

# **THE RIGHT TO A FAIR TRIAL IN SPORTS ARBITRATION**

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### Declaration

I, NZYUKO NENE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 30.05.18 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  13/6/18 .....

For:  
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## **ABSTRACT**

The research centers on the alternate dispute resolution method of sports arbitration and specifically, the right to a fair trial within this dispensation.

Being as the topic a right to a fair trial is a broad one, emphasis shall be placed on two elements, that of the right to be presumed innocent before being found guilty and the right to access to justice.

The main method of research used was that of looking into various forms of literature, statute, reports and various cases that touch on the subject.

The major findings from the research showed that, in respect to the Court of Arbitration for Sport (CAS), they have measures in place that safeguard an athlete's right to a fair trial, however when it comes to doping allegations, stricter measures are put into place to curb the crime which has led to speculation as to whether the process of adjudicating doping offences respects one's right to be presumed innocent before being proved guilty. As regards access to justice, CAS has its main institute based in Lausanne, Switzerland, but they also have various offices spread out across the globe. The only issue that arises is that one is bound to pay a registration fee when filing a case with CAS which amounts to over 100,000 Kshs. and whether this fee could be waived.

## **LIST OF ABBREVIATIONS**

CAS: Court of Arbitration for Sport

ECtHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

ICAS: International Council of Arbitration for Sport

IOC: International Olympics Committee

SDT: Sports Disputes Tribunal

UCI: *Union Cycliste Internationale*

WADA: World Anti-Doping Agency

## **LIST OF CASES**

*Dry Associates Ltd v. Capital Markets Authority & Another* (Petition 328 of 2011) eKLR.

*Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)* (CAS 2002/O/372).

Arbitration CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012.

*Elmar Gundel v Fédération Équestre Internationale*, Decision by the Swiss Supreme Court 4P.217/1992 of 15 March 1993, reported in ATF 119 II 271.

*PIERSACK v. BELGIUM*, no. 8692/79, ECtHR (Chamber), Judgment (Merits) of 01.10.1982, A53.

*Airey v Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.

*Briginshaw v Briginshaw* (1938) 60 CLR 336.

*CAS 2015/A/3979 International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015.

Arbitration CAS ad hoc Division (OG Vancouver) 10/004 Claudia Pechstein v. Deutscher Olympischer Sportbund (DOSB) & International Olympic Committee (IOC), award of 18 February 2010.

## **LIST OF LEGAL INSTRUMENTS**

Constitution of Kenya (2010)

Court of Arbitration for Sport Code of Sports-related Arbitration (2017)

European Convention on Human Rights (1950)

Sports Act (2013)

Universal Declaration of Human Rights (1948)

World Anti-doping Code (2015)

## **CHAPTER ONE:**

### **INTRODUCTION**

#### **BACKGROUND**

This research will be looked at from the point of view of the athletes, they are the primary beneficiaries of the Court of Arbitration for Sport and the reason for which it was created. The Court of Arbitration for Sport was created to provide a framework to deal with issues that surround sport without having to go through the normal court system.<sup>1</sup>

Sports arbitration is a branch of alternative form of dispute resolution that deals with matters arising in sport. Several countries have their own tribunals that deal with sports disputes such as Kenya with its Sports Dispute Tribunal.<sup>2</sup> In the case of internationally, there exists the Court of Arbitration for Sport (CAS) that was established by the International Olympics Committee (IOC) in 1980 and is based in Switzerland. It is a specialised tribunal that deals with sporting matters arising globally.<sup>3</sup>

Sports arbitration came about in order to offer a specialised mode of dispute resolution that is expeditious and efficient in solving sporting disputes. However, this means that they created their own procedures that they would use in this process and as much as it has been effective, it has also had some shortcomings, namely to do with the right to fair trial, which is an innate human right in the dispensation of justice.

As much as this has provided a new avenue for the settlement of disputes, it has come under fire in previous years for the lack of respect placed upon the right of fair trial which is crucial for the achievement of justice as is posited by Jernej Letnar Cernic's article on fair trial guarantees before the Court of Arbitration for Sport.

We shall look at the topic of right to fair trial as embodied in Article 50 of the Constitution of Kenya 2010 which is a right all people have as regards any dispute that is being settled in a court of law or independent tribunal or body.<sup>4</sup> It states that one of the element of the right to fair hearing is the right to be presumed innocent until proved otherwise,<sup>5</sup> they accused should

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<sup>1</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> on 24 August 2017.

<sup>2</sup> Shivaji S, 'Adjudication of Sports Disputes in Kenya – The Hopes, Fears and Expectations Facing the Sports Disputes Tribunal', 1.

<sup>3</sup> <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> on 09 February 2016.

<sup>4</sup> Article 50(1) *Constitution of Kenya* (2010).

<sup>5</sup> Article 50(2)(a) *Constitution of Kenya* (2010).

also be informed of the charge with sufficient detail in order to answer it,<sup>6</sup> also the accused should be afforded ample to prepare a defence,<sup>7</sup> they should also have a public trial before a court established under the Constitution,<sup>8</sup> to refuse to give self-incriminating evidence,<sup>9</sup> and if convicted, to be able to appeal to a higher court.<sup>10</sup>

We shall also refer to the case of *Dry Associates Ltd v Capital Markers Authority & Another*<sup>11</sup> whereby the court laid out the following principles to be the backbone of access to justice:

1. The enshrinement of rights in the law.
2. Awareness of and understanding of the law.
3. Easy availability of information pertinent to one's rights.
4. Equal right to the protection of those rights by the law enforcement agencies.
5. Easy access to the justice system particularly the formal adjudicatory processes.
6. Availability of physical legal services.
7. Provision of a conducive environment within the judicial system.
8. Affordability of legal services.
9. Expeditious disposal of cases and enforcement of judicial decisions without delay.

The above articles of the Constitution of Kenya 2010 as well as the aforementioned case clearly outline what the requirements of a fair trial as well as the principles behind access to justice, which is one of the important element of a right to a fair trial, are and will act as a guide into exploring whether or not there have been injustices in sports arbitration as regards that right and the gaps that may or may not exist within CAS's dispensation of justice as regards the right to fair trial.

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<sup>6</sup> Article 50(2)(b) *Constitution of Kenya* (2010).

<sup>7</sup> Article 50(2)(c) *Constitution of Kenya* (2010).

<sup>8</sup> Article 50(2)(d) *Constitution of Kenya* (2010).

<sup>9</sup> Article 50(2)(l) *Constitution of Kenya* (2010).

<sup>10</sup> Article 50(2)(q) *Constitution of Kenya* (2010).

<sup>11</sup> *Dry Associates Ltd v. Capital Markers Authority & Another* (Petition 328 of 2011) eKLR, paragraph 110.

## **STATEMENT OF THE PROBLEM**

The main problem is witnessed in the flouting of the right to fair trial in sports arbitration. The following elements as enshrined in the Constitution of Kenya 2010 seem to be the most likely to be flouted:

- Having adequate time and resources to prepare a defence.
- Right to a public trial.
- To refuse to give self-incriminating evidence.
- To have the assistance of an interpreter if the cannot understand the language of proceedings.
- The right to appeal a decision.
- The right to be presumed innocent until proven guilty.

In an ideal situation, the system of sports arbitration is a fairly novel concept introduced in the 1980's to deal with disputes arising in the sporting world without having to go through the normal court process. This provided a breath of fresh air in the sporting world as sporting issues would be adjudicated by persons who have a vast knowledge of sports coupled with the legal aspect to provide an avenue for expeditious dispensation of justice as well as lessen the load of courts worldwide.<sup>12</sup>

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<sup>12</sup> <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> on 09 February 2016.

## **STATEMENT OF OBJECTIVES**

The main aim of this study is to adduce whether there are gaps, specifically when it comes to one being assumed innocent before being proven guilty as well as when it comes to access to justice, in the dispensation of justice as regards the right to fair trial and if so, offer solutions on how best to solve them and thus offer justice to all the sportspersons who seek it.

## **RESEARCH QUESTIONS**

In order to direct our focus in the research process, we shall use the question below as our guide:

“Does sports arbitration as a mode of alternative dispute resolution respect the right to fair hearing as regards the presumption of innocence and access to justice and if not, how does it do so and how can such be rectified?”

## **HYPOTHESIS**

The above question shall also be accompanied by the hypothesis that is the right to fair trial being derogated by sports arbitration bodies and particularly the Court of Arbitration for Sport.

## **JUSTIFICATION OF THE STUDY**

The justification of this study comes from the fact that there have been various complaints from athletes such as Claudia Pechstien and Rita Jeptoo, just to name a few who have gone through sports arbitration especially in regard to the right to a fair trial.

Sports arbitration is a fairly new concept but a good one to provide an alternative avenue to dispute resolution in which athletes can have their issues resolved by a tribunal that specialises in that field which they may have been unable to get through the normal court system. However, the organisation tasked with dealing with sports arbitration, mainly CAS, is too centralised in that its only seat is based in Switzerland which hinders one's access to justice and other than that, there is the issue of the right to be presumed innocent until proven guilty which keeps rearing its head.

## THEORETICAL FRAMEWORK

### Natural Law Theory

The right to fair trial is enshrined in Article 6 of the European Conventions on Human Rights<sup>13</sup> and human rights themselves came to the fore after the atrocities committed in World War 2.

Natural Law is a concept of deriving laws that have a basis on the morality of man. This means such laws have to follow what is good for man by his nature as a human being and any other law that contravenes that is unfit for him. Natural Law has several theorist beginning with Thomas Aquinas and later the likes of John Finnis and Lon Fuller.<sup>14</sup>

The right to fair trial fits in this category of theory as it appeals to justice and fairness. Its basis is that everyone should have access to justice whereby they are treated without prejudice and have their matters determined by an impartial entity in order to get a just remedy whether they were right or wrong.

This appeal to fairness stems from the human being's virtue of justice which is meant to give to each their due and thus connects directly to Natural Law.

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<sup>13</sup> Article 6, *European Convention on Human Rights*, 04 November 1950.

<sup>14</sup> [https://en.wikipedia.org/wiki/Natural\\_law](https://en.wikipedia.org/wiki/Natural_law) on 09 February 2017.

## **RESEARCH DESIGN**

### **RESEARCH DESIGN AND METHODOLOGY**

The research shall use various statute, case law, articles as well as other legal instruments in the dissertation. The flow of chapters shall be the following:

1. Introduction
2. Literature Review
3. Access to justice
4. Right to be presumed innocent before being proven guilty
5. Discussion and conclusion

### **ASSUMPTIONS**

The first assumption is that there exist gaps in CAS's law as regards the right to fair trial.

The second is that there are no remedies to athletes who face this injustice.

Third, that CAS needs to be decentralised in order to properly dispense justice to athletes globally.

### **LIMITATIONS**

We shall limit ourselves to a few local as well as foreign case studies in order to properly delve into the sports arbitration process and interrogate the processes used in the various cases to aid the research process and thus keep it within the relevant parameters.

## CHAPTER TWO

### LITERATURE REVIEW

In furtherance of the objectives and hypothesis posited in the previous chapter on the right to fair trial in sports arbitration, we shall delve into literature that touches on the topic and seek to find issues that have not been addressed by the various authors.

As a point of background information, a principle to be looked at is that of *lex sportiva*. It is argued to be the jurisprudence that surrounds international sports law. However, it relates more to the application of international law as well as legal principles to the arbitral proceeding of sporting disputes. This application is bringing about new 'jurisprudence' as per the legal principles used by the Court of Arbitration for Sport in its decision making. One of the key cases that showcases this jurisprudence is that of *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)* (CAS 2002/O/372). Here CAS had to inquire as to which law would be applicable in deciding some aspects of the case. They came to the conclusion that they would rely on three sources of law; the Olympic Charter, Swiss procedural law and CAS laws on doping.<sup>15</sup>

*Lex sportiva*, as understood from the aforementioned case, refers to principles that are derived from sports regulations. This would make it more of proper implementation of the legislation of sports federations. This would mean looking at the different practices of sports federations and the codes that govern them. The task of CAS in this respect is to interpret the different legislations of national federations as well as their own statutes depending in the case before them and make an attempt to harmonise said laws in order to create uniformity in adjudication. This then is to be applied in all cases that CAS deals with. This definition of sports law encompasses a few elements, first of which is its transnational autonomous private order, is constituted by the legislative and constitutional order created by international sports federations, has a formal contractual basis and acquires its legitimacy from voluntary agreement or submission to the jurisdiction of sporting federations by athletes and others who come under its jurisdiction. This points towards CAS having their legislation coming from institutions that govern sport. Due to this, it could be argued that sports law is a private system of governance, with CAS being the global forum.<sup>16</sup>

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<sup>15</sup> Foster K, 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence', 3 *Entertainment and Sports Law Journal* (2005), 1.

<sup>16</sup> Foster K, 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence', 3 *Entertainment and Sports Law Journal* (2005), 2.

The next piece of literature to be put under review is Jernej Cernic's article on emerging fair trial guarantees before the Court of Arbitration for Sport. The introduction begins with a short review of the Contador doping case<sup>17</sup> in which the Court of Arbitration for Sport found him guilty of the offence of doping as they found he had ingested a prohibited substance. However, it being a strict liability offence, it does not matter how the substance entered the accused's body just as long as it is in their body one can be found guilty. Upon the guilty verdict, the decision was termed by the Spanish media, public as well as political officials as being unjust and unfair.<sup>18</sup>

The above case's arbitral award shows a dilemma encountered by CAS in the adjudication of cases. The issue being as whether through the process of prevention of doping, they are undermining the fundamental human rights of athletes and on the flip side, whether the safeguarding of those same human rights would lead to poor adjudication of doping cases.<sup>19</sup>

The right to fair trial is viewed as one of the main tenets of law and the dispensation of justice. Therefore the article examines whether CAS' procedure and case law follows the main elements of the right to a fair trial.<sup>20</sup>

The inference into the fair trial guarantees by CAS first begins with a look into CAS itself. CAS was established by the International Olympic Committee on 6<sup>th</sup> April 1983 as its highest arbitration body for the resolution of sporting disputes. In 1994, CAS was placed under the International Council of Arbitration for Sport (ICAS) in order to ensure its independence and impartiality. This means that currently ICAS is in charge of regulating CAS' administrative and financial matters. However, there have been discussions on whether CAS is merely an arbitration body or a court. CAS is further regulated by the Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (the Statutes). It grants CAS the ability to arbitrate sporting disputes. CAS' jurisdiction also extends to matters arising from the Olympics. Rule 59 of the Olympic Charter gives a clause of exclusivity that any dispute

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<sup>17</sup> Arbitration CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012.

<sup>18</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 2.

<sup>19</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 3.

<sup>20</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 4.

arising in connection to the Olympic Games shall be exclusively submitted to CAS. CAS also has appellate jurisdiction as regards decisions rendered by sports federations.<sup>21</sup>

The next aim within the article is to investigate whether the right to fair trial applies to CAS hearings. This requires looking into the different components of the right to fair trial as set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECtHR).<sup>22</sup>

The first aspect to be looked into is whether arbitral proceedings fall within the remit of civil rights and obligations as enshrined in Article 6 of the European Convention on Human Rights. Since no direct definition is provided as to the place of arbitral proceedings one shall have to look into whether their decisions are open to appeal in regular national courts.<sup>23</sup>

The article posits that Article 6(1) of the ECHR applies to CAS' arbitral proceedings due to the Swiss Federal Tribunal's monitoring jurisdiction. This means that the tribunal looks at whether CAS respected procedural public policy guarantees, one of which is the right to fair trial.<sup>24</sup>

The right to a fair trial before CAS is looked at from the point of view of Article 6(1). The Swiss Federal Tribunal intimates that CAS has a responsibility to respect the stipulations of the statute as it relates directly to *ordre public*<sup>25</sup> which loosely translates to public policy. It is mainly referred to as regards private international law and deals with a State's domestic law. It is applied whenever a court knows that applying a foreign decision would go against public policy.<sup>26</sup> This stresses the importance placed of the right by the federal tribunal.

If a party feels like the right to fair trial was not respected by CAS, one has the option of seeking redress from the Swiss Federal Tribunal. The right to fair trial entails access to a court, a hearing in the presence of the accused, freedom from self-incrimination, equality of arms and the right to adversarial proceedings with a reasoned judgement. The right to access

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<sup>21</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 5.

<sup>22</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 6.

<sup>23</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 7.

<sup>24</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 7.

<sup>25</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 8.

<sup>26</sup> <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1448> on 19 February 2018.

to a court is one of the most important elements of the right to a fair trial. It is posited that this does not however apply to CAS as it is not a proper court but an arbitral tribunal. This is said to be provided by the Swiss Federal Tribunal and that access to CAS is based on an arbitration agreement signed beforehand for them to be involved. It is noted however, that in most cases the arbitration is forced upon the athletes. This occurs especially with professional contracts whereby the arbitration clause stipulates that in case of any dispute, the issues shall be submitted to CAS for adjudication. This leaves athletes with no alternative as to where their disputes are decided and thus could be argued to limit their right to access to a court. This is especially apparent for the Olympic Games as one cannot compete without signing the Olympic entry form which includes a mandatory arbitration clause.<sup>27</sup>

What is being questioned in the above paragraph is the arbitration by way of global reference that binds professional athletes to take their disputes to CAS.

The next element examined is equality of arms. This involves both parties being afforded an equal opportunity to present their case in conditions that does not give either side an upper hand against the other. CAS' proceedings are bound to follow the aforementioned principle. However, this could be waived through the arbitration agreement.<sup>28</sup>

Burden and standard of proof is the next element examined. In doping cases for example, the athlete carries the burden of proof and thus must prove that no banned substance entered their body. This brings out the question as to whether an institution that deals with a strict liability offence is appropriate to deal with doping cases. CAS applies the standard comfortable satisfaction of the court in adjudication of their doping cases and not beyond reasonable doubt. However, it could be better, although much more difficult, to provide the standard of proof to be beyond reasonable doubt as it would give athletes a better chance to plead their case but could be at the detriment of the anti-doping process.<sup>29</sup>

The next element under scrutiny is the right to an independent and impartial tribunal established under law. Article 6 of the ECHR has the requirement for a tribunal to be both independent and impartial. Therefore any court that is not independent and impartial cannot

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<sup>27</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 9.

<sup>28</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 10.

<sup>29</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 10.

purport to be able to guarantee a fair trial.<sup>30</sup> For a tribunal to be independent it would require them to not rely or be controlled by an external body or institution. This also examines the ways in which the tribunal members are appointed, on a permanent or ad hoc basis, their mandate, safeguards against external pressures and the external appearance of independence. As previously stated, CAS was initially formed by the IOC. Due to this link, CAS' independence was first tested in the case of *Elmar Gundel v Fédération Équestre Internationale*.<sup>31</sup> This case brought about the ties that existed between CAS and the IOC which undermined CAS' independence. This brought about the establishment of ICAS to govern CAS. It is also noted that the CAS arbitrators are appointed for a period of four years. A time period of which is meant to ensure their independence. Also coupled by the fact that those same arbitrators are appointed on an ad hoc basis. The selection process considers candidates who have full legal training, recognised competence as regards sports law, good knowledge of sport in general, and a good command of at least one CAS working language. The names of those who qualify are to be brought to the attention of ICAS. This has however brought controversy as per the objectivity due to the phrase 'brought to the attention' which does not seem as impartial as an open call for people who fit the criteria.<sup>32</sup>

There exists a way for one to waive their right to a trial if the party to arbitral proceedings is inactive or decides to plead guilty to the charges placed against them all the while being aware of potential doubts as to the independence of the arbitrators, this must first be looked into by the Swiss Federal Tribunal.<sup>33</sup>

The impartiality of the tribunal is also an important element to the principle of right to a fair trial. A case touching on the aspect of impartiality is that of *Piersack v Belgium*<sup>34</sup>. The CAS statutes are clear on the impartiality of an arbitrator.<sup>35</sup> This is brought out in Rule 33 of the CAS Code on Procedural Rules that deals with the independence and qualifications of

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<sup>30</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 11.

<sup>31</sup> *Elmar Gundel v Fédération Équestre Internationale*, Decision by the Swiss Supreme Court 4P.217/1992 of 15 March 1993, reported in ATF 119 II 271.

<sup>32</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 12.

<sup>33</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 13.

<sup>34</sup> *PIERSACK v. BELGIUM*, no. 8692/79, ECtHR (Chamber), Judgment (Merits) of 01.10.1982, A53

<sup>35</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 14.

arbitrators and states that every arbitrator shall remain impartial and independent and shall disclose any instance in which circumstances may affect that.<sup>36</sup>

Another element under scrutiny is that of the right to a public hearing as well as public pronouncement of judgements. This means that hearings should be open to the public. This however, is not the main constituent of the right to a fair trial as the other elements have to be in play as well. The fact that CAS is an arbitral body poses the question as to whether they should be bound by the need to have a public hearing. CAS' rules note that their proceedings are confidential. However, they have begun publishing their upcoming hearings as well as the names of the parties.<sup>37</sup>

The next piece of literature to be reviewed shall be the adjudication of sports disputes in Kenya, the hopes, fears and expectations facing the sports disputes tribunal by Simon Shivaji.

The article begins with an introduction to the dispute resolution mechanism to deal with sporting issues in Kenya which is the Sports Disputes Tribunal (herein after referred to as SDT). SDT is established under the Sports Act 2013. It has been given the mandate according to Section 58 of the Sports Act 2013 to listen to appeals from decisions by the Sports Registrar. They also have the mandate to deal with arbitration disputes between sports organisations. In addition, they can as well address appeals by athletes against disciplinary decisions and omissions of selection to national teams. SDT can also be described as a quasi-judicial body appointed by the Judicial Service Commission. It is required to have at least five members which includes a chairperson who must be qualified to be appointed as a judge of the High Court of Kenya, two lawyers who have seven years practice experience and with some knowledge of sport. Also at least two persons who have been actively involved in sport for at least ten years.<sup>38</sup>

The next issue addressed is as regards the challenges or limitations that face SDT. The first issue in question is the fact that SDT is a part of the Judiciary. This means that challenges to their decisions must be filed to local courts.<sup>39</sup> A challenge seen by the author is possibly one of conflict of interest. This is due to the fact that three members of the Tribunal are high-

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<sup>36</sup> Rule 33, *Court of Arbitration for Sport Code of Sports-related Arbitration* (2017).

<sup>37</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 18.

<sup>38</sup> Shivaji S, 'Adjudication of Sports Disputes in Kenya – The Hopes, Fears and Expectations Facing the Sports Disputes Tribunal', 2.

<sup>39</sup> Shivaji S, 'Adjudication of Sports Disputes in Kenya – The Hopes, Fears and Expectations Facing the Sports Disputes Tribunal', 3.

ranking officials of national sports organisations. If there exist wrangles in one organisation with another this could affect the decision given to an athlete under a particular organisation. A problem which was also experienced by CAS in its early days when they were still under the IOC.<sup>40</sup>

In conclusion, the first article addresses the concept of sports law or *lex sportiva*, and the role of the Court of Arbitration for Sport in this regard. Foster gives the definition of *lex sportiva* and outlines CAS's role in the adjudication of disputes brought before them. Shivaji brings forth a look into the SDT in Kenya, he covers the establishment of the Sports Disputes Tribunal and its role in dealing with sporting disputes in Kenya as a quasi-judicial body. The issues seen by the author are based on its independence as it is established by the Judiciary and its impartiality is questioned due to the presence of members of national associations in SDT. Cernic's article goes on to offer a critique on the emerging fair trial guarantees before CAS. Here he outlines the issues faced by CAS as regards the right to a fair trial. He touches on the aspects of independence and impartiality of CAS; he goes back into the history of CAS being established by the IOC and how they eventually broke ties with them due to their independence being questioned. The equality of arms is also addressed in reference to both sides being afforded the opportunity to present their cases without either side having an advantage over the other. Next was burden and standard of proof especially as regards doping cases whereby the author agreed to the existence of a dilemma since doping is a strict liability offence. Finally the right to a public hearing of which he pointed out that CAS, being an arbitral body, does not fully adhere to this as it only publishes a few judgements. However, he does not touch on the issue of access to justice as well as the right of one to be presumed innocent until proven guilty. These aspects overlooked shall be addressed in the subsequent chapters and particularly, the right to access to justice and the right to be presumed innocent.

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<sup>40</sup> Shivaji S, 'Adjudication of Sports Disputes in Kenya – The Hopes, Fears and Expectations Facing the Sports Disputes Tribunal', 4.

## CHAPTER THREE

### ACCESS TO JUSTICE

This chapter is going to focus heavily on the element of the right to a fair trial known as access to justice. Access to justice refers to one's ability to seek redress from a competent forum to adjudicate any dispute they may have. This is done so to prevent injustices going on without redress as one could not engage the necessary forum.

The right to access to justice is enshrined in various statute. As per the Constitution of Kenya 2010 Article 48 which states that the State shall ensure access to justice for all persons and if any fee is required it should be reasonable and not be an impediment to justice.<sup>41</sup> In the European dispensation it is covered under Article 6 of the European Convention on Human Rights.

As said earlier, the case of *Dry Associates Ltd v Capital Markers Authority & Another*<sup>42</sup> provides a situation in which the court laid out the principles they deemed to be the backbone of access to justice:

1. The enshrinement of rights in the law.
2. Awareness of and understanding of the law.
3. Easy availability of information pertinent to one's rights.
4. Equal right to the protection of those rights by the law enforcement agencies.
5. Easy access to the justice system particularly the formal adjudicatory processes.
6. Availability of physical legal services.
7. Provision of a conducive environment within the judicial system.
8. Affordability of legal services.
9. Expeditious disposal of cases and enforcement of judicial decisions without delay.

With the above elements in mind, focus shall be placed on awareness of and understanding of the law, easy availability of information pertinent to one's rights, easy access to the justice system, provision of a conducive environment within the judicial system, and affordability of legal services.

Awareness and understanding of the law, which may also be referred to as legal consciousness, involves the empowerment of individuals as regards issues involving law. This helps to promote consciousness of legal culture, participation in the formation of laws as

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<sup>41</sup> Article 49 *Constitution of Kenya* (2010).

<sup>42</sup> *Dry Associates Ltd v. Capital Markers Authority & Another* (Petition 328 of 2011) eKLR, paragraph 110.

well as the rule of law. Legal consciousness as defined by Ewick and Silbey as the process by which people make sense of their experiences by relying on legal categories and concepts. People do this when they are not familiar with the details of law or a legal system.<sup>43</sup>

Easy availability of information pertinent to one's rights refers to the ease one has to access information as regards the law. This would involve making such laws and regulations free to assess whether through hardcopy materials or online sources.

The next element to be dealt with is easy access to the justice system. This refers to the ease in which one can reach representatives and/or judicial systems in order to be able to adjudicate their issues. The Rita Jeptoo case could offer some insight to this. After she was found guilty for doping by using EPO by Athletics Kenya, she had to challenge her judgement at CAS. CAS has only one seat which is based in Lausanne, Switzerland. This would mean that for an athlete to seek recourse there, they would have to find a means to travel from their home country to Switzerland. Even when there, the rules of CAS are regulated by the seat of arbitration. This means that they have to follow Swiss laws and if the said laws conflict with the athlete's home country laws, Swiss law takes preference.

Affordability of legal services is also addressed. This simply refers to the costs of the legal process being at a rate that allows all who seek justice to be able to afford and if not, provide one at no charge. This is seen as regards the provision for legal aid. Article 6(3)(c) stipulates the provision for legal aid as regards criminal proceedings but Article 6(1) makes no reference to legal aid for civil disputes. The Convention is however made to safeguard people's rights, and as such, may compel the State to provide one with the assistance of a lawyer as seen in the case of *Airey v Ireland*.<sup>44</sup>

Jernaj L. Černič posits that CAS has found itself in a dilemma when it adjudicated the Contador case.<sup>45</sup> The case involves a professional cyclist Alberto Contador Velasco who was the winner of the 2010 edition of the Tour de France which ran from 3<sup>rd</sup> to 25<sup>th</sup> of July 2010. During one of the rest days, 21<sup>st</sup> July, he had a urine sample collected for testing for doping

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<sup>43</sup> <http://www.basicknowledge101.com/pdf/literacy/Legal%20awareness.pdf> accessed on 01 March 2018

<sup>44</sup> *Airey v Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305

<sup>45</sup> Arbitration CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012.

by Union Cycliste Internationale (UCI), which is the world governing body for sports cycling and overseas international competitive cycling events.<sup>46</sup> Upon testing by WADA, it came back positive for a prohibited substance known as clenbuterol which is listed under Article S1.2 of the 2010 WADA Prohibited Substances List. Mr Contador was then notified by the UCI that of their findings which led to his provisional suspension from the date of the finding. Mr Contador then submitted that the presence of the substance must have come from contaminated meat. CAS still found him guilty of doping and imposed a ban of two years from professional competition as per their rules. The issue in this case can be argued to be the mandatory arbitration clause in his professional contract which shall be addressed in the case below.

Another case that relates to the right to access to justice is the Claudia Pechstein case.<sup>47</sup> This case involves Ms Claudia Pechstein who is a professional speed skater who was found guilty of a doping offence. The main issue we shall focus on is the mandatory arbitration clause in her professional contract which states that in the case any dispute arises, the athlete can only seek recourse from the Court of Arbitration for Sport. This bars athletes from seeking recourse from other forums. That mandatory clause could be argued to be hindering ones access to justice as one cannot chose the forum that best suits them.

The Pechstein situation was mentioned by Cernic in his article stating that this was the main complaint posed by Pechstein and her camp in opposition to the decision to ban her for two years for doping. Cernic in his article also addresses the same issue, but labels it as the right to access to a court. It is posited that this does not however apply to CAS as it is not a proper court but an arbitral tribunal. This is said to be provided by the Swiss Federal Tribunal and that access to CAS is based on an arbitration agreement signed beforehand for them to be involved. It is noted however, that in most cases the arbitration is forced upon the athletes. This occurs especially with professional contracts whereby the arbitration clause stipulates that in case of any dispute, the issues shall be submitted to CAS for adjudication. This leaves athletes with no alterative as to where their disputes are decided and thus could be argued to limit their right to access to a court. This is especially apparent for the Olympic Games as one cannot compete without signing the Olympic entry form which includes a mandatory arbitration clause.

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<sup>46</sup> <http://www.uci.ch/inside-uci/about/history/> on 16 February 2018.

<sup>47</sup> Arbitration CAS ad hoc Division (OG Vancouver) 10/004 Claudia Pechstein v. Deutscher Olympischer Sportbund (DOSB) & International Olympic Committee (IOC), award of 18 February 2010.

When it comes to the awareness and understanding of the law, the Pechstein case addresses it. This is due to her attack on the mandatory arbitration clause placed within contracts of professional athletes which binds them to take their disputes to CAS and CAS alone. Knowledge of this clause would probably lead athletes to ask for alternative options provided for dispute resolution.

The mandatory clause could be thus argued to go against the right to access to justice. It is akin to telling one that in order to be considered a professional, one must agree to have only one recourse to justice. This ties the hands of the athletes to the whims of CAS who have ties with the national sporting associations that handle the athletes. This leaves athletes feeling as though it's CAS and their national association against them. An athlete should have the choice, which is the main issue here, to seek recourse in a forum that they feel would offer them fair trial guarantees. One's choice of forum is therefore what is primarily being infringed in this situation.

## CHAPTER FOUR

### **THE RIGHT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY**

The right to be presumed innocent until one is proven guilty is an integral part of the right to a fair trial. From the Kenya dispensation it is enshrined in Article 50 Section 2(a) of the Constitution of Kenya 2010 which states that every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved.<sup>48</sup> It is also mentioned in the Universal Declaration of Human Rights under Article 11 which states that anyone charged with a penal offence has the right to be presumed innocent until proven guilty in accordance with the law in a public trial in which they have all guarantees necessary for their defence.<sup>49</sup> The third form of statute in which we see the same right enshrined is as part of Article 6 of the European Convention on Human Rights which states that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.<sup>50</sup> These aforementioned examples shall form the statutory basis for the chapter to delve into the question of whether there does or does not exist the right to be presumed innocent until proven guilty in the current dispensation of sports arbitration especially as regards doping cases, which is an offence under Article 2 of the World Anti-Doping Code,<sup>51</sup> whereby the apparent theme is that one is presumed guilty and the onus is on them to prove innocence.

The process of testing an athlete for doping begins with them being notified by the doping control officer or chaperone of the impending process. The doping control officer then presents the athlete with a variety of sample collection packages from which they must select one. The samples are to be collected in full view of the doping officer. The samples are then sealed and transported to the nearest World Anti-Doping Agency (WADA) laboratory. The sample A is then analysed for prohibited substances. If a prohibited substance is found, WADA would then conduct an initial review to see if the athlete was granted Therapeutic Use Exemption. If that

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<sup>48</sup> Article 50, Section 2(a), *Constitution of Kenya* (2010).

<sup>49</sup> Article 11(1), *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>50</sup> Article 6(2), *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

<sup>51</sup> Article 2, *World Anti-Doping Code*, (2015).

is not the case the athlete is duly notified of the findings and is given a provisional suspension from further competition and if the competition is ongoing, the results of that competition are nullified. At this point, the athlete has two options; first is to plead guilty to doping and in this case receive sanctioning which is usually a two-year ban or option two is to request for sample B to be tested. Being a strict liability offence, an athlete has little room to blame others for the presence of the prohibited substance in their system. The burden of proof therefore lies with the athlete to prove that the doping was not intentional and the standard of proof afforded is that of comfortable satisfaction which lies somewhere in between balance of probabilities and beyond reasonable doubt.<sup>52</sup> The standard of comfortable satisfaction was coined from the case of *Briginshaw v Briginshaw*.<sup>53</sup> It was seen that the more serious the allegation and its consequences, the higher the level of proof required for a matter to be substantiated.<sup>54</sup>

When it comes to doping, it can be defined as the use of performance enhancing substances or methods. There are various types of doping offences as per WADA's World Anti-Doping Code (the Code). Article 2 of the Code deals with anti-doping rule violations.<sup>55</sup> Article 2.1 stipulates the first anti-doping violation which is presence of a prohibited substance or its metabolites or markers in an athlete's sample. This is simply one being found with a prohibited substance within their sample. The second violation is the use or attempted use by an athlete of a prohibited substance or a prohibited method as per Article 2.2 of the Code. The third is evading, refusing or failing to submit to sample collection as per Article 2.3. Article 2.4 is on whereabouts failures. Article 2.5 stipulates tampering or attempted tampering with any part of doping control as an offence. Possession of a prohibited substance or a prohibited method according to Article 2.6 is another offence. Another offence is trafficking or attempted trafficking in any prohibited substance or prohibited method according to Article 2.7. The eighth offence stipulated is the administration or attempted administration to any athlete in-competition of any prohibited substance or prohibited method, or administration or attempted administration to any athlete out-of-competition of any prohibited substance or any prohibited method that is prohibited out-of-competition. Complicity in doping is also regarded as an offence according to Article 2.9. Out of all these offences, when one is in contravention of Article 2.1 of the Code is when the standard of

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<sup>52</sup> Article 3.1, *World Anti-Doping Code*, (2015).

<sup>53</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>54</sup> Davis C, 'The 'Comfortable Satisfaction' Standard of Proof: Applied by the Court of Arbitration for Sport in Drug-related Cases', 1 *University of Notre Dame Australia Law Review* (2012), 4.

<sup>55</sup> Article 2, *World Anti-Doping Code*, (2015).

comfortable satisfaction is applied during the doping trial. The other doping offences are judged on the balance of probabilities. There also are various types of doping, and these methods could be administered either orally, as was with Contador, through blood transfusions as was done by Lance Armstrong, and through injections as Rita Jeptoo was accused of when she tested positive for EPO.

Cernic's article shall be revisited to scrutinise his take on the right to be presumed innocent until proven guilty. This is mentioned within the section of burden and standard of proof. He references the Contador case<sup>56</sup> in his argument. He states that CAS did not consider Contador's arguments to be plausible and in doping cases the athlete must shoulder the burden of proof to show that no prohibited substance entered their body.<sup>57</sup> Contador had argued that the prohibited substance that was found in his system by the name of clenbuterol, had entered his system through contaminated meat. The onus was thus on him to either prove that that was not a prohibited substance, that the test was false or that it was for a medical purpose.

In the case of Rita Jeptoo, on 20<sup>th</sup> April 2014, she won the Boston marathon and was thereafter given a doping test which she tested negative for recombinant erythropoietin (rEPO). Jeptoo claimed that she was run off the road by a car after which she was treated for minor injuries at Kapsabet Medicare Centre by Dr Kalya through intravenous drip and painkillers.<sup>58</sup> Dr Kalya allegedly continued to contact Jeptoo to check on her recovery after her accident. In September of 2014 she proceeded to contact Dr Kalya as she was feeling unwell. Dr Kalya came to Eldoret to see her and upon first instance he deduced that she had either malaria or typhoid and proceeded to take a blood sample. He then contacted her with findings saying that indeed she had malaria and typhoid plus was also suffering from low blood count. They then met again whereby Dr Kalya administered tablets, an injection for typhoid and another injection for her low blood count which must have been how the rEPO entered her system. She then had a urine sample collected on the 25<sup>th</sup> of September 2014.<sup>59</sup>

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<sup>56</sup> Arbitration CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012.

<sup>57</sup> Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 *European Society of International Law Conference Paper Series* (2014), 10.

<sup>58</sup> CAS 2015/A/3979 *International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 2.

<sup>59</sup> CAS 2015/A/3979 *International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 3.

On 24<sup>th</sup> October 2014, the test on the urine sample collected in September came back positive for rEPO. On 28<sup>th</sup> October 2014 Athletics Kenya notified Jeptoo of the finding and her subsequent suspension.<sup>60</sup> She had a hearing under Athletics Kenya which she asked for her Sample B to be tested which was found to confirm the test of Sample A. She was therefore charged with presence of a prohibited substance in an athlete's sample as well as use by an athlete of a prohibited substance.<sup>61</sup> On 27<sup>th</sup> January 2015, Athletics Kenya notified Jeptoo that she had been found guilty of a doping offence and was imposed on a two-year suspension from competing professionally.<sup>62</sup>

The athlete then decided to approach CAS for an appeal decision. IAAF submitted that not only had she tested positive for rEPO in September 2014, but her APB profile shows that there were traces of rEPO (or a similar substance) in a test leading to her victory in the Boston marathon of 2014. They ascertained that the repeated use of rEPO before major competitions amounted to a doping scheme and evidence shows that it has been a widespread practice in Kenya and asked the CAS panel to increase the ban to four years.<sup>63</sup> Jeptoo submitted that she was unsure about the date of the accident. She also submitted that Dr Kalya provided her with medication after the accident which includes injections of EPO. She also submitted that her contact with Dr Kalya began after the accident. There was evidence that Dr Kalya did not have a license to practice medicine and his efforts to treat athletes was to exploit the weak anti-doping measures in Kenya. He was arrested and held in custody at an unknown location. She also questioned IAAF's adversarial approach whereby they asked the athlete to provide disclosure and did not take any steps to investigate themselves.<sup>64</sup>

The issue in contention in this case is as to whether the athlete knew that the rEPO was injected into her and whether she acted intentionally. The panel stated that Jeptoo's statement of injection of rEPO to boost blood levels after an accident would amount to therapeutic use. However, the fact that she kept changing her date of when the accident occurred brought

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<sup>60</sup> *CAS 2015/A/3979 International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 4.

<sup>61</sup> *CAS 2015/A/3979 International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 5.

<sup>62</sup> *CAS 2015/A/3979 International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 7.

<sup>63</sup> *CAS 2015/A/3979 International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 21.

<sup>64</sup> *CAS 2015/A/3979 International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 23.

doubt into the minds of the panel. Also, there were desperate attempts to hide that there was contact between the athlete and Dr Kalya before the day of the alleged accident.

The panel also concludes that the athlete had intentionally used rEPO before as evidenced by her ABP samples.<sup>65</sup>

The panel gives the decision that she is indeed culpable for the use of rEPO as she knew she received something to 'boost her blood'. They also came to the conclusion that she had been using rEPO for a while due to her long relationship with Dr Kalya. Jeptoo is therefore given a sanction of ineligibility for a period of four years beginning from 30<sup>th</sup> October 2014.

This still brings about the question is as regards the treatment of those found doping by national sports organisations and CAS. When an athlete is found with a prohibited substance in their system, they are presumed guilty and have to prove their innocence. This proves a daunting task as they have to show that the substance entered their system without their knowledge and/or fault as evidenced by the aforementioned case. The adversarial system of inference also does not aid the athlete as the national sporting organisation places the duty on the athlete to provide evidence to prove their innocence with the organisation not doing any research. The standard of proof of comfortable satisfaction of the court may vary from one panel to another as was seen in the Rita Jeptoo case whereby the panel was not convinced that Jeptoo did not know Dr Kalya.

The reason for the removal of innocence in doping cases could be down to the mode in which one is found to have used a prohibited substance. In most criminal proceedings, the accused is arraigned in court with evidence provided on the part of the prosecution against the accused and they are in turn given the opportunity to also plead their case. In a doping case, the evidence provided, in form of the samples, is nearly always theirs therefore they cannot challenge the sample. All they can do is show that the prohibited substance entered their body without their knowledge. This is what brings out the found-guilty-and-must-prove-innocence aspect to doping. This is done, in part, to reduce the prevalence of doping in sport as athletes know they have to watch everything that enters their body. One could argue that that is too much attention for one to pay to whatever they ingest, but since sport is about one's performance, WADA feels that those small boosts one may give themselves may prove to be the difference between an athlete and the rest of the competition.

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<sup>65</sup> CAS 2015/A/3979 *International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo*, award of 2015, 28.

As a remedy to this, the national sports organisations and CAS should be more active in their inferences into how a prohibited substance got into the system of an athlete before concluding that the athlete had knowingly used the substance. This would require the change of doping to move away from being a strict liability offence. This would better afford athletes more room to defend themselves and thus have a better chance to prove their case.

## CHAPTER FIVE

### SUMMARY

Chapter one of the dissertation deals with the introduction. This begins with a background of the topics that shall be discussed. There is a brief look into sports arbitration and the various bodies that carry out this function (locally and internationally). The main focus is placed on the Court of Arbitration for Sport (CAS) which is the main international body that deals with sports disputes and has the mandate to do so. The other topic looked at is that of the right to a fair trial. This is seen as an important element for the proper dispensation of justice as it affords parties to a dispute an equal footing when it comes to the adjudication of matters. Within the right to a fair trial there also seem to be elements that constitute what it means to have a fair trial. Out of all the elements only those regarding access to justice and the right to be presumed innocent before being proved guilty were selected. Chapter one went on to deal with the statement of the problem which was the flouting of the right to a fair trial within sports arbitration proceedings, which led to the formulation of the objective that is to find out if the right to a fair trial is indeed being derogated by CAS proceedings. The aforementioned statements then gave rise to the research question that asked if sports arbitration as a form of alternative dispute resolution respect the right to a fair trial. The justification for the above study is supported by complaints from various cases, namely *Pechstein*, *Rita Jeptoo* and *Contador* cases. The theoretical framework that backs the research is that of Natural Law which is derived from the morality of man. This concept is most suitable as the topic of fairness is being looked at. Finally the research design sets out the format the dissertation shall take, coupled with the assumptions (that there exists a gap in CAS' dispute resolution dispensation) and limitations (case law wise).

Chapter two goes on to set out the literature review of the research. This chapter consists of the various pieces of content that have been looked at in order to support the research. There are various pieces of literature that are delved into beginning with Foster's article on *lex sportiva* and *lex ludica*. *Lex ludica* can be defined as a set of formal rules and equitable principles that surround sports. As regards *lex sportiva* it is the application of international law as well as legal principles to sporting disputes. These said principles are derived from sports regulations. Loosely speaking, *lex sportiva* translates to sports law. This is relevant as

the topic under research and discussion is in the realm of sports law. The next piece of literature dealt with is Jernej Čerňič's emerging fair trial guarantees before CAS. This begins with the premise of the Contador case being termed as being unfair. He continues to delve into the past of CAS how it went from being under the IOC to being under ICAS. As to whether CAS follows the right to fair trial he relies on the right to fair trial under the ECtHR. He questions the mandatory arbitration clause within professional contracts of athletes and how it limits their choice when it comes to access to justice. The argument then continues to look at the different elements of the right to fair trial, namely equality of arms, burden of proof, right to an independent and impartial tribunal, and the right to a public hearing and public pronouncement of judgements. The third and final article reviewed is that of Simon Shivaji who touches on Kenya's Sports Disputes Tribunal. He sets out the function and composition of the SDT as well as its history. He mentions that the major issue facing the SDT as a dispute resolution mechanism in Kenya's sports arena is that of independence and impartiality.

Chapter three finally introduces one of the topics that shall be discussed. This is the element of the right to a fair trial known as access to justice. The elements of access to justice are set out in the case of *Dry Associates Ltd v Capital Markets Authority & Another*. Of all the elements set out, special focus is placed on the awareness and understanding of the law, easy availability of information pertinent to one's rights, easy access to the justice system, provision of a conducive environment within the judicial system, and finally, affordability of legal services. Aspects of the cases of Rita Jeptoo and Pechstein provide insight as to the impact of the said elements in the said cases. This enquiry offers insight as to the handling of the cases as per the said elements.

Chapter four deals with the right to be presumed innocent until proven guilty. The first look goes into statute around the said right whereby the Constitution of Kenya 2010 is highlighted as well as within the Universal Declaration of Human Rights. Since the main offence being dealt with in the cases under review is doping, and specifically the offence of presence within the sample, there is a review of the doping laws according to WADA's Anti-doping Code as well as the doping process and sentencing. This then brings forth the issue of right to be presumed innocent since the process already finds the athlete guilty upon finding a prohibited substance in an athlete's sample.

## FINDINGS

On the question of access to justice, it would seem that as per awareness and understanding of the law, athletes in more developed countries have received better education and as such, have a better understanding of the legal obligations and consequences they have as athletes. As regards easy availability of information pertinent to one's rights, in this digital age the information is readily available online for ease of access. When it comes to easy access to the justice system, CAS is the main arbitral body that deals with professional athlete disputes and is based in Lausanne, Switzerland. This makes it cumbersome for athletes who are not based within the European Union to get to. On the aspect of a conducive environment within the judicial system, CAS comes short during the conducting of trials whereby the athlete does not have an understanding of any of CAS's applicable languages during the trial. Lastly, on the point of affordability of legal services, the cost of seeking redress from CAS is 1,000 Swiss Francs for initial filing of the case which translates to over 100,000 kshs. This is a high fee for an athlete, and it being the initial fee, means that it could eventually increase. Legal aid could be provided according to the legal aid statute but the beneficiary could be made to make that payment themselves should they lose the case according to Article 16 of the Legal Aid Rules.<sup>66</sup>

Onto the topic of the right to be presumed innocent until proven guilty, the focus was placed on doping cases, and it being a quasi-criminal offence, one should enjoy the aforementioned right. This would mean the accused athlete going through a trial process before being sanctioned. In doping cases, especially as regards the doping offence whereby a prohibited substance is found in an athlete's sample, the athlete receives the news that they have had one of their two samples collected to have tested positive for a prohibited substance and as such, receive an immediate suspension from competing professionally in their respective field pending their contesting of the decision. If the athlete does not contest they receive a two-year ban from competing professionally from the date of notice. This form of sentencing shows that the athlete has already been found guilty and the onus is on them to prove their innocence, a situation which, more often than not, proves an uphill task for the athlete.

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<sup>66</sup> <http://www.tas-cas.org/en/arbitration/legal-aid.html> accessed on 26 March 2018.

## **RECOMMENDATIONS**

When it comes to the issue of access to justice, the specific elements that require redress are easy access to the justice system and affordability of legal services.

CAS is based in Lausanne, Switzerland, but they have managed to have decentralised offices around the globe. This means that athletes who seek to have their matters adjudicated by CAS have a way to seek redress. However, they should try and establish courts around the world as well to enable ease of access to justice by athletes instead of having to travel all the way to Switzerland.

When it comes to the affordability of legal services, the price of registration being 1,000 Swiss Francs locks out professional athletes that cannot meet that amount. This may lead to an athlete suffering an injustice simply because they were unable to raise the registration fee and as the case goes on, more costs would be incurred. However, they have a legal aid program in place but this does not help if the athlete loses their case.

## **CONCLUSION**

In conclusion, the Court of Arbitration for Sport has offered an avenue for the resolution of sporting disputes from a forum that specialises in sporting matters. However, being an arbitration institution, their mode of dispute resolution differs from the ordinary court process and as such, when it comes to the right to a fair trial, they have managed to implement most of the elements associated with it apart from the few aforementioned ones. With the implementation of the above recommendation, CAS's system of dispute resolution shall be able to be open to more athletes globally as well offer justice to those who cannot afford to pay for it.