption in sport. Additionally, such integrity is considered a valuable asset which is deserving of special protection in the society.²¹ Another perspective of doping as cheating is supported by the fact that the existing legislation already condemns it and therefore perceives it as cheating.²²

²⁰ Green S, 'Cheating' 23(2) *Law and Philosophy* 2004, 138.

²¹ Frenger M, Emrich E and Pitsch W, 'Corruption in Olympic Sports: Prevalence Estimations of Match Fixing Among German Squad Athletes' 9(3) *Sage Open* 2019.

-<<https://journals.sagepub.com.ezproxy.library.strathmore.edu/doi/epub/10.1177/2158244019865361> >- on 5 March 2023.

²² Amos A, 'Anti-Doping Policy: Rationale or Realisation?' published Ph. D Thesis, University of Sydney, Sydney, 2008, 97.

Following from this conceptualization of cheating and classifying doping as a form of cheating, it is then conclusive that cheating is wrong and unfair because it violates the fair play principle.²³ The latter occurs when an athlete violates a fair and fairly enforced rule while subsequently benefitting from the cooperation of their competitors. As a result, doping is wrong and unfair since it constitutes cheating. In addition, the first aim of WADC, which is the basis of Kenyan anti-doping legislation, is to protect the athlete's fundamental right to participate in fair sport and thus promote health, fairness and equality for athletes.²⁴ How then does classifying doping as cheating justify the imposition of criminal penalties on athletes found to be in violation of anti-doping legislation? The body tasked with monitoring doping activity has already undertaken to prohibit the use of performance-enhancing drugs. Despite this, violators of such policies continue to use banned drugs and compete in various events once the period for which they are disqualified lapses.

Criminal law offers the public a sense of justice by providing an assurance of general cooperation with legal rules.²⁵ The increased popularity brought about especially by the commercialization of sport has introduced a significant involvement of the public into sporting matters. This involvement goes beyond mere enjoyment of sport and includes vast investments made by individuals and corporate bodies. Therefore, despite the existence of the relationship between the athlete and the governing body of the sport, when an anti-doping rule violation occurs, it then directly affects this segment of the public. As a result, given this public involvement, doping in sport can be properly viewed as a public wrong and a subject of criminal law which is the defender of the public. The same can be said for the criminal offence of fraud whose main component is cheating. Although in most occurrences it occurs between two parties, it is still prosecuted as a criminal offence.

1.8 LITERATURE REVIEW

The aims of the rules designed and enforced by various sporting governing bodies are healthy competition, equal or level-playing field for all.²⁶ Athletic doping to enhance performance

²³ Hart H, 'Are there any natural rights?' 64(2) *The Philosophical Review* 1955 (185).

²⁴ The preamble of the World Anti-Doping Code lists two main purposes: to protect the *athletes'* fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *athletes* worldwide, and; to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.

²⁵ Chiao V, 'What is the Criminal Law For?' 35(2) *Law and Philosophy* 2016, 139.

²⁶ Ioannidis G, 'The Application of Criminal Law on Doping Infractions and the 'Whereabouts Information' Rule: State Regulation v Self-Regulation' 1(2) *International Sports Journal* 2010, 16.

constitutes a form of cheating and a violation of the spirit of sport.²⁷ Looked at in further detail, doping is a way of creating unwarranted disadvantages by imposing negative externalities on third parties and distorting the level playing field of fair competition which weakens the public trust in the institutions involved.²⁸ In addition, performance enhancing drugs that athletes use in doping, distort the connection between natural talents, and the dedication to be successful within the sport.²⁹ Therefore, anti-doping programs are created in order to provide a competitive environment that is free from artificial performance enhancement, and athletes compete based on their natural abilities.³⁰ The goal of anti-doping mechanisms through sport governing bodies, such as ADAK and WADA, is primarily to test and detect doping activity among athletes. These bodies however adopt another equally important role which is to deter³¹ the use of banned substances by athletes. For deterrence to be effectively achieved, both detection and punishment must be severe enough on the athlete.³² In addition, deterrence is achieved when people are aware of the risks of being caught, and the severity of the punishment.³³

There is robust academic work and scientific research on the long-term health risks that doping poses on athletes however, little is being said about the most effective way to deter doping among athletes. In Kenya particularly, there is very little academic discourse on the general area of anti-doping and none discussing whether it should be criminalized or not. Moni Wekesa writes that one of the reasons that justify the regulation of doping is the compelling public interest since the general public, athletes, corporate bodies, and other spectators are interested in competition free of drug use.³⁴ This classifies sport as a matter of the general public and therefore its protection should be carried out in the same sphere. In addition, on the societal level, policies to maintain clean sport³⁵ are justified by the role that sport plays in building

²⁷ Willick S, Miller G and Eichner D 'The Anti-Doping Movement' 8(3) *National Library of Medicine* 2016.

²⁸ Dimant E, 'The Economics of Corruption in Sports: The Special Case of Doping' Harvard University, Edmond J. Safra Working Papers, Number 55, 2015, 7 - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546029 >-on 1 March 2023.

²⁹ Murray T, *Good Sport: Why Our Games Matter—and How Doping Undermines Them*, Oxford University Press, Oxford, 2018, xiv.

³⁰ Murray T, *Good Sport: Why Our Games Matter—and How Doping Undermines Them*, 4.

³¹ Section 4(b), *Anti-Doping Act of Kenya* (Act No. 5 of 2016).

³² Paternoster R and Bowers L, 'Inhibiting doping in sports: deterrence is necessary, but not sufficient' 11(1) *Sports, Ethics and Philosophy* 2017, 133.

³³ Paternoster R and Bowers L, 'Inhibiting doping in sports: deterrence is necessary, but not sufficient' 135.

³⁴ Wekesa M, 'Regulation of Doping in Sports: Implications for Kenya' Published Ph.D. Thesis, University of Nairobi, Nairobi, 2010, 43.

³⁵ There is no formally agreed upon definition of clean sport in the anti – doping community. However, some key elements of what it constitutes are undisputed. These are that: athletes compete on a level playing field; are

values for individuals that are desirable for the society.³⁶ I expect my study to be a unique contribution through its scope and the argument in favour of prosecuting athletes who are found to commit doping infractions.

In addition, credit must be given to Soita Silicho's piece of work on the legal framework on doping in Kenya. The crux of his discussion lies in the comprehensive analysis of the legal framework on doping in Kenya and a comparative study on the same with a focus on Germany and South Africa. In assessing the sufficiency of the existing legislation on doping, Silicho arrives at the conclusion that it suffices to criminalise it.³⁷ My research goes beyond this by examining the current penalties for doping violations, exposing the disparities in these penalties, and making the case for doping to be viewed as fraudulent in nature and therefore justifying its criminalisation.

Scholars in other jurisdictions have discussed this issue and even proposed that there is merit in warranting the criminalization of doping as a deterrent for other athletes. McKenzie proposes that criminal justice mechanisms such as the use of criminal charges against athletes and sports managers will challenge what he calls 'the culture of greed' perpetuated through doping.³⁸ Therefore, it will yield much more promising results as compared with administrative sanctions through sports bodies as is the current position in Kenya. Hlinak proposes a careful approach to prosecution of cheating athletes when he states that there stands a risk of government haphazardly interfering with the governing bodies of sports through the criminal justice system which has been the case in various jurisdictions before. It is important in his view, to examine the societal interest outside of the sport, the interest of fairness and whether cheating resulted in a real injury to a real person.³⁹ Claire Sumner in evaluating public perceptions of doping in sports found that doping is seen as a form of cheating and therefore a strong anti-doping stand such as its criminalization should be adopted. Sumner gives two justifications for this: first to

rewarded for their hard work; value the spirit of the sport; respect and look after their bodies; follow the anti-doping rules; and understand the importance of a drug testing regime.

Mortimer H, Whitehead J, Kavissanu M, Gürpınar and Ring C, 'Values and Clean Sport' 39(5) *Journal of Sports Sciences*, 2021, 535.

³⁶ Clancy S, Owusu-Sekyere F, Shelly J, Veltmatt A, De Maria A and Petróczi A 'The role of personal commitment to integrity in clean sport and anti-doping' 10(4) *Performance Enhancement and Health* 2022, 10.

³⁷ S Silicho, 'Sports and Drugs: A critical analysis of the legal framework on doping in Kenya' unpublished Undergraduate Dissertation, Strathmore University, Nairobi, 2017.

³⁸ McKenzie C, 'The Use of Criminal Justice Mechanisms to Combat Doping in Sport' *Sports Law eJournal* 2007, 9 -<<http://www.austlii.edu.au/au/journals/SportsLeJ/2007/2.pdf>>- on 3rd March 2023.

³⁹ Hlinak M, 'Cheating in Professional Sports and the Criminal Justice System' 9(2) *Williamette Sports Journal* 2012, 26.

punish doping with a stigmatic deterrent and second to alter public belief in the truth of sporting performance.⁴⁰ In emphasizing Sumner's arguments, Singh adds that doping should be criminalized since it is detrimental to the spirit of the sport and a threat to modern day sport. In addition, it must be a collaborative effort by both sports and non-sports organizations⁴¹ which by extension can include the courts.

Nelson recognizes that sporting bodies are capable of protecting athletes and players from harms such as those that originate from doping activity and other sport related harms. In addition, she notes that it is paramount for the State to intervene as and when there is a need to uphold the values of society and enforce punishments which deter others from performing such activity.⁴² This argument stems from the conceptualization of doping as a means of cheating in order for the competitor to gain an advantage over others who have not taken such performance enhancing substances. In their discussion, the main focus is the criminalization of violent acts in sports⁴³ and how prosecuting athletes who conduct themselves in such behaviour will set a good enough example as a positive deterrent. I propose the application of this same school of thought to doping activity because it recognizes the strong role that criminal liability plays as a deterrent for rule breaking.

It is noteworthy that some scholars such as Shaw do believe that the sanctioning of individual athletes through making them ineligible to participate is a significant deterrent. This is because of the damage that can be caused on their reputations as athletes and their potential to compete in future events as well as the money that comes with. In addition, the athlete's competitive medals and achievements may be rendered forfeited once sample positive of prohibited substances is collected from the athlete.⁴⁴

⁴⁰ Sumner C, 'The Spirit of Sport: the case for criminalisation of doping in the UK' 16 *International Sports Journal* 2017, 217.

⁴¹ Singh M, Kour R and Kour A, 'A collaborative diversified investigation of respective responses of sports person coaches and organizations on criminalization of doping, 6(3) *International Journal of Health Sciences* 2022.

⁴² Nelson A 'When, where and why does the State intervene in Sport: a contemporary perspective' *Sports Law eJournal* 2005, 15 -<

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjmmmp6o6puDaxVKV6QEHYg7CDQQFnoECAoQAO&url=https%3A%2F%2Fslgi.scholasticahq.com%2Fapi%2Fv1%2Farticles%2F6395-when-where-and-why-does-the-state-intervene-in-sport-a-contemporary-perspective.pdf&usq=AOvVaw3hSLFeFVC4C5yzDbnLXOWr&opi=89978449> >- on 5 May 2023.

⁴³ Nelson A 'When, where and why does the State intervene in Sport: a contemporary perspective' *Sports Law eJournal* 2005, 17.

⁴⁴ Shaw A, 'The 2012 and 2014 Olympic Doping Scandals: A Critical Analysis of the Effectiveness of Anti-Doping Mechanisms in Sports Law and the Necessity of Global Unity and Rehabilitation in Enforcing Anti-Doping Measures' 10 (4) *Beijing Law Review* 2019, 677.

1.9 METHODOLOGY

This study will constitute the following major parts: first, will be a detailed discussion on the origins of anti-doping legislation both globally and in Kenya and the influences of such legislation from WADC. To do so, the study will be reliant on qualitative evidence from primarily secondary sources such as journal articles, reports, books, chapters in books, and other sources. The study will be desk-based and will rely on primary resources such as the Anti-Doping Act and the Sports Act. This study will utilise deductive reasoning from which the main claim will be formulated from the premises derived from the first and second chapters. The first chapter is intended to demonstrate the history of anti-doping legislation in Kenya and derive the aims and rationale behind such legislation. This part of the study will be a doctrinal analysis of the current anti-doping legislation in Kenya.

The second part of this study will explore the available mechanisms for dispute resolution between athletes and sport governing bodies over anti-doping legislation infractions. This part will reveal the penalties that anti-doping legislation imposes on athletes which are: suspension and disqualification from competitions and events, and payment of sanctions. The study will explore the disparities between the penalties that athletes face and those that athlete support personnel face which will be done through a doctrinal analysis. Moreover, a philosophical analysis will be conducted in order to offer more insight as to the appropriateness of such penalties given the gravity of doping activity as a wrong.

The final part of the study will discuss a new approach toward achieving the purpose of anti-doping legislation, particularly deterrence. This will explore the possibility of criminalizing infractions of anti-doping legislation as a much more effective deterrent through academic material on criminal law.

1.10 CHAPTER BREAKDOWN

The first chapter of the study will take the form of this research proposal. It has the key aspects of the study such as the research questions and objectives, the conceptual framework that I will rely on, and the justification for conducting the study. These aspects of the study especially the first two, lay the foundation for the remaining chapters of the study.

Chapter 2 will explore the origins of anti-doping legislation both globally and in Kenya. This chapter is important because it will explain the need for anti-doping legislation, and

consequently what Parliament hoped to achieve by designing such legislation in the way it is designed. This chapter will also explain the why the current anti-doping regime both globally and in Kenya is not a subject of criminal law. A primary argument under this chapter will be made that seeks to establish cheating as the key element of intentional doping and therefore it constitutes an offence to the public, and a subject of criminal law. This chapter will also briefly introduce the current penalties for infractions of anti-doping rules on athletes as the foundation for Chapter 3.

Chapter 3 will examine the rationale behind the current penalties for infractions of anti-doping legislation on athletes. This chapter will explain why the current system focuses on suspension, disqualification or sanctions while highlighting the reasons why there has been hesitation by governments to subject such infractions to the ordinary criminal justice system. Moreover, this chapter will demonstrate the inconsistency between penalties for athletes and those of athlete support personnel as found in the Anti-Doping Act of Kenya.

Chapter 4 will discuss whether criminalisation of doping will lead to a more effective outcome. This chapter will examine legislation from other countries that have classified doping as a criminal offence. In addition, justifications will be given for criminalisation since criminal implications on it act as greater deterrents than sanctions. In examining this claim, this chapter will demonstrate how doping can be classified as fraud under the realm of criminal law and therefore a case can be made for its criminalisation.

Chapter 5 will outline the conclusions and recommendations made from the study. This research was undertaken to study whether the Kenyan anti-doping legal framework could be more effective by criminalizing doping offences by athletes. This is the concluding part of the discussion which will close with recommendations on improving the efficacy of the anti-doping legislation in curbing doping as an offence.

CHAPTER TWO

The objective in this chapter is to find out the origins of antidoping legislation and its intended purpose. Thereafter, I will elaborate on the concept that intentional doping is a form of cheating or fraudulent activity and therefore the punishment imposed on athletes who voluntarily take part in doping activity should be more severe and a subject of criminal law.

2.1 Introduction.

During the late 19th and early 20th centuries - the early days of the modernization of sport - performance-enhancing substances were not collectively condemned. Many popular events such as long-distance pedestrianism and cycling races lasted several days taking a toll on athletes' bodies. Therefore, it was not uncommon for athletes to use stimulants such as coca kola, cocaine, and strychnine to push them through exhaustion. From the mid-nineteenth century, bio-medical scientists became increasingly curious about the exploits of athletes and encouraged experimentation. In addition, there was a key interest in the possibilities of creating more energy for the human body especially given that the Industrial Revolution was underway and fatigue in the workplace would cause inefficient production.⁴⁵

The origins of anti-doping legislation were predicated upon class politics during the early 20th century that sought to create a divide between sporting practices on the amateur stage and the working-class. Gleaves claims that anti-doping rules that were founded upon on amateurism ideals would then become a tool for excluding or marginalising working-class professionals. The amateur movement presently known as the Olympic movement, sought to keep itself separate from working-class athletes by displaying true sporting prowess without the influence of an enhancer. It was during this time for example that the International Olympic Committee (IOC) established a rule that prohibited doping by Olympic athletes and introduced compulsory drug testing.⁴⁶

2.2 The modern anti-doping movement.

It is considered that the starting point for the modern anti-doping movement was the IOC's response to the French cyclist Knud Jensen's drug related death at the 1906 Athens Olympics.

⁴⁵ Ritchie I and Henne K, 'Amateurism, scientific control, and crime: historical fluctuations in anti-doping discourses in sport' 4 (1) *Journal of Criminological Research, Policy and Practice* 2018, 20.

⁴⁶ Ritchie I and Henne K, 'Amateurism, scientific control, and crime: historical fluctuations in anti-doping discourses in sport', 20.

Olympic games. A wave of information about drug use in elite sport emerged followed by public condemnation of the use of drugs by amateurs.⁴⁷ This incident led to the creation of a doping subcommittee within the IOC that served as a platform for medical personnel to share information pertaining the care and treatment of athletes. Fuelled by a strong desire to defend amateur sport as well as the principles of true sport, committee members would make public and private statements against doping.⁴⁸ In the years that followed, complexities surrounding doping were not only confined to the Olympics or major track and field competitions. The investigations conducted on the Festina team during the 1998 Tour de France particular triggered similar parallel investigations in Belgium, Switzerland, and Italy. Of great significance is that these instances removed the inhibitions felt by some governments towards interfering in high-profile cycling competitions.⁴⁹

2.3 Doping Defined.

Klaus Vieweg in his article on “doping notes that there exists no common legal definition of the term nor any binding legal criteria for such a definition. He proceeds to mention that “doping” is defined by the sports organisations in their own individual manner.⁵⁰ This means that the definition generally varies by jurisdiction. The definitions are given by international sports organizations which are then adopted by national sports organisations that regulate sports in their countries. WADC has nevertheless defined the term and the definition has nearly acquired universal acceptance. The Code defines doping as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through to Article 2.11 of the Code.⁵¹ It is Vieweg’s view and one that I agree with that this definition is abstract and leaves open the question as to what doping really is and when violation of the rules really begins.⁵²

⁴⁷ Gleaves J, ‘Doped Professionals and Clean Amateurs: Amateurism’s Influence on the Modern Philosophy of Anti-Doping’ 38(2), *Journal of Sport History* 2011, 228.

⁴⁸ Ritchie I and Henne K, ‘Amateurism, scientific control, and crime: historical fluctuations in anti-doping discourses in sport’, 22.

⁴⁹ Houlihan B, *Dying to Win: Doping in Sport and the Development of Anti-Doping Policy*, Council of Europe Publishing, Strasbourg, 1999, 14.

⁵⁰ Vieweg K, ‘The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position 15(1) *Marquette Sports Law Review* 2004, 37.

⁵¹ Article 1, World Anti-Doping Code 2021. This definition captures the presence of a prohibited substance in an athlete’s sample, use or attempted use by an athlete of a prohibited substance or method, evading, refusing or failing to submit to sample collection, whereabouts failures by athletes, tampering or attempted tampering with any part of doping control, possession of a prohibited substance or method, trafficking or attempted trafficking in any prohibited substance or method, administration or attempted administration of any prohibited substance, complicity or attempted complicity, prohibited association and acts to discourage against reporting to authorities all committed by athletes or other persons.

⁵² Vieweg K, ‘The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position 40.

In the Anti-Doping Act of Kenya (Anti-Doping Act), doping is defined as “the use of prohibited substances and methods in any sporting activity whether competitive or recreational in order to artificially enhance performance.”⁵³ This definition captures two crucial elements that identify instances of doping activity: the use of prohibited substances and methods, and the motivation being to artificially enhance performance. Scholars have claimed that there are two foundational principles that underpin anti-doping policies: that “artificial” performance enhancement poses a threat to the unique moral purity of sport and, that athletes merit protection from significant threats to their health.⁵⁴ The latter of these elements is evident in the short title of the Anti-Doping Act which provides for the purpose of the Act as the regulation of sporting activities free from the use of prohibited substances, in order to protect the health of athletes.

At its inception, anti-doping legislation was premised on moral grounds that sought the protection of amateur sport. In a subtle way however, the inclusion of medical personal and pharmaceutical experts within the field demonstrates that to some extent, athlete welfare was also a point of consideration for these bodies. In addition, maintaining the integrity of the sport by promoting “clean sport” also became an aim of antidoping legislation. One would expect that health concerns related to doping would deter an athlete from taking harmful and dangerous chemicals that pose a threat to their career and their lives. The increasing commercialisation of sport is enough incentive for athletes, their coaches, and managers to use whatever means necessary to sustain a high level of success.⁵⁵

2.4. Understanding Cheating.

To understand what cheating is, one must identify the elements that make it possible. First, the violation of a fair and enforced rule, which is done with the intention of obtaining an advantage over a party with whom they are in a cooperative, rule-bound relationship.⁵⁶ There is also the possibility of an additional element namely “deception”. The *Oxford English Dictionary* for example defines the verb “to cheat” as to act in a dishonest way to gain an advantage, especially in a game, a competition, an exam, etc. Starting from this conception, one can already deduce that cheating is wrong because it is unfair. This person is bound by a

⁵³ Section 2, *Anti-Doping Act* (Act No. 5 of 2016).

⁵⁴ Hunt T, Dimeo P and Jedlicka S, ‘The historical roots of today’s problems: A critical appraisal of the international anti-doping movement’ 1(2) *Performance Enhancement & Health* 55, 2012.

⁵⁵ Houlihan B, *Dying to Win: Doping in Sport and the Development of Anti-Doping Policy*, 7.

⁵⁶ Green S, ‘Cheating’ 23(2) *Law and Philosophy* 2004, 144.

duty of fair play to do their part and not take advantage of the benefits by not cooperating.⁵⁷ It would therefore make sense to conclude that the rationale for anti-doping legislation apart from protecting the health of athletes, is to ensure that sporting activity is free from prohibited performance enhancing substances. These substances allow athletes who use them to have an unfair advantage over other competitors which can be characterised as a form of cheating since every athlete has the right to a level playing field which is the ideal of fair play. In addition to challenging ‘the culture of greed’ that is perpetuated through doping, McKenzie argues that by viewing doping as an offence against the public generally or akin to fraud, some sort of faith may be regained in sportsmanship.



⁵⁷ The principle of fair play John Simmons.

CHAPTER THREE:

What are the current penalties for doping in Kenya and how appropriate are they?

As demonstrated in the previous chapter, the origins of anti-doping rules have given a unique character to the regime that governs doping in sport. These regulations having come from sporting bodies as opposed to governments have had an impact on the kind of procedures followed in addressing their violations, as well as the penalties imposed there under. The norm, which is no exception for Kenya, is that rule violations are investigated and dealt with under the various sports governing bodies without government intervention.

3.1. The Anti-Doping Act of Kenya.

The Anti-Doping Act confers jurisdiction to the Sports Tribunal (the Tribunal) to hear and determine cases on anti-doping rule violations while being guided by the international standards established by the WADC and other instruments alike.⁵⁸ Through this additional function of the Tribunal, Kenya has already demonstrated a desire to go beyond the rules and procedures established by the sport governing bodies in combatting doping. The Act, however, makes a stark contrast between the repercussions faced by persons and bodies, persons participating in recreational sport, medical practitioners, and other health related professionals and those faced by athletes and athlete support personnel who either use, possess, administer or in any way deal in prohibited substances.⁵⁹ The former are either to face a fine, imprisonment or both whereas the latter are subjected to the Anti-Doping Regulations of 2020 which supports the implementation of the Anti-Doping Act by highlighting various sanctions thereunder.

3.2 The Procedures for anti-doping violations.

Under section 42 of the Act, liability upon conviction of certain offences attracts a fine or imprisonment which presupposes that a trial has taken place in court. In addition, this can also be inferred from the functions of the ADAK, one of which includes a responsibility to prosecute anti-doping offences before the Sports Tribunal or the courts.⁶⁰ This function under the Act to prosecute individuals is seemingly restricted to instances not involving athletes or athlete support personnel. This is because the Act explicitly states that athlete and athlete

⁵⁸ Section 31, *Anti-Doping Act* (Act No. 5 of 2016).

⁵⁹ Section 42, *Anti-Doping Act* (Act No. 5 of 2016).

⁶⁰ Section 7(1)(u), *Anti-Doping Act* (Act No. 5 of 2016).

support personnel are to be subject to the Anti-Doping Rules and not the Act.⁶¹ If the aim of the Act is to regulate sporting activities by ensuring they are free from prohibited substances, it begs the question why there is a separation of regimes in dealing with anti-doping offences. On the one hand, either the Sports Tribunal or the courts as per the Act, and on the other, a hearing conducted by ADAK for athletes and athlete support personnel following the Anti-Doping Rules.⁶²

3.3. The sanctions imposed and their appropriateness.

The sanctions on individuals that ADAK can impose under the latter process are disqualification of results in the event, a declaration of ineligibility, forfeited prize money, and other financial consequences specifically fines. The appropriateness of these sanctions can be discredited by two main arguments. First, the discrepancies in the prescribed penalties whereby athletes and athlete support personnel are governed by the subsidiary legislation that prescribes ADAK as the appropriate body to deal with anti-doping infractions on the other hand, other persons face the Tribunal or the courts. Perhaps the rationale for the procedure under the Anti-Doping Rules is for expediency and maintenance of a level of restraint from the State with regards to sports matters.

Given that the aim of the anti-doping legislation is to promote drug free sport, then it is only rational that the implementation of this legislation is done in a manner that does not differentiate between the persons found to be dealing with prohibited substances. Secondly, Kenya remains in Category A on the list of nations on watch for anti-doping violations despite having such robust laws and demonstrating some commitment to have drug free sport. The Athletics Integrity Unit (AIU) was founded to combat doping in the sport of athletics and part of its responsibility is to publish a consolidated list of all persons serving a period of ineligibility in Athletics. The AIU's Global List of Ineligible Persons uploaded in November 2023, 63 of the more than 400 athletes and athlete support personnel are from Kenya.⁶³ This demonstrates that despite the effort, anti-doping legislation seems not to be achieving its aims at the athlete and athlete support personnel level. Moreover, with rising cases of doping, it is

⁶¹ Section 42(6), *Anti-Doping Act* (Act No. 5 of 2016).

⁶² Article 8, *Anti-Doping Rules* 2020.

⁶³ -< <https://www.athleticsintegrity.org/downloads/pdfs/disciplinary-process/en/Global-List-OCT23.pdf> >- on 16th November 2023.

evident that the incentives for athletes to dope outweigh whatever disincentives the current rules impose.

3.4. Performance enhancing drugs and their impact on health.

The prohibited substances used in doping are not the same demonized and problematized drugs, that are society abhors and the societal outlook is also not the same. This explains why doping is not viewed in the same way despite the fact that the use of performance enhancing drugs can pose serious health implications for users. For example, anabolic-androgenic steroids which when consumed influence muscle fibre characteristics and affect size and muscle type.⁶⁴ The consumption of these substances can lead to a range of unwanted side effects both related to long-term and short-term use on their users.⁶⁵ In the short run, one can experience increased aggression, mania, delusion, anger, mood swings and unwanted physical changes. Long-term use can be linked to causes of liver damage, kidney damage and a range of cardiovascular issues.⁶⁶

Another effect of the continued use of performance enhancing drugs is masculinisation which was the case for young East German female athletes who suffered under their government's plan to dominate Olympic sports through chemistry. The famously recounted history of Heidi Krieger demonstrates the effects of long-term use of these drugs on her body were enormously drastic that she eventually chose to completely change her gender.⁶⁷ Finally, in the most unfortunate circumstances, death has occurred such as that of London Marathon Runner Claire Squires. It is reported that she collapsed and died on the final stretch of the 26-mile course due to cardiac failure caused by extreme exertion, complicated by toxicity from dimethyl amylamine ingestion – now a banned drug.⁶⁸ Therefore, it is also in consideration of public health that a case for the criminalisation of the use of performance enhancing drugs is made.

⁶⁴ Ellis R 'How Dangerous are Anabolic Steroids?' WebMD 18 January 2024

-< <https://www.webmd.com/men/anabolic-steroids>>- on 22 January 2024.

⁶⁵ Lifeline Project Report 'Image and Performance Enhancing Drugs' 2016, 5.

⁶⁶ National Institute on Drug Abuse Report 'Steroids and other Appearance and Performance Enhancing Drugs (APEDs), 2018, 15 – 18.

⁶⁷ <https://www.andreas-krieger-story.org/en/>

⁶⁸ -<<https://www.bbc.com/news/uk-england-london-21262717>>- on 22 January 2024.

Some perceptions are that a criminal record with potential imprisonment may act as a more powerful deterrent than sanctions imposed by WADA or a sporting federation.⁶⁹ Prosecuting cheating athletes and sports managers under a charge of fraud is likely to create an environment that requires them to think twice before engaging in the use of performance enhancing drugs. The repercussions for such a charge under the criminal justice system are much more dismal than suspensions or bans.⁷⁰



⁶⁹ Westmattmann D, Dreiskämper D, Strauß B, Schewe, G and Plass J, 'Perception of the Current Anti-doping Regime – A Quantitative Study Among German Top-Level Cyclists and Track and Field Athletes' 9 *Frontiers in Psychology* 2018, 4.

⁷⁰ McKenzie C, 'The Use of Criminal Justice Mechanisms to Combat Doping in Sport' 9.

CHAPTER FOUR:

Making doping a crime within the existing legal framework on 'Fraud'.

4.1. The elements of a crime.

To criminalise certain conduct, it must be established that the conduct is wrongful.⁷¹ Doping is wrong both morally since creates an unfair advantage over others and also wrong in practice since it involves actual rule breaking therefore making it cheating. Furthermore, cheating is contrary to the fair play and the ideologies that govern sport.⁷² Intentional doping which involves premeditation and deception by the athlete is more problematic than ordinary rule-breaking particularly due to the fact that it is a calculated dishonest act.⁷³ The two elements required to prove criminal responsibility are *mens rea* and *actus reus*. The former refers to the mental state of the offender while the latter, the physical act of committing a crime. Using these two elements, athletes who take part in intentional doping can be considered criminally culpable in the following way. The *mens rea* involves the motivation to enhance their performance artificially while the *actus reus* involves the use of the prohibited substances. Fraud on the other hand, is a broad term that often describes instances that involve deception and dishonesty. It is the deliberate use of deception to deprive, such that one gains advantage over another.

4.2 Doping as a crime in other jurisdictions: Austria, Italy, and Spain.

While seeking to criminalise doping, specifically the use of performance enhancing drugs, states can consider expanding fraud or like-offences to include intentional doping. Some countries have opted to deal with the investigation of doping offences under the realm of public law criminal justice investigations.⁷⁴ For example, the Austrian Criminal Code creates an offence of fraud for individuals who cheat in sports by using prohibited substances or forbidden methods. The severity of the penalty is determined subjectively, depending on the size of financial reward that the athlete stands to gain.⁷⁵

⁷¹ Sumner C, 'The Spirit of Sport: the case for criminalisation of doping in the UK' 224.

⁷² Sumner C, 'The Spirit of Sport: the case for criminalisation of doping in the UK' 224.

⁷³ Fitzgerald T, 'Doping in Sport – Should it be a Crime?' 1(1) *Sports law eJournal* 2018, 5.

⁷⁴ McKenzie C, 'The Use of Criminal Justice Mechanisms to Combat Doping in Sport' 1.

⁷⁵ Section 147, Austrian Criminal Code (StGB) (Austria).

A similar approach can be transplanted in Kenya whereby an extension can be made to the existing provisions on fraud to allow charges to be brought against athletes who take performance enhancing drugs and compete dishonestly by making the false representation that they are clean. In Italy a more detailed framework exists whereby the law creates three distinct types of criminal doping offences. The first two offences address athletes and athlete support personnel who procure, administer, and promote the use of WADC banned substances or methods that aim at enhancing the athlete's performance. The third offence addresses the illegal supply of WADC banned substances.⁷⁶ Similarly in Spain, the Public General Act introduces a new section in the Penal Code that makes it a crime to practice unauthorized methods with the motive of enhancing athlete performance.⁷⁷

In Spain, France and Belgium, the use of criminal justice mechanisms - formal police investigations, interviews, charges, court processes, trials, acquittals, sentences, fines, and custodial imprisonment - have all been a key factor in the fight against doping. For example, the Spanish government famously rolled out *Operación Puerto* whereby investigations were conducted by the police and found 107 cyclists who had taken part in doping with the assistance of medical doctors and the team manager.⁷⁸ The *Festina* team implicated under the Festina affair in France were caught by French customs officials with prohibited substances and their director, doctor and masseur were altogether charged under French law whereby they received suspended sentences and fines upon conviction.⁷⁹ In this particular instance, the French authorities preferred to charge them with the offence of trafficking drugs.⁸⁰

4.3. Doping as crime within the existing legal framework on 'fraud'.

In Kenya, the Penal Code creates an offence of conspiracy to defraud. It entails a conspiracy by a person with another conducted by deceit or any fraudulent means, with an aim of defrauding the public or any person.⁸¹ Since this offence is limited to instances of conspiracies to defraud, either an expansion or a new provision can be added to the Penal Code such that it covers the use of banned substances and methods via fraudulent means with an aim to obtain an added advantage by an athlete as is illustrated in the above-named countries' laws.

⁷⁶ Section 9, Law Number 376 of 2000 (Italy).

⁷⁷ Section 44, The Public General Act 7/2006 (Spain).

⁷⁸ McKenzie C, 'The Use of Criminal Justice Mechanisms to Combat Doping in Sport' 2.

⁷⁹ McKenzie C, 'The Use of Criminal Justice Mechanisms to Combat Doping in Sport' 3.

⁸⁰ McKenzie C, 'The Use of Criminal Justice Mechanisms to Combat Doping in Sport' 3.

⁸¹ Section 317, *Penal Code* (Act No. 20 of 2020).

The inclusion of this offence in the Penal Code then puts anti-doping rule violations under the realm of criminal law. In criminal cases, the old established standard of proof remains to be beyond reasonable doubt. Presently, ADAK has the burden of establishing that an Anti-Doping rule violation has occurred. The standard of proof is whether ADAK has established so to the comfortable satisfaction of the hearing panel. It must be greater than a mere balance of probabilities but less than proof beyond reasonable doubt.⁸² In addition, ADAK has the authority to test and analyse samples collected in order to determine whether an Anti-Doping Rule violation has occurred.⁸³ Once a person is asserted to have committed such a violation, then ADAK ensures that they provide a fair hearing in compliance with the WADC.

The law does recognize that certain matters can have both civil and criminal proceedings. To this effect, the Criminal Procedure Code provides that the fact that any matter in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition, or delay of the criminal proceedings.⁸⁴ Therefore, it would not be erroneous to institute criminal proceedings against Anti-Doping rule violators for committing an offence against the public while at the same time, granting them a fair hearing before the Hearing Panel under the Anti-Doping Rules. This power that allows concurrent litigation however is to be exercised responsibly in accordance with law and in good faith.⁸⁵ This means that neither one of the proceedings cannot stand in the way of the other unless one is being used to perpetuate ulterior motives or generally abuse the process of the court.⁸⁶

⁸² Article 3.3.1 Anti-Doping Rules 2020.

⁸³ Articles 5 & 6 Anti-Doping Rules 2020.

⁸⁴ Section 193A, *Criminal Procedure Code* (Act No.18 of 2018).

⁸⁵ *Commissioner of Police and The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* (2013) eKLR.

⁸⁶ *Alfred Lumiti Lusiba v Pethad Rank Shantilal & 2 others* (2016) eKLR.

CHAPTER FIVE:

Findings, Recommendations and Conclusions

5.1 Introduction

This chapter gives the findings of the study, recommendations, and conclusions from the author. The purpose of the study was to explore whether the criminalization of doping offences committed by athletes would be a considerable solution to making anti-doping legislation in Kenya more effective.

5.2 Findings

5.2.1 The commercialization of sport has led to an increase in doping cases.

The proliferation of doping substances and methods has been caused by a great deal of factors including a poor value and ethical system, increasing trafficking of prohibited substances and commercialization in sport.⁸⁷ It has been argued that athletes, coaches, doctors and representatives of sports federations have an interest in the achievements made by athletes as a substantial source of income that is on the rise due to professionalisation and commercialisation of sports.⁸⁸ The prizes and bonuses that come with winning competitions are a huge incentive for athletes and therefore the temptation to cheat at competitions is even greater. For example, Kenya's Faith Kipyegon who broke Three World Records in the 2023 season pocketed thousands of dollars from the events and the government of Kenya. She won a total of \$70,000 in the Diamond League season and \$140,000 from the World Athletics Championships.⁸⁹ In addition, these successes will also attract endorsements from various entities which come with their own advantages.

⁸⁷ Wekesa M, 'Regulation of Doping in Sports: Implications for Kenya' Published Ph.D. Thesis, University of Nairobi, Nairobi, 2010, 64.

⁸⁸ Platonov V, 'Doping in Olympic Sports: Current crisis and solutions' 2, *Science in Olympic Sports* 2016, 24.

⁸⁹ Kiplagat E, 'What Faith Kipyegon Earned for Two Golds, Diamond League Title, Breaking Three World Records' Sports Brief 20 September 2023, -< <https://sportsbrief.com/athletics/49121-kiyegon-earned-winning-two-golds-diamond-league-title-breaking-three-world-records/>>- on 18 December 2023.

5.2.2 The Anti-Doping legal framework has proven to be insufficient to deal with the rising level of doping among athletes in the country.⁹⁰

Most recently, Kenya has had a difficult time at the international athletics stage facing threats of bans due to recurring anti-doping violations by athletes or what is being termed a “crisis”.⁹¹ The Kenyan Sports Minister has before said that the country might need to criminalise doping especially in athletics in order to control and end the rising cases.⁹² These statements have however not been converted into a Bill in Parliament. The most notable instance of such a commitment towards criminalising doping is that of former World Marathon record-holder turned Member of Parliament Wesley Kipkorir who publicly spoke about criminalising doping.⁹³ The current Anti-Doping Bill (Amendment) Act 2020, that is yet to become law and amend the Anti-Doping Act, is meant to comply with the 2021 World Anti-Doping Code. This Bill however remains silent as to the potential criminalisation of intentional doping. Cognisant of this growing issue, National Assembly Deputy Speaker Gladys Boss Shollei has also made public statements to the President of Kenya asking him to transfer ADAK to the Ministry of Health for better oversight.⁹⁴

5.2.3 The general position is that WADA is against criminalising doping.

Since inception, the World Anti-Doping Agency has maintained a strict “no-criminalisation policy” having no history of ever seeking to criminalise anti-doping offences. This no interference policy is informed by the conviction that existing sporting structure are well equipped to deal offending athletes. In this respect, WADA recognises the sovereign right of countries and by extension sport’s governing bodies thereunder, to make adequate laws for their people.

5.3 Recommendations

⁹⁰ Member of Parliament and former athlete Wesley Korir introduced a motion to Parliament in 2016 during the inception stages of the Act that proposed the criminalization of doping offences. This motion was rejected as it was against the World Anti-Doping Association (WADA) code of criminalization.

⁹¹ Imray G, ‘Kenya faces threat of athletics ban for doping ‘crisis’ AP News 25 November 2022, -< <https://apnews.com/article/winter-olympics-sports-qatar-kenya-doping-e1d02b35859210ff60b4a829f513761e> >- on 19 December 2023.

⁹² Sankar V, ‘Kenya Sports Minister Namwamba wants to “criminalise doping” Inside the Games 08 December 2022, -< <https://www.insidethegames.biz/articles/1131398/kenya-criminalisedoping> >- on 18 December 2023.

⁹³ ‘Kenyan athlete-turned-MP seeks to criminalize doping’ Daily Nation 04 July 2014 -< <https://nation.africa/kenya/sports/athletics/kenyan-athlete-turned-mp-seeks-to-criminalise-doping-1044636> >- on 19 December 2023.

⁹⁴ Okubasu D, ‘Gladys Shollei Asks Ruto to Transfer Agency from CS Namwamba’s Ministry to Nakhumicha’s’ Kenyans.co.ke 14 January 2024 -< <https://www.kenyans.co.ke/news/96472-gladys-shollei-asks-ruto-transfer-agency-cs-namwambas-ministry-nakhumichas> >- on 25 January 2024.

5.3.1 Further investigation on whether sporting bodies are conducting adequate investigations into doping cases.

Before hitting the international arena, athletes engage closely with the sporting bodies that govern their sport. This usually goes to participation in local events and registration for international assignments. It is the general presumption that before the body approves of an athlete's participation in a competition, they must be sure that the athlete is compliant with all the rules and regulations governing the sport. Therefore, good due diligence would inform these bodies of doping violations by athletes before giving them the necessary approval to compete internationally.

What one can conclude from the recent trends is that either the bodies are not well equipped to detect these anti-doping rule violations or, there are corrupt individuals within these bodies who are allowing doped athletes to be registered for international competitions. Thorough investigations into this matter ought to reveal either one of the above.

5.3.2 To amend the current Anti-Doping Bill (Amendment) Act 2020 and include the harmonisation of procedures and penalties anti-doping offences making them criminal offences.

The Anti-Doping Act has a dual goal: to ensure that there is drug free sport and protect the health of athletes through the ban and use of prohibited substances and methods. These aims do not distinguish between athletes, athlete support personnel and other persons. Therefore, it should not be the case that these individuals face different standards of procedure when they commit offences as per the Act. The most efficient way to deal with these offences is through a single process that does not distinguish the offenders.

Having been effect for close to eight years now, the existing framework on anti-doping seems to be ineffective in both dealing with offenders and deterring future offenders. Therefore, it is evident that a new system might be preferred to deal with such offenders and the same be included in the Anti-Doping Bill (Amendment Act 2020).

5.3.3 To reinforce the anti-doping roles and responsibilities of national federations and sports governing organisations in Kenya.

ADAK's 2021 Policy on Anti-Doping already recognises that each national sports organisation bears a responsibility towards governance of sport in Kenya and particularly in anti-doping.

These organisations are expected to promote the principles of the policy and designate a staff member or other person to act as an Anti-Doping Officer to ensure that the policy requirements are satisfied. In addition, these organisations are expected to be compliant with the ADAK Anti-Doping Rules and offer any necessary support to ADAK in undertakings. These national federations must undertake their own rules and guidelines for athletes with regards to doping violations. They can also conduct awareness and wellness campaigns for their respective sports as a means to educate athletes on the health and legal implications of doping.

5.3.4 The Director of Public Prosecutions to make regulations on when and how to prosecute.

To ensure effective prosecution under the criminal justice system, the Director of Public Prosecutions ought to make special regulations and guidelines for prosecuting crimes of doping. In this respect, they will consider multiple factors including, whether the offender is a repeat offender, who the parties involved in the perpetration of the crime are, the level of doping and competition that the athlete is taking part in and the reputation of the athlete. From this, the prosecutor can ascertain the seriousness of the doping violation and make the decision to prosecute.

5.4 Conclusion

The study aims to present intentional doping by athletes as fraudulent activity or cheating that is an offence against the general public as well as a breach of the rules of play in the respective field. It discusses the legislation on anti-doping offences in Kenya, particularly the processes and sanctions for dealing with anti-doping rule violations and concludes that these are ineffective given the rising number of doping cases. It reveals unexplained discrepancies within these processes and sanctions and concludes that if Kenya were to adopt a criminal approach towards doping then the legal framework would be better suited to regulate doping cases in the country.

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