

**DOPING IN ATHLETICS: A CRITICAL ANALYSIS ON THE RIGHT TO
A FAIR HEARING OF AN ACCUSED ATHLETE.**

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By

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DEDICATION

[To myself, for being an exceptional human being, and my best friend Trina Koross. To conquering life together.

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DECLARATION

I, **SANG TIMOTHY KIPKEMBOI** 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:

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

Signed:.....

[Supervisor's Name]

ABSTRACT

Most, if not all sports are governed by a regulatory framework. However, it is the efficacy of these frameworks that ensure fair and just enjoyment of the sport. There are a number of claims that have risen in athletics on the credibility and impartiality of sports dispute tribunals, more so the Court of Arbitration of Sports. The paper looks into the strict application of the World Anti-Doping Code focusing on the disparities of the doping regulatory framework and its rippling effect on the careers of elite athletes.

The study uses a combination of doctrinal research as its primary research method focusing on the highest appellate body and case study method to highlight the mishaps of various rulings that have violated the contested right to a fair and impartial tribunal. In order for these to be achieved the tribunal needs to restructure its evidentiary process by allowing discovery of evidence from WADA accredited laboratories and eliminating the shift of the burden of proof that clearly disadvantage the accused athlete.

LIST OF ABBREVIATIONS

AAS	Anabolic Androgenic Steroids.
ADAK	Anti- Doping Agency of Kenya.
AIU	Athletic Integrity Unit.
BALCO	Bay Area Laboratory Cooperative.
CAS	Court of Arbitration for Sports.
EPO	Erythropoietin.
FDA	Food and Drug Administration
FIFA	Federation Internationale de Football Association
IAAF	International Association of Athletics Foundation.
ICCPR	International Covenant on Civil and Political Rights.
In-ACHR	Inter-American Convention on Human Rights.
IOC	International Olympic Committee.
ISL	International Standards for Laboratories.
NOCCS	Norwegian Olympic Committee and Confederation of Sports.
NZRFU	New Zealand Rugby Football Union.
PIL	Private International Law.
SDT	Sports Dispute Tribunal.
TAS	Tribunal Arbitral du Sport.
UCI	Union Cycliste Internationale.
UIPM	Union Internationale de Pentathlon Moderne.
USADA	United States Anti-Doping Agency.
WADA	World Anti-Doping Agency.
WADC	World Anti-Doping Code.

LIST OF CASES

1. *Al Qadsia v. FIFA & Kazma SC* (2010), Court of Arbitration for Sports.
2. *Amar Muralitharan v. Indian National Anti-Doping Agency (NADA), Indian National Dope Testing Laboratory, Ministry of Youth Affairs and Sports* (2014), Court of Arbitration for Sports.
3. *Andreea Rdducan vs IOC*
4. *B. v. Federation Internationale de Natation* (1999), Court of Arbitration for Sports
5. *Federazione Italiana Nuoto v. Federation Internationale de Natation Amateur* (1997), Court of Arbitration for Sports.
6. *Ferdinand Omanyala v Athletics Kenya* ([2019] eKLR
7. *Floyd Landis v USADA* (2007), Court of Arbitration for Sports.
8. *G v International Equestrian Federation* (1992), Court of Arbitration for Sports.
9. *Gundel v. FEI* (1993), Swiss Federal Tribunal.
10. *International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo* (2015), Court of Arbitration for Sports.
11. *I v Fédération Internationale De L'automobile* (2010), Court of Arbitration for Sports.
12. *Kim v International Triathlon Union* (2014), Supreme Court of British Columbia.
13. *Lazutina and Danilova v IOC* (2002), Court of Arbitration for Sports.
14. *Muchlegg v IOC* (2002), Court of Arbitration for Sports.
15. *Mutu and Pechstein v. Switzerland* (2018), European Court of Human Rights.
16. *N v Federation Internationale de Natation* (1998), Court of Arbitration for Sports.
17. *N v International Equestrian Federation* (1993), Court of Arbitration for Sports.
18. *N,J,Y,W v Fédération Internationale de Natation (FINA)* (1998), Court of Arbitration for Sport.
19. *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)*.
20. *Piersack v Belgium* (1982), European Court of Human Rights
21. *Pistorius v IAAF* (2008), Court of Arbitration for Sports
22. *Puerta v. International Tennis Federation* (2006), Court of Arbitration for Sports.
23. *Reynolds v International Amateur Athletic Federation* (1992) United States District Court for the Southern District of Ohio.
24. *Shannessey v Australian Olympic Commission* (2000), Court of Arbitration for Sports.
25. *Smith De Bruin v FINA* (1999), Court of Arbitration for Sports.
26. *St Johnston FC v Scottish Football Association* (1965), The Scottish High Court.

27. *UCI & WADA v Hondo & Swiss Olympic* (2005), Court of Arbitration for Sports.
28. *Union Cycliste Internationale (UCI) v Alberto ContadorVelasco & Real Federación Española de Ciclismo* (2012), Court of Arbitration for Sports.
29. *USADA v Michelle Collins* (2004), American Arbitration Association.
30. *Vionet v Barret* (1885) Queens Bench.
31. *X. v. ATP* (2007), Tour et Tribunal Arbitral du Sport (TAS).
32. *Wang v. Fédération Internationale de Natation* (1998), Court of Arbitration for Sports
33. *World Anti-Doping Agency (WADA) v Alberto Contador Velasco* (2012), Court of Arbitration for Sports

1.0 CHAPTER ONE -A TALE OF THE RIGHT TO FAIR HEARING IN VARIOUS SPORTS DISCIPLINES.

1.1 INTRODUCTION

Sports governance plays a pivotal role in the effective functioning of sporting organizations. In contrast to other international sporting bodies, the Court of Arbitration for Sport ('CAS') is a private arbitral tribunal, designed specifically to adjudicate sports-related disputes and is essentially sport's ultimate umpire. A constituent of the right to fair trial relates to the character of the tribunal before which a defendant is tried.¹ International human rights law reflects the fundamental precept of the rule of law that trial should be by an independent and impartial tribunal that is established by law and is jurisdictionally competent to hear a case.² The right to be heard and the equality of the parties in adversarial proceedings is an internationally recognized legal principle as is provided in Article 182(3) Private International Law Act (hereinafter PILA).³ Under Article 190(2)(d) PILA, the parties may file a motion to set aside an arbitral award in case of violation of their right to be heard and equal treatment.⁴ According to the jurisprudence of the Swiss Federal Tribunal, parties have to raise all procedural objections in a timely manner, failure to which they lose their right to validly argue violation of their procedural rights. The Panel must take into consideration all the parties' legal and factual submissions, which are relevant for rendering its decision.

They need to stay relevant in the sport brings out the aspect of doping. Doping is defined as the occurrence of one or more of the anti-doping rule violations.⁵ The violations include; presence of a prohibited substance or its metabolites in an athlete's sample,⁶ use or attempted use by an athlete of a prohibited substance,⁷ evading or failure to submit sample collection,⁸ possession of a prohibited substance and complicity.⁹ The definition reiterates prohibited substances, which is, define in article 4 as substances within the ambit of the prohibited list provided by The World Anti-doping Agency.¹⁰ The substances enhance the performance of the

¹ Marks S and Clapham A, *International human rights lexicon*, Oxford University Press, Oxford, 2005, 154.

² Marks S and Clapham A, *International human rights lexicon*, Oxford University Press, Oxford, 2005, 154.

³ Article 182(3) Private International Law Act.

⁴ Article 190(2)(d) Private International Law Act.

⁵ Article 1, *World Anti-Doping Agency CODE* (2015).

⁶ Article 2(1), *WADA CODE*.

⁷ Article 2(2), *WADA CODE*.

⁸ Article 2(3), *WADA CODE*.

⁹ Article 2(9), *WADA CODE*.

¹⁰ Article 4(2), *WADA CODE*.

athlete giving them an added advantage compared to fellow athletes. As a result, the athlete maintains his top performance.¹¹

In light of this development, stringent laws have been put in place to ensure doping-free sports. Athletes go through mandatory tests before any international competition and those held in violation of the law are brought before the Athletics Integral Unit (hereinafter AIU), before proceeding to the Court of Arbitration for Sports (hereinafter CAS).

The right to a fair trial is one of the most expansive and most complicated of all human rights protected under international law.¹² This is because of its varying enforcement by judicial bodies in different jurisdictions. Furthermore, the right encompasses a bundle of rights that guide the apprehension of the suspect till his or her judgement, but hardly is the right respected by authorities let alone recognized. The right's International stature is developed in Article 6 of Protocol Number 7 of the European Convention on Human Rights and Fundamental Freedoms,¹³ Article 14 of the International Covenant on Civil and Political Rights (ICCPR),¹⁴ article 8 of the Inter-American Convention on Human Rights (In-ACHR).¹⁵ Regionally, article 7 of the African Charter on Human Rights runs through the fundamental principles that establish the said right.

Nationally, the right to fair trial (as embodied in Article 50 of the Constitution of Kenya 2010) is a right all people have as regards any dispute that is being settled in a court of law or independent tribunal or body.¹⁶ It states that one of the elements of the right to a fair hearing is the right to be presumed innocent until proved otherwise, the accused should also be informed of the charges with sufficient detail in order to answer it.¹⁷ Furthermore, the accused should be afforded ample time to prepare a defense, they should also have a public trial before a court established under the Constitution, to refuse to give self-incriminating evidence.¹⁸ Lastly, if convicted, to be able to appeal to a higher court.¹⁹ This dissertation will proceed by critically examining the nature of the relationship between elite athletes and sports-governing bodies and

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¹¹ Yesalis E and Bahrke S, 'History of Doping in Sport' 21 *International Sports Studies*, 2002.

¹² Curtis FJ, *International Human Rights Law: cases and Materials*, CDP special printing, United States of America 2003.

¹³ Article 6, *European Convention on Human Rights and Fundamental Freedoms*, 4 November 1950.

¹⁴ Article 14, *International Covenant on Civil and Political Rights*, 16 December 1966.

¹⁵ Article 8, *Inter-American Convention on Human Rights*, 22 November 1969.

¹⁶ Article 50(1), *Constitution of Kenya* (2010).

¹⁷ Article 50(2)(b), *Constitution of Kenya* (2010).

¹⁸ Article 50 (2)(1), *Constitution of Kenya* (2010).

¹⁹ Article 50(2)(q), *Constitution of Kenya* (2010).

whether the prevailing classification, that is, one of private contract law, affords the athletes the requisite due process protections in disciplinary proceedings involving doping charges.

1.2 STATEMENT OF THE PROBLEM

The right to a fair trial is one of the backbones of the rule of law and a *conditio sine qua non* for the protection of human rights and fundamental freedoms. According to article 8 of the WADA Code,²⁰ every athlete has the right to a fair hearing and hearing notice. This provision is propelled by article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 50 of the Kenyan Constitution.²¹ This will ensure proper legal representation of an athlete and a just outcome.

The current situation is that most Kenyan athletes suspected of violating the WADA code have no recourse to prove their innocence. Evidence collection and handling is solely done by the agency. The probability of evidence tampering is high, as the process is not publicly disclosed. In most cases the athlete seeks a third-party expertise on the matter. However, the expert opinion is discredited and not considered. The presumption propounded, is guilty until proven innocent. This has led to many promising athletes accepting the tribunal's verdict and as a result losing their career.

In response, this paper examines whether fair trial guarantees can also be exercised before the CAS. It attempts to identify whether the procedural rules and case law of the CAS should follow all four component parts of the right to a fair trial (the right to a fair hearing, the right to an independent and impartial tribunal established by law, the right to a public hearing and the public pronouncement of judgments, and the right to a fair trial within a reasonable time).

1.3 JUSTIFICATION OF THE STUDY

This dissertation seeks to analyze the contested right to a fair trial in previous and current cases and unravel its violations. This will be achieved through comparison of judgements given by sports disciplinary tribunals more so the CAS and the best recourse for victimized athletes.

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1.4 STATEMENT OF OBJECTIVES

The objectives of the study are:

1. To analyse the current trial system conducted by anti-doping agencies
2. To analyse whether the rights of an athlete are achieved by meeting International threshold.

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²⁰ Article 8, WADA CODE (2019).

²¹ Article 6 (1), European Convention on Human Rights and Fundamental Freedoms.

3. To look into the best application of the law in relation to doping matters ensuring the right to a fair tribunal.
4. To identify measures that will ensure fair play in the trial process.

1.5 RESEARCH QUESTIONS

The research questions are:

1. What is the current trial system adopted by the anti-doping agencies?
2. Why the strict application of the WADA code is an inhibitor to the right to a fair trial?
3. What are the recourses, if any, that are offered by appellate tribunals?
4. What are the international best practices regarding trial of athletes and do the same ensure their rights are protected?

1.6 HYPOTHESIS

Sports tribunals take a strict approach in the application of the WADA code in cases brought before them. Therefore, procedural matters take precedence over the substantive consequently violating the right to a fair trial accorded to all.

1.7 THEORETICAL FRAMEWORK

Natural justice theory is defined as the natural sense of what is right or wrong. This definition was coined by Lord Estlin in *Vionet v Barrett*.²² Simply put, it entails more than just the sense of right or wrong. The theory bears the term justice. As put by Aristotle, justice is fairness as injustice brings about a state of lawlessness and unfairness.²³ Taking the two perspectives the term natural has been provided to mean a sense in man, while the term justice has been explained to mean fairness which brings about the state of lawfulness. Combining the two terms bringing about the term natural justice, however, gives it a deeper meaning applicable in the execution of justice. Thus, the theory; natural justice goes deeper in setting rules governing adjudication of matters. The theory was developed by courts of equity to control decisions of lower courts and further developed to govern administrative bodies and it serves to ensure procedural fairness and fair decision making is achieved by judicial authorities. In turn it enables the achievement of public confidence in a judicial system. The principle encompasses two maxims; *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge their own case).

²² *Vionet v Barret* (1885) Queens Bench.

²³ Ross W, 'Aristotle Nicomachean Ethics Book V, Batoche Books, Kitchener, 1999.

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As a result of the theory, common law rules have been formulated to include;

1. a) The hearing rule; a person ought to be given adequate time to present their case, especially where their interests and rights may be negatively affected by an adjudicator. The rule goes to the extent of allowing a person adequate opportunity to prepare and adduce evidence as well as challenge evidence produced by the adverse party and to challenge rebuttals against them. The alleged wrongdoer also ought to be afforded the chance to be informed of the allegations before them.
2. b) The bias rule; no one ought to be judge in their trial, the rule requires that an adjudicator be completely impartial in adjudicating the matters before him. The rule extends to investigators who should guard against conflict of interest, in conducting investigations and collecting evidence. The rule also extends to any appearance of actual or apparent bias, in which if found to exist on the part of a decision maker, deprives them of the credibility to adjudicate the matter.
3. c) The evidence rule; investigators should not base their findings on speculation or suspicion rather it should be clear that their findings are based on logical proof or material evidence. Evidence obtained by one party is also subject to scrutiny by a party against whom it is adduced.²⁴

The sports disciplinary procedure is a reflection of the natural justice theory. The tribunals uphold the second maxim that no man can judge his own case, however, the first maxim on the right to be heard is contested as seen in a number of rulings. The application of the law is one of strict liability in that an athlete is convicted on the comfortable satisfaction of the adjudicating tribunal. This denies him a of a fair defense and as a result the right to a fair hearing is violated.

1.8 RESEARCH METHODOLOGY

This study will be doctrinal in this regard it will involve the review of relevant primary and secondary sources. The primary sources will include legislation and case law while books, journal articles, reports will be the secondary sources of data. Scholarly works by local and international authors will be considered

²⁴ Ross W.D, Aristotle Nicomachean Ethics book V , Batoche Books, Kitchener, 1999.

1.9 LITREATURE REVIEW

1.8.1 Lex Sportiva

According to Beloff, lex sportiva is the jurisprudence that surrounds international sports law. The 'cornerstone' of lex sportiva is 'autonomy for decision making bodies in sport' capable of producing a distinct and unique body of law, with due recognition of the CAS as the institutional source of sports law.²⁵ 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)*.²⁶ 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.²⁷ 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. 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.²⁸

1.8.2 Evidentiary issues arising in Sports law

Maureen Weston, criticises the absence of evidentiary protections that exist in civil and criminal proceedings as the cause of injustice by the CAS.²⁹ This is a consequence of the commercial origins of arbitrations and the fact that disciplinary tribunals are often not required to adopt

²⁵ Beloff M, Kerr T and Demetriou M, *Sports Law*, 2nd Edition, Hart Publishing, Oxford, 1999.

²⁶ *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)*(2002), Court of Arbitration for Sport..

²⁷ Foster K, 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence' Volume 3 Entertainment and Sports Law Journal,2005, 1.

²⁸ Foster K, 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence', Volume 3 Entertainment and Sports Law Journal, 2005, 2.

²⁹Maureen A Weston, 'Doping Control, Mandatory Arbitration and Process Dangers for Accused Athletes in International Sports' (2009) 10 Pepperdine Dispute Resolution Law Journal 5.

judicial standards. Weston's view is based on the need for the rules of evidence in determining doping disputes brought out in the *Briginshaw* Principle.³⁰ The principle demonstrates the standard of proof required will depend on the seriousness of the matter at hand. Furthermore, Doug Jones notes that since disputes often involve parties from different legal backgrounds, international arbitration procedures cannot adopt a purely civil law or common law approach, to the presentation of evidence.³¹

Kaufman-Kohler and Antonio Rigozzi highlight the prevailing contemporary judicial practice, human rights, and in particular the specific procedural guarantees in criminal matters, that are not applicable to doping disputes before private sport's governing bodies. This is the approach by the Swiss Tribunal as seen in the *Gundel v. FEI*. The tribunal states that doping proceedings concern issues of private law that do not need to be considered in the light of notions proper to criminal law. This leaves out key rights such as the presumption of innocence and the principle in *dubio pro reo* which feature in the European Convention of Human Rights. From the SPT decision, it seems that the UNESCO Convention's reference to instruments relating to human rights and the IOC's sentiment that sports are a human right are misplaced rhetoric in regard to the tribunals ruling.

1.8.3 The right to a fair trial by the Court of Arbitration for Sport

Jernej Cernic's article touches on emerging fair trial guarantees before the Court of Arbitration for Sport. The introduction begins with a short review of the Contador doping case,³² 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.³³

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 safe

³⁰ *Briginshaw v Briginshaw* (1938), the High Court of England.

³¹ Doug Jones, 'The Cost, Time and Process Implications of the New IBA Rules of Evidence' (Paper presented at the Financial Review of International Dispute Resolution Conference, Sydney, 15 October 2010) 4.

³² *Union Cycliste Internationale (UCI) v Alberto ContadorVelasco & Real Federaci6n Espanola de Ciclismo* (2012), Court of Arbitration for Sports.

³³ Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 European Society of International Law Conference Paper Series (2014), 2.

guarding of those same human rights would lead to poor adjudication of doping cases.³⁴ Furthermore, a case touching on the aspect of impartiality is that of *Piersack v Belgium*.³⁵ The CAS statutes are clear on the impartiality of an arbitrator.³⁶ This is brought out in rule 33 of the CAS Code on Procedural rules that deals with the independence and qualifications of arbitrators and states that every arbitrator shall remain impartial and independent and shall disclose any instances in which circumstances may affect that.³⁷

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. Jean goes on to establish the autonomy of the tribunal. It is through the tribunal's autonomy that it can guarantee the right to impartiality to the parties before it. Cemic'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. 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 by this paper in the subsequent chapters and particularly, the right to access to justice and the right to be presumed innocent.

As is the case with most legal systems, anti-doping jurisprudence is not perfect. Some consequences of the strict liability system, while promoting the integrity of athletics as a whole, may lead to individual injustices. However, it is clear that the CAS requires drastic reforms in order to ensure athlete's rights are guaranteed in entirety. The CAS as a global forum should uphold general principle of law to the letter. Its laboratories should be open and transparent as they factor in second opinions. The standard of strict liability should be used cautiously and on a case to case basis. This will ensure intentional acts of doping are apprehended. , there is a need of establishing a new Doping Arbitration Division which will improve the CAS's accountability and capacity to achieve the fair resolution of doping disputes. This reforms would enable the CAS to be a model arbitration court, with an emphasis on righteousness for athletes and the upholding of the principle of fairness in sport. Accordingly, this would ensure

³⁴ Cemic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 European Society of International Law Conference Paper Series (2014), 3.

³⁵ *Piersack v Belgium* (1982), European Court of Human Rights.

³⁶ Cernic J, 'Emerging Fair Trial Guarantees Before The Court Of Arbitration For Sport' 4 European Society of International Law Conference Paper Series (2014), 14.

³⁷ Rule 33, *Court of Arbitration for Sport code of Sports-related arbitration* (2017).

that the CAS's structure and procedures continue to develop in accordance with the principles of good governance.

1.10 LIMITATION OF THE STUDY

The research has been constrained by various factors. Among them is the time factor. The work is considered part of the coursework as a requirement for the Bachelor of Laws degree hence has to be submitted within the prescribed time. Due to this, some research methods that require a lot of time will not be conducted.

Furthermore, sports law and doping has not been accorded much attention legally and scholarly. It suffers from legal neglect yet its impact on society cannot be downplayed. Most countries have their legal frameworks on doping still at their embryonic stages. In Kenya for instance, the Sports Act and the Anti-Doping Act have been enacted recently and much is yet to be done. On the other hand, scholars have dedicated less of their time on doping..

1.11 CHAPTER BREAKDOWN

Chapter one has introduced the study stating the problem, justification, research guides, theories and literature review of the paper. **Chapter two** will examine the current trial system conducted by sporting tribunals in application of anti-doping laws. **Chapter three** will examine the application of the WADA code and if this acts as an inhibitor to the right to a fair trial. This follow with an analysis of the recourses that exist before appellate tribunals. **Chapter four** will look at the international best practices regarding trial of athletes and whether there is a measure to ensure that their rights are undertaken. **Chapter five** will close with the findings, conclusions and recommendations.

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2.0 CHAPTER 2 THE SPORTS REGULATORY FRAMEWORK

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2.1 Introduction

Doping affects the nature of sporting competition. It artificially amends the physical conditions of athletes who claim to evaluate their natural differences of performance against each other. Doping is an issue, which can change fair competition into a spectacle for the mere amusement of the spectator. The WADA code was enacted to regulate anti-doping in sport. Because of the widespread of the adoption of the Code, athletes are bound by anti-doping regulations under the Code as well as the corresponding arbitration framework. In practice, this is a form of compulsory arbitration, the individual having a choice between accepting the arbitration agreement or refraining from participation in organized sports altogether. This was reaffirmed in *Mutu and Pechstein v Switzerland*, where it was agreed that the jurisdiction of the CAS must be regarded as compulsory arbitration within the meaning of its case law.³⁸

This chapter focuses on the legal framework of the disciplinary tribunals from the national level. The CAS framework will dominate most parts of the chapter due to its stature as an International Arbitral tribunal and court of final appeal. This is because the athletes have their respective governing bodies but in the appreciation of *lex sportiva* that harmonizes national of laws the CAS legal framework is necessary.

2.1 SPORTS DISPUTE TRIBUNAL

The Sports Act³⁹ which is the principal legal instrument on sports in Kenya establishes the Sports Disputes Tribunal.⁴⁰ The jurisdiction of the Tribunal is set out under Section 58 of the Act. The Tribunal is mandated to determine appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue, such appeals include those against disciplinary decision and not being selected for a Kenyan team or squad. The jurisdiction of the Tribunal also extends to other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear and appeals from decisions of the Registrar under this Act.⁴¹

The Sports Dispute Tribunal is not a final court. Appeals against decisions of the Tribunal lie with the Court of Arbitration for Sport and the same cannot be challenged in national courts.

³⁸ *Mutu and Pechstein v. Switzerland* (2018), European Court of Human Rights.

³⁹ *Sports Act* (Act No. 25 of 2013).

⁴⁰ Section 53, *Sports Act* (Act No. 25 of 2013).

⁴¹ Section 58, *Sports Act* (Act No. 25 of 2013).

However, they are subject to the judicial review jurisdiction of the High Court pursuant to the provisions of Articles 47 and 165 (6) of the Constitution of Kenya, 2010.

2.2 THE COURT OF ARBITRATION FOR SPORTS (CAS)

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The CAS was founded in 1983 through an initiative by the then President of the International Olympic Committee. The idea behind the CAS was a court with a jurisdiction specifically adapted to the needs of sports. The CAS is a permanent arbitration tribunal with its seat in Lausanne, Switzerland. The arbitration cases are decided by a panel of one or three arbitrators following the code for the CAS.⁴² It is made up of three divisions: i) the ordinary arbitration division that settles disputes submitted to the ordinary procedure, ii) anti-doping division that settles dispute related to anti-doping and iii) appeals arbitration division which reviews decisions by sports organizations such as the IAAF.⁴³ A further appeal lies to the Swiss Federal Court.

In 1993, the International Council of Arbitration for Sport was formed due to the reservation on the independence of the CAS vis a vis the International Olympic Committee. The independence of the CAS was challenged based on its structure, mode of appointment of arbitrators and on its organization, financing and function before the Swiss Federal Tribunal. However, CAS has indeed proven itself as an independent sports tribunal by ruling for and against the International Olympic Committee, International Sports Federation and national federations.⁴⁴

The CAS represents a vital structure in the regulation of doping as its jurisdiction is limited to sports related matters. Access to CAS is governed by Article R47 of the CAS Code which provides that there must be exhaustion of the internal remedies before appeal through a decision from federation or other sport related body. Furthermore, the parties must have submitted to the competence of CAS.⁴⁵

The CAS provides a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations, and it ensures

⁴² *Code of Sports Related Arbitration*, 1 January 2019.

⁴³ Article 20, *Code of Sports Related Arbitration*.

⁴⁴ *Pistorius v IAAF* (2008), Court of Arbitration for Sports.

⁴⁵ Article R47, *Code of Sports Related Arbitration*.

fairness and integrity in sport through sound legal control and the administration of diverse laws and philosophies.⁴⁶

2.2.1 LEGAL FRAMEWORK

The Olympic Charter states that any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS. As a condition of participating in the Olympic Games, athletes are required to submit any disputes in connection therewith to the CAS for final resolution.⁴⁷ Outside the Olympic Charter the CAS is bound to apply the rules of the federation.⁴⁸ The interpretation of the doping offense will depend on the formula used in the respective statutory provisions. However, the guiding definition is provided by the WADA code.

The CAS's jurisdiction and authority as an arbitration tribunal is based on agreement of the parties.⁴⁹ Its origin and association with the Olympic Movement have facilitated its recognition and acceptance as the world's "supreme court for sport." Courts generally will enforce a written arbitration agreement requiring that the parties submit a dispute to CAS for resolution as well as International Olympic Committee or International Federation rules requiring arbitration before the CAS as a condition of participating in an Olympic or International Athletic competition, which bars an athlete from litigating the merits of the subject dispute in a judicial forum.⁵⁰

2.2.2 THE APPELLATE JURISDICTION OF THE CAS

1. Arbitration agreement.

The arbitration agreement forms the basis of each arbitration procedure. Here the parties agree to exclude state court jurisdiction in favor of the jurisdiction of an arbitration Panel. For the appellate arbitration proceedings, article R47 of the CAS Code provides that the arbitration agreement may be contained in the statutes or regulations of sports bodies.⁵¹ Most if not all

⁴⁶ McLaren R, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes* Valparaiso University Law Review, Valparaiso, 381.

⁴⁷ Article R40, *Code of Sports Related Arbitration*.

⁴⁸ Article R58, *Code of Sports Related Arbitration*.

⁴⁹ Article R27, *Code of Sports Related Arbitration*.

⁵⁰ McLaren R, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes* Valparaiso University Law Review, Valparaiso, 402.

⁵¹ Article R47, *Code of Sports Related Arbitration*.

International Federations including the IAAF have such clauses. This provision provides that an appeal against all anti-doping decisions by the IAAF is subject to appeal before the CAS.

2. Time limits and exhaustion of remedies

An appeal will only be admitted if the applicant has exhausted all internal remedies prior to the appeal.⁵² This runs parallel with proceedings before state courts and follows the idea that the federation has reached a final decision only after all internal remedies against the decision of one of its organs have been exhausted. A Kenyan Athlete is therefore expected to seek remedies from the sport's disciplinary tribunal, then the IAAF before moving to the CAS. Usually, the IAAF statute provides a certain time limit to file the appeal before the CAS. If no such time limit is provided, the Code will fix a time limit of twenty-one days from the day of communication of the decision which is appealed.⁵³

3. Procedure

According to article R28 of the CAS Code, the seat of each Arbitration Panel is in Lausanne.⁵⁴ Thus, the law governing the arbitration procedure (the so called *lex arbitri*) is Swiss Law.⁵⁵ The procedure before the panel is divided into two steps. A written procedure with an exchange of documents⁵⁶ is, in almost all cases, followed by a hearing⁵⁷ where the Panel will examine witnesses and discuss the evidence with the parties. The Panel may also request the production of certain pieces of evidence.⁵⁸ In *Al Qadsia v FIFA & Kazma SC*, the panel ordered the production of the original document in order to check its authenticity.⁵⁹

The applicable substantive law will be the law chosen by the parties or the law of the country where the federation, which issued the challenged decision has its seat. This provision ensures stable legal framework for the decision of the federation and is predictable for all parties. In reaching a decision the Panels have full power to review the facts and the law. In *B v Federation International de Natation*, the CAS clarified its powers holding that the Panels may consider "all evidence, oral and written, produced before it. Therefore, the Panel will constitute a hearing

⁵² Article R47, *Code of Sports Related Arbitration*.

⁵³ Article R49, *Code of Sports Related Arbitration*.

⁵⁴ Article R28, *Code of Sports Related Arbitration*.

⁵⁵ Kaufmann-Kohler G and Bartsch P, *The Ordinary Arbitration Procedure of the Court of Arbitration for Sport*, T.M.C. Asser Press, The Hague, 2005, 69

⁵⁶ Article R 54, *Code of Sports Related Arbitration*.

⁵⁷ Article R57, *Code of Sports Related Arbitration*.

⁵⁸ Article R 44.3, *Code of Sports Related Arbitration*.

⁵⁹ *Al Qadsia v. FIFA & Kazma SC* (2010), Court of Arbitration for Sports.

de novo, that is rehearing of the merits of the case.⁶⁰ Generally, the CAS will apply the rules applicable at the time the offense was committed. However, the *lex mitior* principle obliges the Panel to apply the law as it stands at the time of the determination where it is more favorable to the appellant.

2.2.3 STRICT LIABILITY

The CAS tribunal applies the principle of strict liability in doping-related cases. This means that once the positive finding is reported, athlete is under an obligation to prove the medium through which the banned substance has entered his body or no banned substance has entered his body in an unauthorized manner. Even after successfully proving a case of no significant fault,⁶¹ a ban of 6-24 months is imposed on the athletes. In *Andreea Rdducan vs IOC*, a Romanian athlete was chosen to represent her country at the 2000 Olympic Games in Sydney, Australia. In her doping control form, she provided the details of the Nurofen Cold and Flu tablet. She was found guilty but upon appeal the CAS acknowledged that the small amount of pseudoephedrine could not have resulted in enhanced performance.⁶²

Considering this principle, the subjective elements of the case are not examined: the guilt of the athlete is presumed and he or she does not have an opportunity to supply exculpatory evidence to mitigate.⁶³

2.2.4 ENFORCEMENT OF AWARDS

The award shall be rendered within a time limit of four months starting from the filing of the statement of appeal.⁶⁴ The time limit may only be extended by the President of the Appeal's decision by a motivated request by the President of the Panel.⁶⁵ Upon constitution of the Panel, the CAS Code provides that the competence of any state court to order such measures while an appeal is pending before the CAS shall be excluded.⁶⁶

⁶⁰ *B. v. Fédération Internationale de Natation* (1999), Court of Arbitration for Sports.

⁶¹ Article, 2.2.2.1, *World Anti-Doping Agency Code* (2015).

⁶² 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' *Sports and Entertainment Law Journal*, 2006, 161, http://www.rconnollylaw.com/VaSE_Doping_Article.pdf on 30th November 2020.

⁶³ *Wang v. Fédération Internationale de Natation* (1998), Court of Arbitration for Sports

⁶⁴ Article R59, *Code of Sports Related Arbitration*.

⁶⁵ Article R32, *Code of Sports Related Arbitration*.

⁶⁶ Article R37, *Code of Sports Related Arbitration*.

2.2.5 BURDEN OF PROOF

The presumption is a concept of material law. Here, the burden of proof lies with the party claiming a fact in his favor.⁶⁷ An athlete arguing against his presumed guilt would have to prove his innocence. There are also CAS decisions that, regarding the guilt of the athlete, speak of a shift of the burden of proof rather than of a legal presumption.

The CAS Panel clearly considered that the burden of proof for establishing the existence of a forbidden substance in an athlete's bodily fluids rests with the federation. To this extent, the presumption of innocence operated in favor of the athlete until the federation discharged that burden. In the *International Triathlon Union case*, the CAS arrived at the conclusion that the federation had not only to prove the mere existence of a forbidden substance in the body of the athlete but also its ingestion. The arbitrators in this case did not demand the proof of a specific case but rather the reasonable exclusion of all other possible causes.⁶⁸ The validity is based on whether more than one scientific possibility was used to ascertain the level of forbidden substance that might have been created. There are unique incidents where the burden of proof is shared by both parties. Such an incident is when the substance found was not contained in the list of forbidden substances.⁶⁹

In Kaufmann Kohler's report, the federation claimed that this substance should be treated as a stimulant, but it was unable to show the stimulant effects. Consequently, the athlete had to be acquitted, since no forbidden substance had been found in his urine. The CAS recognized that it was almost impossible for a federation to offer proof of "intent or negligence on the basis of simple objective analyst[is]"-the only piece of evidence it can produce to prove a doping offense.⁷⁰

2.2.6 STANDARD OF CARE

The CAS applies high standards for an appellant to show that he took all the necessary precautions to avoid a contamination with doping substances.⁷¹ In its opinion an elite athlete must meet a standard of care that is above the ordinary man on the street or even the ordinary

⁶⁷ Article 3.1, *WADA Code*.

⁶⁸ *Kim v International Triathlon Union* (2014), Supreme Court of British Columbia.

⁶⁹ Anderson J, 'Leading Cases in Sports Law' TMC Asser Press and Springer, 2013, 175.

⁷⁰ Kaufmann-Kohler G and Bartsch P, *The Ordinary Arbitration Procedure of the Court of Arbitration for Sport*, T.M.C. Asser Press, The Hague, 2005, 76.

⁷¹ *G v International Equestrian Federation* (1992), Court of Arbitration for Sports.

person practicing sport as a hobby.⁷² The CAS has strongly rejected the argument of athletes that they acted in good faith and had no interest in taking forbidden substances.

The CAS has also ruled that athletes are presumed to have knowledge of information, which is in the public domain. In this case, the athlete should have been warned by press releases issued by the IOC about the possible contamination of nutritional supplements. Since he failed to show that he had tested the nutritional supplement in question, he was unable to rebut the presumption of negligence on his part.⁷³ The Panel also rejects the allegation that the prohibited substance was contained in meat which had been eaten prior to the competition. These possibilities were considered as pure speculation.⁷⁴

2.2.7 STANDARD OF PROOF

The CAS provides that the IAAF has to show beyond reasonable doubt and to the satisfaction of the law that there was a case of administration of a forbidden substance.⁷⁵ In *Federation Internationale de Natation* case, the panel confirmed that the standard of proof that had to be met by the IAAF while establishing a doping offence was high in that it was less than criminal standard of proof, but more than the ordinary civil standard.⁷⁶ Furthermore, the panel adopted the comfortable satisfaction test. This test implies that the level should be 'greater than a mere balance of probability, but less than the proof beyond reasonable doubt. The CAS code provides that these rules are not intended to be subject to or limited by any national requirement and legal standards applicable to such proceedings.

2.2.8 SANCTIONS

The general principle is that a sanction must be proportionate to the fault of the accused. The particulars of the case, circumstance of the doping offense and the personality and behavior of the athlete are considered when issuing sanctions. The issue of proportionality of the penalty could therefore only arise, from the restricted standpoint of incompatibility with public policy, if the arbitration award were to constitute an attack on personal rights which was extremely

⁷² *Shannessey v Australian Olympic Commission* (2000), Court of Arbitration for Sports.

⁷³ *Shannessey v Australian Olympic Commission*.

⁷⁴ World Anti-Doping Agency, *Stakeholder Notice Regarding Meat Contamination*, 30 May 2019, 12.

⁷⁵ *N v International Equestrian Federation* (1993), Court of Arbitration for Sports.

⁷⁶ *N v Federation Internationale de Natation* (1998), Court of Arbitration for Sports.

serious and totally disproportionate to the behavior penalized.⁷⁷ In the case of a doping offence the CAS issues two penalties which are disqualification and an additional sanction.

Disqualification occurs when the sample of an athlete tests positive. The athlete is asked to forfeit the games and any medal if the results came after the competition. Additional offence is dependent on whether the rules provide for such, however, they are generally considered mandatory. In fixing the number of additional sanctions, the CAS Panels takes subjective elements of the case into consideration. However, it is up to the athlete to show why the maximum sanction should not be imposed.⁷⁸ In *Federazione Nuoto case*, the CAS got the greenlight to intervene in a sanction only if the rules adopted are contrary to the general principles of law, if the application is arbitrary or of the sanction provided can be deemed to be excessive or unfair on their face.⁷⁹

2.3. CONCLUSION

This chapter has shown that importance of Sports Dispute Tribunal as the court of first instance and its transition to the CAS which forms an integral part of the world-wide fight against doping. It can provide protection for the rights of the accused athlete and is able to ensure that the fight against doping will be upheld unremittingly. Over the recent years the CAS has developed quite an impressive body of decisions. The CAS offers a unique possibility of international decision making due to its jurisdiction in doping cases. This is because it overcomes the traditional multiplication of legal disputes before the state courts of various jurisdictions. Therefore, ensuring a certain degree of legal security for both the IAAF and the athlete concerned.

However, every cloud has a silver lining. There is much need for improvement. Quite frankly, one can identify a certain degree of misunderstanding of the legal concepts. This uncertainty is resolved sporadically by some decisions, which will hopefully be followed in the future. These differences are because the arbitrators are limited to the interpretation of existing rules. Here, the call for harmonic criteria touches the legal borders of the CAS jurisdiction. On the other hand, one should clearly consider that the different legal cultures of the arbitrators may also

⁷⁷ *Puerta v. International Tennis Federation* (2006), Court of Arbitration for Sports.

⁷⁸ *Federation Internationale de Natation Amateur*.

⁷⁹ *Federazione Italiana Nuoto v. Federation Internationale de Natation Amateur* (1997), Court of Arbitration for Sports.

cause certain differences as to the understanding of the legal concepts. The clash between legal cultures is one of the features of international arbitration and helps to ensure a certain degree of flexibility in its decisions.

In addition, the ongoing interpretation of doping definitions which contain only a strict liability rule has been rightly criticized with respect to the rights of an accused athlete. The doctrine gives life to the presumption of guilt which on the face of is a recipe for judicial injustice. The crucial question is whether the application of strict liability is appropriate in doping cases. It is doubtful because once an athlete submits his sample, he has no control over it. The reality is full fair trial guarantees before the CAS are yet to be evolved. The liability of athletes in case of the use of banned substances must not override their right to a fair trial before an independent and impartial tribunal.

3.0 **CHAPTER THREE – THE WADA CODE: A PROPONENT OR DETRACTOR OF THE RIGHT TO A FAIR TRIAL.**

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3.1 INTRODUCTION

This Chapter examines the application of the WADA code and if this acts as an inhibitor to the right to a fair trial. This follows with an analysis of the recourses that exist before appellate tribunals. In order to understand the application of WADA code and whether it inhibits fair trial, it is important to first understand the historical background of the organization to understand the role it plays in sports. Different countries tend to prefer one type of sport over another, which leads to more focus being placed on that sport. Additionally, sports can initiate change, bring communities together and have a financially rewarding outcome for the participants. As a result, athletes feel pressured to give and maintain high performance in every event which leads to performance-enhancing measures being used by the athletes.⁸⁰.

3.2 HISTORICAL BACKGROUND OF WORLD ANTI-DOPING AGENCY (WADA)

Efforts to enhance athletic performance is not a modern problem. It dates back to the ancient games where athletes found ways of enhancing their performance other than through training.⁸¹ Athletes would ingest animal parts and portions of plants to increase their effectiveness on the field. In 1908 for example, football teams in Belgium inhaled pure oxygen to increase their performance in football matches.⁸² During this era, human testing had not yet begun and evidence of doping was by way of either confession or eye-witness testimony.

The use of performance-enhancing drugs began in the 20th Century and was limited to alcohol and other stimulants.⁸³ Sports bodies began placing restrictions on the use of these pharmaceutical products in sports with the IAAF banning the use of stimulants in 1928. These restrictions largely remained ineffective since human testing had not yet started. World War II also brought a new drug called amphetamine which was used to increase the alertness of soldiers. After the war, athletes began using the drug to aid their performance. In 1960, the use of anabolic steroids become prevalent in various types of sports. The death of Danish cyclist Knut Jensen in the 1960 Summer Olympics led to more pressure placed on athletics bodies to

⁸⁰ Park K, 'Governing doped bodies: The World Anti-Doping Agency and the global culture of surveillance', 5 *Cultural Studies ↔ Critical Methodologies* 174, 2005, 177.

⁸¹ Mazzoni I, Barroso O and Rabin O, 'The List of Prohibited Substances and Methods in Sport: Structure and Review Process by the World Anti-Doping Agency' 35 *Journal of Analytical Toxicology* 608, 2011, 608

⁸² Thieme D and Hemmersbach P, *Doping in sports*, Springer Science & Business Media, 2009, 4.

⁸³ Mazzoni I, 'The List of Prohibited Substances and Methods in Sport', 608.

control doping in sports. Jensen collapsed and fractured his skull in the middle of the race and later died.⁸⁴ The cause of death was later linked to doping and performance-enhancing drugs. The Federation Internationale de Football Association (FIFA) in 1966, and the Union Cycliste Internationale (UCI) and Union Internationale de Pentathlon Moderne (UIPM) in 1967 compiled a list of prohibited substances.⁸⁵ The International Olympic Committee (IOC) in 1967 instituted its own Medical Committee which had a list of banned substances and conducted testing during the Olympic games. The first test done by the committee was at the 1968 Summer Olympics held in Mexico and the Winter Games in Grenoble. However, all these tests were not very effective since athletes withdrew from using long-standing drugs before the Olympics.⁸⁶

The 1998 Festina scandal during the Tour de France fast-tracked the need for a global body to deal with doping. The scandal started when performance-enhancing drugs were found in the boot of Willy Voet's car.⁸⁷ Voet was a carer of Richard Virenque, one of the leading French cycling stars. Later, doping revelations emerged after police investigations launched searches, raids and arrests.⁸⁸ IOC held an emergency meeting in August 1998 where Dick Pound, an IOC official, stated that there was a need to establish a worldwide anti-doping agency.⁸⁹ In 1999, the IOC convened the World Conference on Doping in Sports in Lausanne, Switzerland. The conference included the United Nations representatives as well as representatives of national governments around the world.⁹⁰ The conference led to the Lausanne declaration which formed the World Anti-Doping Agency (WADA).

3.3 APPLICATION OF THE WADA CODE

WADA has its headquarters in Montreal but also have four regional headquarters. The four regional offices are in Lausanne (Europe), Tokyo (Asia/Pacific), Cape Town (Africa) and Montevideo (Latin America).⁹¹ According to its constitutive document, the objective of the organization is to "promote and coordinate at the international level the fight against doping in

⁸⁴ Segarra L, 'These athletes have died while competing in the Olympics over the years', *Time*, 14 February 2018, <https://time.com/5155540/athletes-who-have-died-competing-in-the-olympics/> on 28 December 2020.

⁸⁵ Mazzoni I, 'The List of Prohibited Substances and Methods in Sport', 608..

⁸⁶ Thieme D and Hemmersbach P, *Doping in sports*, 4.

⁸⁷ Whittle J, 'Twenty years on the Festina affair casts shadow over the Tour de France', *The Guardian*, 3 July 2018, - <https://www.theguardian.com/sport/2018/jul/03/tour-de-france-festina-affair> on 28 December 2020.

⁸⁸ Whittle J, 'Twenty years on the Festina affair casts shadow over the Tour de France'.

⁸⁹ McPherson S, *Doping in sports: Winning at any cost?*, Twenty-First Century Books, 2016, 25.

⁹⁰ McPherson S, *Doping in sports*, 25

⁹¹ Casini L, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)' 6 *International Organizations Law Review* 421, 2009, 8.

sport in all its forms including through in and out-of-competition” among other objects.⁹²WADA has a typical organizational structure with the Board as the supreme organ. Other organs are the Executive Committee and the Auditing Body.

After several decades of disorganization, the formation of WADA brought about the harmonization of anti-doping policies and regulations in the world. The organization also equilibrated the fight against doping by developing a code.⁹³The code acted as a framework for a coordinated policy and rules used by public authorities and sports organizations. Many sports organizations have accepted the WADA code as the base framework to deal with doping issues in their respective sports. As a global hybrid organization, the WADA code has to equally apply to public and private actors.⁹⁴WADA has to ensure a balance of the private and public interests it represents. The private interest is seen in its need to ensure elite athletes abide by the anti-doping rules. The public interest, on the other hand, is to promote a safe, fair and healthy sports environment.⁹⁵

The code has six international standards to ensure consistency among anti-doping organizations.⁹⁶ Two new standards on Education and Results management are set to become operational in 2021. These standards include the following.

3.3.1 The International Standard for Testing and Investigations (ISTI)

At the core of the functions of WADA is the testing of athletes’ samples to find out whether the athlete doped or not. ISTI establishes a mandatory standard of testing applied by laboratories to maintain the integrity of the samples and the identity of the athlete. ISTI provides for the procedure of testing of samples which starts with the planning of the testing, notification of the athlete, collection, post-test administration, transportation and ownership of the samples.⁹⁷ Additionally, the standards prescribe for intelligence gathering and investigation. ISTI contains annexures with detailed guidelines and procedures for various scenarios that may occur during the process of testing.

⁹² Article 4, *Constitutive instrument of foundation of the Agence Mondiale Antidoping*, WADA.

⁹³ Aguilar-Navarro, ‘Sport-specific use of doping substances: Analysis of world anti-doping agency doping control tests between 2014 and 2017’, 55 *Substance use & misuse* 1, 2020, 1.

⁹⁴ Chappelet J and Nicolien L, ‘The institutional governance of global hybrid bodies: The case of the World Anti-Doping Agency’, *Hybridity in the governance and delivery of public services*, 7 Emerald Publishing Limited 1, 2018, 170.

⁹⁵ Chappelet J and Nicolien L, ‘The institutional governance of global hybrid bodies’, 170.

⁹⁶ WADA, ‘The Code’, *World Anti-Doping Agency*, 14 November 2013, - <https://www.wada-ama.org/en/what-we-do/the-code> on 28 December 2020.

⁹⁷ *World Anti-Doping Code International Standards for Testing and Investigations* (2019).

3.3.2 The International Standard for Laboratories (ISL)

One of the major informational tools used by WADA to gather information on new substances is through its accredited laboratories and collaboration with pharmaceutical companies. International sporting events like the Olympics present an opportunity for WADA to collect biological data of athletes participating in the events through the passport approach.⁹⁸WADA, through this standard, sets out the requirements for these laboratories to demonstrate their technical capacities and ability to produce forensically valid results after the testing of samples from athletes.⁹⁹The ISL has the approval process and procedure for laboratories wishing to become approved by the organization.

WADA consistently publishes technical documents and technical letters for its approved laboratories to follow in the testing of samples. It uses sophisticated approaches to prevent doping traps that can result from nutritional supplements adulterated with Anabolic Androgenic Steroids (AAS) or natural products containing steroids.¹⁰⁰ The standards imposed on the laboratories require the laboratories to use state of the art detection mechanisms for long-term doping substances. The technical documents have also allowed the laboratories to develop mechanisms that allow for retrospective testing of samples which aid in the institution of disciplinary proceedings within 10 years from the date of the tested samples.¹⁰¹

3.3.3The International Standard for Therapeutic Use Exemptions (ISTUE)

The United States National Library of Medicine defines therapeutic use as “Uses of chemicals which affect the course of conditions, diseases, syndromes or pathology to benefit the health of an individual”.¹⁰²Therefore, this standard aims to give conditions for a Therapeutic Use Exemptions (TUE) to be issued that allows for the permitted presence of a prohibited substance in an athlete’s sample. The standard imposes responsibilities on anti-doping organizations in making TUE decisions and prescribes the procedure that an athlete can use to apply for TUE exemption.¹⁰³Furthermore, ISTUE gives the process of review of its decisions and has obligations on strict confidentiality.

⁹⁸ Athanasiadou I, ‘Analytical progresses of the World Anti-Doping Agency Olympic Laboratories: A 2016 update from London to Rio’ 8 *Bioanalysis*, 2016, 2265.

⁹⁹ WADA, ‘International Standards’, *World Anti-Doping Agency*, 14 November 2013, <<https://www.wada-ama.org/en/what-we-do/international-standards>> on 28 December 2020.

¹⁰⁰ Athanasiadou I, ‘Analytical progresses of the World Anti-Doping Agency Olympic Laboratories’, 2265.

¹⁰¹ Athanasiadou I., ‘Analytical progresses of the World Anti-Doping Agency Olympic Laboratories’, 2265.

¹⁰² ‘What does therapeutic uses mean?’- <https://www.definitions.net/definition/therapeutic-uses> on 28 December 2020.

¹⁰³ WADA, ‘International Standards’.

3.3.4 The International Standard for the Prohibited List (The List)

The Code allows for the publication of an annual Prohibited list that is the same for all sports.¹⁰⁴The list is published after consultations with all the stakeholders including the national governments and other international organizations. All signatories of the Code have to abide by the prohibited substances lists. WADA has adopted three-pronged criteria to put a substance on the prohibited list. The substance has to satisfy any two out of the three criteria. Firstly, there must be evidence (medical, scientific and pharmaceutical) that the substance could demonstrate performance-enhancing capabilities either alone or in combination with other substances. Secondly, the substance may have actual or potential health risk on the athletes using it.¹⁰⁵ Lastly, the substance contravenes the spirit of the sport.

The prohibited lists are classified under different categories such as gene-editing, steroids, stimulants among others. Some of the substances and methods are prohibited during competitions while others are prohibited out of competitions. The list also contains substances banned in particular sports, owing to the difference in skill, physicality and testing procedures in different types of sports. The current list in force was published on 1st January 2020 and is set to be replaced in 2021 with a new list. WADA also maintains a monitoring program for substances not in the list but that which WADA would like to monitor their use.

3.3.5 The International Standard for the Protection of Privacy and Personal Information (ISPPPI)

In the course of running of anti-doping programs, organizations involved often use sensitive private information of athletes. Consequently, WADA and other Anti-Doping organizations have the responsibility of ensuring adequate protection of the privacy and personal information they collect and use during the process.¹⁰⁶The current ISPPPI in operation came into force in June 2018 and was drafted to be in line with the developments in data protection regulations such as the European General Data Protection Regulation and other international and regional laws.

¹⁰⁴ Millán Aguilar-Navarro, 'Sport-specific use of doping substances', 1.

¹⁰⁵ Del Coso J, Muñoz G and Muñoz-Guerra J, 'Prevalence of caffeine use in elite athletes following its removal from the world anti-doping agency list of banned substances', 36 *Applied Physiology, Nutrition, and Metabolism*, 2011, 555.

¹⁰⁶ *World Anti-Doping Code International Standard Protection of Privacy And Personal Information*, (2018).

ISPPPI provides that the process of handling should be per international standards and applicable law.¹⁰⁷The standard prescribes minimum standards and all anti-doping organizations must comply with it even though compliance will exceed requirements under their national laws. Important principles of data protection such as consent based on adequate information and non-disclosures are all incorporated in the ISPPPI. The standard also has provisions on maintaining the security of the personal information and retention periods for the information.

3.3.6 The International Standard for Code Compliance by Signatories (ISCCS)

The ISCCS was approved by the WADA Executive Committee and became operational in 2018. This standard complements the mandate given to WADA by the code to ensure that the signatories conform with the code and the International Standards. ISCCS sets out the responsibilities of the signatories like the National Anti-doping organizations, IOC, International Paralympic Committee (IPC) among other signatories. It also creates a monitoring program to ensure “that Signatories deliver Anti-Doping Programs within their respective spheres of responsibility”.¹⁰⁸ISCCS also outlines WADA’s role in supporting the signatories in achieving their mandates under the code through measures such as giving the signatories opportunity to rectify non-conformity.

3.4 THE RIGHT TO A FAIR TRIAL AND ITS APPLICATION BY THE WADA CODE

1. Burden of Proof and Evidence

According to the WADA Code, the Anti-Doping Organization has the burden of proving that doping violation has occurred.¹⁰⁹ The Code adopts a standard that is higher than a balance of probabilities but lower than the criminal proof of beyond reasonable doubt. The panel hearing the allegation must be comfortably satisfied that an athlete has violated the Code. Additionally, the code creates a rebuttable presumption that the laboratories carrying out testing of the samples have complied with ISL. However, an athlete may bring evidence to show that the laboratory failed to follow the standards set by WADA.

¹⁰⁷ Clause 4.0, *World Anti-Doping Code International Standard Protection of Privacy And Personal Information*, June 2018.

¹⁰⁸ Clause 5.0, *World Anti-Doping Code International Standard Code Compliance by Signatories*, (April 2018).

¹⁰⁹ Article 3, *World Anti-Doping Code* (2015).

The rebuttable presumption placed by the Code shifts the burden back to the athlete. Indeed, jurisprudence arising from the CAS has evolved to apply the strict liability principle in doping cases. The strict liability approach is used to evaluate the evidence placed before the panel to make a finding that a prohibited material is contained in a sample.¹¹⁰ Official WADA documents have not mentioned the applicability of this principle as seen in article 3 of the Code. However, case laws emanating from CAS consistently show the need for an athlete to establish how a prohibited substance entered into their system.¹¹¹

Placing the burden of proof to the athlete has a potential of impacting on fair hearing, shown by the few athletes who have won a case before the panel. The draft Anti-Doping Rules 2020 states that in cases where the burden shifts to the athlete, the athlete is required to prove the case on a balance of probabilities, a standard which is lower than the comfortability test of the panel.¹¹² Lowering the burden of proof may work in favor of athletes who have often labored to prove their case to the comfortability of the panel.

Additionally, an Anti-Doping organization may also prove a doping offence with circumstantial evidence. CAS has confirmed that the organizations bear the burden of proving and may be so proved even where the evidence is circumstantial. In *Smith De Bruin v FINA*, the tribunal allowed the organization to apply circumstantial evidence and found Michelle Smith to have violated the anti-doping rules.¹¹³ Smith, an Irish swimmer, was found to have altered the urine samples with alcohol despite her contention that a third party had tampered with her samples.

The acceptance of circumstantial evidence is highly prejudicial and may potentially infringe on the right to a fair trial of the athletes. The panels and tribunals have always dismissed claims by athletes of third-party tampering, claiming that the chain of custody of the samples is difficult to interfere with. Most decisions hold the laboratories, storage and transport chains of the samples to be of higher integrity which cannot be interfered with, leaving any room for athletes to succeed on this ground. The standard of proof for circumstantial evidence is that of comfortable satisfaction of the panel, as was established in Smith's case.

2. Testing

Testing Athletes' samples are always subject to WADA's technical documents made in line with ISTI. According to Article 6.4 of the Code, the approved laboratories are required to

¹¹⁰ Richard H McLaren, 'CAS Doping Jurisprudence: What Can We Learn?' Sweet & Maxwell, 2006, 4.

¹¹¹ *UCI & WADA v Hondo & Swiss Olympic* (2005), Court of Arbitration for Sports.

¹¹² Article 3.1, *Draft Anti-Doping Rules* (2020).

¹¹³ *Smith De Bruin v FINA* (1999), Court of Arbitration for Sports.

comply with the technical document. The laboratories are granted the power to “analyze Samples for Prohibited Substances not included in the Sample analysis menu described in the Technical Document or specified by the Testing Authority”.¹¹⁴The freedom given to the laboratories to depart from the technical document can lead to an athlete testing positive for material which is not within their knowledge as they are not described in the technical documents.

Challenges often arise when a new method of testing is used during events. Most athletes may feel that the new testing method does not meet the required standard or is prejudicial to them. One such example occurred during the 2002 Winter Olympics. Two Russian athletes, Larissa Lazutina and Olga Danilova were aggrieved by the decision of the IOC Executive Board to suspend them after a new test detected darbepoetin in their sample. They appealed the decision to the CAS. Expert evidence was called from both sides with the athletes’ expert failing to convince the tribunal.¹¹⁵The standard adopted for a new test was stated by CAS in *Muchlegg v IOC*. The arbitrator stated as follows:

“What must be established to the comfortable satisfaction of the panel is that the testing procedure as carried out was in accordance with the prevailing standards and practice of the scientific community”¹¹⁶

The higher standard adopted for new testing aids in the rights of the athletes to a fair hearing to be implemented.

3. Fair Hearing

The legal nature of the sanctions imposed by the code is not criminal in their nature. According to a legal opinion given by Jean-Paul Costa to WADA, violation of the code are not criminal within the meaning of article 6 of the European Convention on Human Rights. Article 6 of the convention provides for the right to a fair trial. Costa stated that the concept of a fair trial before the panels are those of civil nature and not of criminal nature such as innocence till proven guilty.¹¹⁷ CAS decisions have corroborated the stand that the sanctions are not criminal in nature. This was seen in *Mutu & Pechsteing v Switzerland*. However, in the case, the court

¹¹⁴ Article 6, *WADA Code* (2015).

¹¹⁵ *Lazutina and Danilova v IOC* (2002), Court of Arbitration for Sports.

¹¹⁶ *Muchlegg v IOC* (2002), Court of Arbitration for Sports.

¹¹⁷ Jean-Paul Costa, ‘Legal Opinion 2019 (Expert Opinion) on the World Anti-Doping Code’, WADA Publications 26 September 2019, 5, https://www.wadaama.org/sites/default/files/resources/files/avis_2019_code_mondial_en.pdf .accessed on 30 December 2020.

stressed the importance of fair trial and that CAS must guarantee that the athletes are going to be accorded a fair hearing.¹¹⁸

The situation is, however, different in the Kenyan legal sphere. The Kenyan Anti-Doping Act 2016 creates certain offences on doping which are criminal in nature. Section 42 of the Act creates offences relating to medical practitioners, persons in recreational sports and sports bodies.¹¹⁹ The Act excludes Sports tribunal's jurisdiction for offences of criminal nature provided for under the Act.¹²⁰ These offences are triable in Kenya's local courts, which are subject to the constitutional provisions on fair trial.¹²¹ Nevertheless, violations by athletes of certain rules of the Anti-Doping Agency of Kenya (ADAK) have not been criminalized and are subject to the rules set by the Agency. Even though certain violations are not criminal in nature, the administrative sanctions imposed on the athletes necessitates the need for the agencies and the tribunals to ensure the right to a fair hearing of the athletes.

Consequently, article 8 of the Code obligates all Anti-Doping organizations to provide at a minimum fair hearing for athletes charged with violations of the rules. The aspects of fair hearing provided by the code include trial within a reasonable time, by an impartial panel and a timely and well-reasoned decision explaining the outcome. The code also provides for expedited hearings in the course of an event.¹²²

In Kenya, the Anti-Doping Rules provides for the right to a fair hearing in all disputes relating to anti-doping violations referred to the Sports Tribunal.¹²³ The sports tribunal has jurisdiction to hear both in the first instance and as an appellate body for decisions of ADAK. Members of the tribunal must have no prior involvement in the case and must inform the chairperson of any circumstances which is likely going to lead to impartiality in the case.¹²⁴ The sports tribunal is required to write its decision with full reasons for any imposed sanctions or a justification on why the consequences were not imposed on the athlete.¹²⁵ ADAK has the responsibility of providing the athlete or any other person with the decision. All of ADAK's decisions are appealable.

¹¹⁸ *Mutu and Pechstein v. Switzerland* (2018), European Court of Human Rights.

¹¹⁹ Section 42, *Anti-Doping Act* (Act No 5 of 2016)

¹²⁰ Section 31(7), *Anti-Doping Act* (Act No 5 of 2016).

¹²¹ Article 50, *Constitution of Kenya* (2010).

¹²² Article 8.2, *WADA Code* (2015).

¹²³ Article 8.1.1, *Anti-Doping Rules* (2016).

¹²⁴ Article 8.1.7 and 8.1.8, *Anti-Doping Rules* (2016).

¹²⁵ Article 8.3.1, *Anti-Doping Rules* (2016).

As seen above, the WADA code has comprehensive substantive provisions to uphold the right to a fair hearing of athletes. Despite these provisions in both the WADA Code and the National Anti-Doping Rules, athletes all over the world still feel that their right to a fair hearing is not properly upheld in the tribunals. In many cases both at the CAS and local tribunals, athletes have raised concerns of violation of their right to a fair trial. Jurisprudence emanating from CAS has evolved to cure this concern by allowing athletes to present new evidence before it.¹²⁶The CAS has the power to hear both facts and law and call new evidence as was held in *N.J.Y.W. v Fédération Internationale de Natation (FINA)*.¹²⁷This allows for calls of fair hearings to reduce as it is pointless to raise a violation of the right by the lower body.

However, some scholars still state that the right to a fair trial may not be achieved, particularly by athletes from developing countries. Eferström and Bäckström state that inequities and structural injustices emerge at a more individual level due to the difference in conditions and contexts.¹²⁸Access to justice issues such as the delays in the process and expenses are some of the obvious causes of worries in the application of the Code. For instance, a party filing for arbitration at the CAS are required to pay a sum of 1000 Swiss Francs or roughly one hundred and twenty-two thousand Kenya Shillings.¹²⁹This huge sum may not be affordable for a majority of young or amateur athletes.

Another aspect of a fair trial is seen in the forced nature of the arbitral tribunal. The concept of a fair trial rests on a person's access to a fair and impartial court established by the law. In sports-related disputes, the right of access to courts is replaced by the Sports Tribunal or the CAS.¹³⁰Even though both these bodies are independent and impartial, they cannot be construed as courts established by law as parties approach them by agreement. In *X v ATP Tour et Tribunal Arbitral du Sport (TAS)*, it was noted as follows:

“Faced with the choice to submit to arbitration or to practice his sport in his garden, by watching the competitions on TV, the athlete who wants to compete with real

¹²⁶ Star S and Kelly S, ‘A Level Playing Field in Anti-Doping Disputes? The Need to Scrutinize Procedural Fairness at First Instance Hearings’, *The International Sports Law Journal*, 2020, 14 - <https://doi.org/10.1007/s40318-020-00176-6> on 29 December 2020.

¹²⁷ *N,J,Y,W v Fédération Internationale de Natation (FINA)* (1998), Court of Arbitration for Sport.

¹²⁸ Eferström A and Bäckström Å, ‘Different Societies, Different Conditions : Lessons from Anti-Doping in Elite-Sport on a Global Level’, Aarhus University, Department of Public Health, 2017, 7-
<http://urn.kb.se/resolve?urn=urn:nbn:se:gih:diva-5050> on 29 December 2020.

¹²⁹ ‘Arbitration Costs’ <https://www.tas-cas.org/en/arbitration/arbitration-costs.html> on 29 December 2020.

¹³⁰ Pentsov D and de Montmollin J, ‘Do Athletes Really Have the Right to a Fair Trial in “Non-Analytical Positive” Doping Cases?’, *22 American Review of International Arbitration* 189, 2011, 207.

competitors or who is forced to do so because this represents his only source of income.”¹³¹

The above excerpt shows the little power that athletes have in these disputes, despite doping offences being civil in nature.

3.5 CASE LAW ANALYSIS ON THE RIGHT TO FAIR TRIAL OF ATHLETES

The Indian case of Amar highlighted some of the major issues facing athletes from areas with challenges in access to justice. Amar had tested positive for a prohibited substance during National Indian Championship and was provisionally suspended. The case was heard two years later while Amar was still serving his provisional suspension and with the tribunal further delaying in giving its award.¹³² The CAS compounded to the concerns denial of the right by stating that concerns of the right to a fair hearing “fade away to the periphery” as the tribunal can remedy the violation.¹³³ Even though the CAS can remedy some violations, an athlete may have suffered irreparable harm occasioned by such delays in access to justice. In cases where the appellate tribunal finds innocence of the athlete, a lot of time may have passed leading to the athlete missing out on many competitions due to suspension.

In Kenya, the case of Rita Jeptoo brought the plight of athletes to the limelight. Rita Jeptoo won the Boston Marathon on 20th April 2014 and tested negative for a prohibited substance.¹³⁴ She later tested positive after her urine sample was collected on 25th September 2014. Jeptoo claimed that she had an accident and had suffered from malaria and typhoid. Jeptoo alleged that she had been receiving medication from Dr Kyla as the accident and the illnesses had reduced her blood count. Athletics Kenya notified her of the suspension and she appealed the decision. She was found guilty of doping and was notified about the same.¹³⁵ She filed an appeal at CAS. IAAF submitted to the CAS that traces of the banned recombinant EPO (rEPO) had been found in her blood even before the marathon.

The CAS revised the suspension to four years owing to the inconsistencies of the evidence given by Jeptoo. Jeptoo was unsure as to when the accident occurred and kept changing the

¹³¹ X. v. ATP Tour et Tribunal Arbitral du Sport (TAS) (Switz.) ATF 133 III 235 (2007), English translation found in Christoph Muller, *Swiss Case Law in International Arbitration*, 2nd Edition, Schulthess, 2010, 48–49

¹³² Star S and Kelly S, 'A Level Playing Field in Anti-Doping Disputes?', 18.

¹³³ *Amar Muralitharan v. Indian National Anti-Doping Agency (NADA)*, *Indian National Dope Testing Laboratory, Ministry of Youth Affairs and Sports* (2014), Court of Arbitration for Sports.

¹³⁴ *International Association of Athletics Federation (IAAF) v Athletics Kenya and Rita Jeptoo* (2015), Court of Arbitration for Sports.

¹³⁵ Nzyuko N, 'The Right to a Fair Trial in Sports Arbitration' (Dissertation, Strathmore University 2018), 22 <<https://su-plus.strathmore.edu/handle/11071/6219>> on 29 December 2020.

dates during the trial process. The panel agreed with Jeptoo that injecting rEPO to boost her blood levels after the accident amounted to therapeutic use.¹³⁶ However, since she kept on changing the dates, the panel suspended her for four years. Notable issues from the trial included Jeptoo's struggle in finding a counsel to represent her. During the trial, her lawyer withdrew from the case two days before the hearing, leading to the International Council of Arbitration for Sport (ICAS) appointing a counsel to represent her on a pro bono basis.¹³⁷ The hearing proceeding without Jeptoo after she had joined via telephone call and left during the opening statement. Athletics Kenya also failed to join the hearing despite announcing their presence at the hearing.

Amar and Jeptoo's case highlight critical issues that the application of the WADA code raises. The Code's universal application, even though achieves harmonisation of anti-doping laws, raises concerns due to the unequal nature of athletes from various parts of the world. Furthermore, the code lacks a distinction between minor and professional athletes as was seen in *I v Fédération Internationale De L'automobile (FIA)*.¹³⁸ The distinction only arises to determine the degree of fault which could lighten the sanctions to be imposed by the disciplinary body.

3.5.1 The Recourses available before the Appellate Tribunal

1. Sports Disputes Tribunal (SDT)

The Sports Dispute Tribunal is established under the Sports Act 2013. According to the Act, the SDT consists of members appointed by the Judicial Service Commission in consultation with the national sports organizations.¹³⁹ It is the first appellate tribunal available for athletes facing anti-doping violation accusations. The jurisdiction of the tribunal as provided for under section 58 of the Act as follows;

“The Tribunal shall determine

a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including—

(i) appeals against disciplinary decisions; ...

¹³⁶ Nzyuko N, 'The Right to a Fair Trial in Sports Arbitration', 22.

¹³⁷ Cottrell S, 'IAAF Appeal Upheld - Rita Jeptoo Suspended for Four Years by the Court of Arbitration for Sport (CAS)', Law In Sport, 26 October 2016, -<https://www.lawinsport.com/newsletters> on 29 December 2020.

¹³⁸ *I. V. Fédération Internationale De L'automobile (2010)*, Court of Arbitration for Sports.

¹³⁹ Section 55(2), *Sports Act* (Act No 25 of 2013).

(b) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear...”¹⁴⁰

The Anti-Doping Act additionally, provides for the jurisdiction of the SDT in doping violation matters. It gives SDT the jurisdiction to determine all disputes regarding anti-doping rule violations of athletes and athlete’s sporting staff and compliance from the sporting organizations.¹⁴¹ The tribunal has both original and appellate jurisdiction to hear matters involving national and county level athletes. For international athletes, the tribunal only has first instance jurisdiction, with the appellate jurisdiction reserved for the CAS.¹⁴²

Athletes appealing to the SDT from the sporting organizations and Anti-Doping Agency have the reserve the right of appeal from SDT to the CAS. The appeal must be filed within thirty days from the communication of the tribunal’s decision. The Act does not mention the remedies that SDT can give. Kariuki Muigua states that the absence of provisions for remedies is a major shortcoming of the Act and can be used to challenge remedies granted by the Tribunal.¹⁴³ The SDT is, however, empowered to make its own rules of procedure.

2. Court of Arbitration in Sports

The CAS is an arbitral body established by the Code of Sports-related Arbitration.¹⁴⁴ The World Anti-Doping Code (WADC) provides that the remedies provided for by an Anti-Doping Organization must first be exhausted before moving to CAS.¹⁴⁵ In Kenya, the Anti-Doping Act provides that the ADAK may appeal against a decision of WADA or any other International Federation to the CAS without having to go through the SDT.¹⁴⁶ International Level athletes, athlete support personnel, the Agency, an international federation or the WADA may also appeal against decisions made by SDT.¹⁴⁷

CAS Procedural rules stress the importance of impartiality of the judges to ensure fair hearing and trial. Every arbitrator is required to maintain impartiality and must disclose any circumstances that may affect their independence.¹⁴⁸ A challenge commission is established to

¹⁴⁰ Section 58, *Sports Act* (Act No 25 of 2013).

¹⁴¹ Section 31(1), *Anti-Doping Act* (Act No 5 of 2016).

¹⁴² Section 31(4) & (5), *Anti-Doping Act* (Act No 5 of 2016).

¹⁴³ Muigua K, ‘Promoting Sports Arbitration in Africa’, *Promoting Sports Arbitration in Africa*, Kariuki Muigua & Company Advocates, 2019, 24 <http://kmco.co.ke/wp-content/uploads/2019/12/Paper-on-Promoting-Sports-Arbitration-in-Africa.pdf> accessed on 30 December 2020.

¹⁴⁴ Section 1, *Code of Sports-related Arbitration* (2020).

¹⁴⁵ Article 13.1, *World Anti-Doping Code* (2015).

¹⁴⁶ Section 32(1), *Anti-Doping Act* (Act No 5 of 2016).

¹⁴⁷ Section 32(2), *Anti-Doping Act* (Act No 5 of 2016).

¹⁴⁸ Rule 33, *Code of Sports related Arbitration* (2020).

determine the challenges of an arbitrator's independence and decide on their removal. Rule 27 of the code provides that CAS may award conservatory orders to a party subject to exhaustion of the internal remedies of the federation or the sports agencies. The arbitral award given by CAS is final. However, in some instances, certain recourses may be allowed by Swiss law within 30 days from the notification of the award.¹⁴⁹CAS may also give directions as to the costs of the proceedings relating to matters such as administrative fees, cost and fees of arbitrators, CAS Court fees among other costs.

3.6 CONCLUSION

In conclusion, WADC has adequate provision to ensure the rights of a fair trial of athletes is achieved. The code stresses the need for a fair trial to be accorded by disciplinary committees and the tribunals. Even when meting out the sanctions on the athletes, the code states that principles of proportionality and fault must be taken into consideration by the disciplinary body. In the case of *Ferdinand Omanyala v Athletics Kenya*, the Sports Dispute Tribunal noted these two important principles in determining whether AK's decision to ban all athletes who had previously violated the Code from participating in competitions. The tribunal found that the respondents had violated the basic principles of proportionality and fault as it defeated the purpose of differentiation in the policy.¹⁵⁰

What remains as a challenge is various aspects of the code. WADA and WADC were created to achieve harmonization of all anti-doping laws and rules and while this has largely been achieved, it is still important to critique the overall role it has played in ensuring both the weeding out of doping in sports while achieving fair trial for the athletes at the same time. The overall approach adopted by the Code, supported by the jurisprudence of CAS imposing the obligation on athletes to establish how the prohibited substance entered into their system remains a major obstacle for most athletes.¹⁵¹Other individual factors may also contribute as inhibitors to the right to a fair trial

¹⁴⁹ Rule 46, Code of Sports related Arbitration (2020)

¹⁵⁰ *Ferdinand Omanyala v Athletics Kenya* ([2019] eKLR

¹⁵¹ *World Anti-Doping Agency (WADA) v. Sri Lanka Anti-Doping Agency (SLADA) & Don Dinuda Dilshani Abeysekara* (2016), Court of Arbitration for Sport.

4.0 CHAPTER 4: A COMPARATIVE ANALYSIS ON THE INTERNATIONAL BEST PRACTICES IN THE FIGHT AGAINST DOPING.

4.1 INTRODUCTION

Doping is a huge problem that affects sports and athletes worldwide. Although doping continues to erode fair competition in sports, the challenge of ensuring athletes accused of doping receive a fair trial remains a huge consideration for national sporting organizations as well as the CAS.¹⁵² The current trial system adopted by anti-doping agencies strictly apply the WADA code, which in many instances sometimes inhibit the rights of athletes to a fair hearing. Even though the WADA code¹⁵³ stipulates that athletes have rights to a fair hearing when facing accusations of doping, most sporting tribunals across the world give precedence to procedural rules over substantive rules. This widely threatens the right of athletes to receive a fair hearing.¹⁵⁴ Fair hearing is a cardinal element of natural justice and is recognized internationally, as one of the core rights inherent to accused persons. Therefore, even in the quest of ensuring integrity in sporting activities, sporting tribunals and CAS have an obligation to promote and uphold the tenets of fair trial against athletes appearing before them.¹⁵⁵

This chapter analyses international best practices regarding the trial of athletes in order to determine whether these practices promote and uphold the rights of athletes to a fair hearing when they face accusations of doping. It will analyse best practices in selected European countries as well as the United States of America. Many countries have domesticated the WADA code, condensing it into a domestic Act of Parliament to guide their national sporting tribunals when conducting trials of athletes accused of doping. As such, countries apply different standards and approaches as far as trial of athletes and the right to fair hearing comes into question.¹⁵⁶ Even though WADA code and most domestic legislations guiding trial of doping cases guarantee fair hearing, athletes, especially those from developing countries with inability to reach the CAS, still experience violation of this rights by domestic tribunals and sporting organizations.¹⁵⁷

¹⁵² Boye E, Skotland T, Østerud B, Nissen-Meyer J, "Doping and drug testing: Anti-doping work must be transparent and adhere to good scientific practices to ensure public trust." 18 *EMBO Reports* 3, 2017, 351-353.

¹⁵³ Article 8, *WADA CODE* (2019).

¹⁵⁴ Blair F, "Procedural Fairness in Doping Disputes," 22, *UNSWLJ*, 1999, 885.

¹⁵⁵ Blair "Procedural Fairness in Doping Disputes," 885.

¹⁵⁶ De-Montmollin J and Dmitry AP, "Do Athletes Really Have the Right to a Fair Trial in 'Non-Analytical Positive' Doping Cases?." 22 *American Review of International Arbitration* 2, 2011, 189-240.

¹⁵⁷ Dawer D, "Levelling the Playing Field: Why the USADA Must Adopt a Criminal Burden of Proof in Anti-Doping Proceedings." 2008.

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4.2 BEST PRACTICES IN THE UNITED STATES

Certain practices in America help entrench the right to a fair trial to athletes during doping cases. Even though Athletes have had numerous challenges with the United States Anti-Doping Agency (USADA) in anti-doping proceedings, those playing in American professional leagues have enjoyed some level of protection compared to those representing United States in international sporting activities. Most athletes playing professional leagues have enjoyed protection from US domestic laws as well as representation from their professional or player's associations.¹⁵⁸ These associations have represented their members in anti-doping proceedings, availing resources and proficient legal representation to their aid. In addition, the participation of the player's associations has prevented USADA from violating the cardinal rights to fair trial when enforcing compliance of the WADA code.¹⁵⁹

The United States government has also waded itself into the doping issue by bringing the supplement industry under scrutiny. The Food and Drug Administration (FDA) warned athletes against consuming bodybuilding substances sold over the counter as nutritional supplements, for danger that these supplements may contain banned substances, leading to unintentional doping. The government, through FDA, took an active role in preventing cases of unintentional doping, which may hinder the career of athletes in the country.¹⁶⁰ The FDA's move to crack down companies selling substances containing steroids helps in preventing admonition of athletes based on non-intentional doping, as they will have evidence of unintended consumption of banned substances. Further, United States passed a legislation that seeks to clean up sports by punishing institutions or organizations that promote doping in America and beyond. The legislation opens leeway for athletes to whistle blow on schemes that promote intentional and non-intentional doping in the country.¹⁶¹ World Players Association (WPA) lauded the legislation because it focuses on institutions, organizations and team owners who

¹⁵⁸ Feidler S, "Fundamental Rights of International Athletes in the Court of Arbitration for Sports Viewed through the Eyes of the US Constitution in Cases Involving Anti-Doping Violations." 3 *Resolved: J. Alternative Dispute Resolution*, 2013, 9.

¹⁵⁹ Feidler S, "Fundamental Rights of International Athletes," 9.

¹⁶⁰ Greene P, "United States Anti-Doping Agency v. Montgomery: Paving a New Path to Conviction in Olympic Doping Cases." 59 *Maine Law Review*, 2007, 149

¹⁶¹ Henning AD and Paul D, "The complexities of anti-doping violations: A case study of sanctioned cases in all performance levels of USA cycling." 3 *Performance Enhancement & Health* 3, 2014, 159-166.

might encourage use of performance enhancing substances as opposed to athletes. This offers reprieve to athletes' rights to a fair trial, which have suffered since time immemorial.¹⁶²

4.3 BEST PRACTICES IN EUROPE

In many countries, the law does not allow judicial review of decisions made by sporting bodies in numerous issues including anti-doping proceedings. However, in Scotland, the law does not discriminate between private and public matters and they have readily granted judicial review to decisions made by sporting bodies.¹⁶³ This has buttressed the rights of athletes to a fair trial against national sporting organizations. In *St Johnston FC v Scottish Football Association*,¹⁶⁴ the court granted judicial review against proceedings by the Scottish Football Association, which led to disciplinary action against the Applicant. The Court found itself to have had jurisdiction to conduct the review despite the matter falling in the realm of private law. This approach by Scottish Courts ensures anti-doping agencies respect the right to a fair trial for athletes appearing before it for disciplinary proceedings. Moreover, this approach ensures athletes have recourse in domestic courts before moving to the CAS if they please.¹⁶⁵

New Zealand also offers another example where the right of an athlete to a fair trial against a national governing body or federation remains a subject of judicial review within local courts. Unlike England where courts are not subject to decisions under private law such as contract to judicial review, the Judicature Act of 1972 allows courts to review decisions of sports organizations in the New Zealand, irrespective of the public or private nature of their authority.¹⁶⁶ This explains the two instances in which the court has reviewed the disciplinary decisions undertaken by the New Zealand Rugby Football Union (NZRFU). The ability to review decisions of sporting organizations protects athletes from rampant violation of their rights to a fair trial, as studies indicate that CAS most likely sides with national sporting organizations against athletes when determining appeals before it in relation to disciplinary proceedings.¹⁶⁷ Further, the case of *Mutu and Pechstein V. Switzerland* speaks to the regional involvement of the EU in protection of basic international human rights, which include the right to a fair trial.

¹⁶² Kaufmann-Kohler G, Giorgio M, and Antonio R, "Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-Doping Code." *International Sports Law Review*, 2003, 39-52 - <<https://archive-ouverte.unige.ch/unige:44126>> on 23 January 2021.

¹⁶³ Henning A, and Jesper A, *Preventing, producing, or reducing harm? Fitness doping risk and enabling environments. Drugs: Education, Prevention and Policy*, Taylor & Francis, Milton Park, 2020, 1-10.

¹⁶⁴ *St Johnston FC v Scottish Football Association* (1965), The Scottish High Court.

¹⁶⁵ Henning and Jesper, *Preventing, producing, or reducing harm?* 1-4.

¹⁶⁶ Haggie M, "The Judicial Disciplinary Procedures of the New Zealand Rugby Football Union." *Victoria University. 29 Wellington Law Review*, 1999, 317.

¹⁶⁷ Haggie M, "The Judicial Disciplinary Procedures of the New Zealand Rugby Football Union," 317.

The applicants moved to the European Court of Human Rights alleging violation of their right to a fair trial by the Court of Arbitration for Sports (CAS).¹⁶⁸ The applicants challenged the legality of the proceedings instituted against them before the CAS arguing that pursuant to the European Convention on Human Rights, CAS could not operate as an independent and impartial tribunal because some members of its panel had biased interests. Even though the court found against the allegations for denial of the right to a fair trial, the judges recognized that arbitration proceedings undertaken by CAS required safeguards of fair hearings to protect the interests of accused persons appearing before it for disciplinary appeals.¹⁶⁹

The European Court of Human Rights' decision to hear this appeal alleging violation of a right to fair trial in a doping proceeding before CAS had a huge and significant impact of uplifting the right to a fair trial in arbitration proceedings to an international status.¹⁷⁰ This move could embolden human rights courts from other regions such as America, Africa and Asia to undertake to listen to complaints relating to the right to fair hearing arising from anti-doping proceedings before national governing agencies or organizations. In a way, the European Court of Human Rights undertook a "judicial review" process against the proceedings before the CAS on doping allegations levelled against the applicants.¹⁷¹

4.4 OBSERVATIONS OF THE ANTI-DOPING CONVENTION MONITORING GROUP

In 2017, the Anti-Doping Convention Monitoring Group made recommendations to member states on how to establish independent panels for anti-doping proceedings as means of guaranteeing athletes their rights to receive a fair trial. The Monitoring group recommended that member states should create independent, centralized and impartial panels to hear doping disputes as opposed to national sporting federations, which could exercise biasness.¹⁷² Further, the group recommended that member state should tailor anti-doping proceedings to protect athletes' right to a fair trial by ensuring:

¹⁶⁸ Dos Santos C, "European Court of Human Rights Rules upon Sports-Related Decision: Switzerland Condemned" 37 *ASA Bulletin* 1, 2019.

¹⁶⁹ Dos Santos C, "European Court of Human Rights Rules upon Sports-Related Decision," 2019.

¹⁷⁰ Wojtowicz P, "You Will Be Heard: The European Court of Human Rights Clarifies the Arbitration Right to a Public Hearing." 37 *Alternatives to the High Cost of Litigation* 2, 2019, 27-32

¹⁷¹ Wojtowicz P, "You Will Be Heard," 32

¹⁷² Toby W, Lambros L, Vassilis B, and Andrea P, "Doing what is right and doing it right": A mapping review of athletes' perception of anti-doping legitimacy." 84 *International Journal of Drug Policy*, 2020-<http://www.sciencedirect.com/science/article/pii/S095539592030205X> on 22 January 2021.

- i. The independence of the hearing panel. The panel should have and retain its independence from the government, sporting federations, National Olympic Committees, and National Anti-Doping Organisation among others.¹⁷³
- ii. Only independent and competent members sit in the panel. The panel should have odd number of members sitting and the chair of the panel and one other member should have a background in the practice of law.¹⁷⁴
- iii. The panel should have rules ensuring an accused athlete can access the hearing against them and have enough time to mount a defense to support their case by challenging evidence given by the sporting organization. The state should also establish legal aid mechanisms to assist athletes in this respect.¹⁷⁵
- iv. The panel should extend right of appeal, public hearings and right to receive written notifications of decisions to the athlete. Further, athletes should have the right to mount a defence by asking for discovery, calling witnesses and having access to all relevant documents.¹⁷⁶

These recommendations by the Monitoring group to the Anti-Doping Convention represent some of the best international practices, which may aid member states in entrenching the right to a fair trial for athletes facing anti-doping proceedings. The working group noted the problematic practice of anti-doping proceedings and the potential violation of athletes' rights to a fair trial from these proceedings.

4.5 CONCLUSION

In many countries, sporting disputes such as doping between governing bodies or anti-doping agencies and athletes do not enjoy the trappings of judicial review of local judicial intervention because they are matters of private law. Therefore, appeals against decisions of governing bodies lie with CAS, which sits in Switzerland. The inadequacy of contract jurisdiction approach to sports disputes, especially those relating to doping exposes athletes to possible violations of their right to fair trial.¹⁷⁷ For instance, although professional athletes usually have contracts that give effect to the contract jurisdiction, most amateur professionals lack contracts

¹⁷³ Toby et al, "Doing what is right and doing it right."

¹⁷⁴ Toby et al, "Doing what is right and doing it right."

¹⁷⁵ Toby et al, "Doing what is right and doing it right."

¹⁷⁶ Toby et al, "Doing what is right and doing it right. "

¹⁷⁷ Van der Sloot B, Mara P, and Ronald L, *Looking at the Anti-Doping Regime through a Human Rights Lens. Athletes' Human Rights and the Fight against Doping: A Study of the European Legal Framework*, TMC Asser Press, The Hague, 2020, 189-243.

and may suffer from procedural unfairness of WADA code applied by national governing bodies or CAS.¹⁷⁸

Anti-Doping Convention Monitoring Group correctly observed that the challenge of implementing the right to a fair trial for athletes subjected to anti-doping proceedings both in the national governing council and before CAS remains the incessant procedural abnormalities resulting from strict application of the WADA code. Even though international sports demands consistency in law procedural and substantive law applied to resolve doping disputes, the constant violation of the athletes' rights to fair trial continues to pain the anti-doping system as a corrupt and faulty system.¹⁷⁹

¹⁷⁸ Weston MA, "Simply a Dress Rehearsal-US Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport." 38 *Georgia Journal of International and Comparative Law*, 2009, 97.

¹⁷⁹ Van der Sloot et al, *Looking at the Anti-Doping Regime through a Human Rights Lens*, 189-221.

5.0 CHAPTER 5: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 FINDINGS

From the study, it is evident that even though athletes have a right to be represented by counsels at their own expenses, the timelines for conducting the doping proceedings and the costs usually robs them the opportunity to acquire proficient legal representation. Secondly, arbitrator conflicts also hamper rights to a fair trial in the CAS as some of the arbitrators have concomitantly severed as advocates for different parties before the tribunal.¹⁸⁰ Most anti-doping proceedings do not employ meaningful fair hearing rights because they do not incorporate clear procedures and protocols for discovery by athletes accused of doping. Athletes representing countries in different sporting activities lack protections from player association, making it easier for tribunals to disregard athletes' rights to a fair hearing in most anti-doping cases. These and many other factors demonstrate the lack of fair trial accorded to athletes during doping proceedings both domestically and internationally.¹⁸¹

5.2 CONCLUSION

The establishment, role and operation of the CAS attracts divided opinion in the world of sports. However, regardless of the opinion held by different categories of people, the court is emerging as a major and important institution in sports across the globe. In light of the growing number of doping cases and the primary role taken by CAS and its affiliates in curbing this vice, it is necessary to evaluate the openly complex and contradictory systems of hearing employed by CAS.¹⁸² Doping is a significant threat to sporting activities across the globe. Doping in sports endangers not only the wellbeing of athletes and the fair competition of sporting events, but also the overall integrity and growth of internal sports as well. Doping can occur intentionally and unintentionally.¹⁸³ Although sporting players largely consent that intentional doping is cheating, there is a huge division in opinion whether non-intentional doping constitutes cheating within the realm of sports. The international sporting community has adopted measures against doping; the WADA code, which prescribes strict liability against

¹⁸⁰ Straubel M, "Enhancing the performance of the doping court: how the court of arbitration for sport can do its job better." 36 *Loyola University Chicago Law Journal*, 2004, 1203.

¹⁸¹ Oschutz F, "Harmonization of anti-doping code through arbitration: The case law of the Court of Arbitration for Sport." 12 *Marquette Sports Law Review*, 2001, 675.

¹⁸² Mavromati D, *Applicability of Swiss law in doping cases before the CAS and the Swiss federal tribunal. Yearbook of international sports arbitration 2016*. TMC Asser Press, The Hague, 2017, 17-39.

¹⁸³ Lenskyj HJ, *The War on Doping. Gender, Athletes' Rights, and the Court of Arbitration for Sport*, Emerald Publishing Limited, Bingley, 2018.

athletes found guilty of doping. Anti-doping agencies employ this code strictly, when dealing with athletes accused of doping domestically as well as internationally. Further, athletes found guilty of doping by anti-doping agencies are increasingly also facing criminal proceedings before national courts for criminal sanctions.¹⁸⁴

The strict application of the WADA code is an inhibitor to the right to a fair trial for athletes accused of doping because of the measures that it places for hearing of doping allegations. While the WADA code purports to guarantee a “right to a fair trial” to athletes accused of doping, the rules, system of arbitration and participants of the process indicated a significant departure from process employed by courts of law.¹⁸⁵ Firstly, under the WADA code, CAS and anti-doping agencies presume as valid, the doping report produced only by a laboratory accredited by WADA. The fact that CAS and anti-doping agencies treat this report as conclusive proof of doping infringes on the rights of athletes to a fair trial, by denying them the opportunity to challenge the veracity and scientific accuracy of the report.¹⁸⁶ Secondly, the burden of proof is on the athlete arguing against his presumption of guilt to prove his innocence. This burden placed on the athlete infringes on the athlete’s rights to a fair trial because he or she is likely at an information and resource disadvantage to present evidence rebutting the presumption of doping by demonstrating the departure of the laboratory practices from internationally recognized standards.

The case of *Floyd Landis v USADA* demonstrates the downside of the rules on the burden of proof in the WADA code. Landis, a US cyclist took on the anti-doping agency against a report filed by a French laboratory that indicted a positive doping test against him. Unlike many athletes, Landis was able to mobilize financial resources to hire proficient legal representation in an uphill legal battle that costed him 2 million dollars. However, despite unearthing massive lab malpractices, the CAS panel affirmed his disqualification by USADA and even imposed a \$100,000 fine against Landis for bringing “unfounded claims” against the French laboratory. This decision indicated the manner in which the CAS frowned upon athletes challenging the doping reports presented to support claims of doping against them.¹⁸⁷

Furthermore, the inability of the Landis and his proficient legal team to win against USADA only asserts the infallible nature of WADA testing. The fact that USADA has only lost less than two doping cases to date demonstrates the bitter reality that most athletes cannot win

¹⁸⁴ Lenskyj HJ, *The War on Doping*, 2018.

¹⁸⁵ Boye et al, “Doping and drug testing” 352.

¹⁸⁶ Blair “Procedural Fairness in Doping Disputes,” 885.

¹⁸⁷ De-Montmollin and Dmitry, “Do Athletes Really Have the Right to a Fair Trial,” 189-202.

against USADA, regardless of their guilt or innocence. The WADA code does not protect the right to a fair trial for athletes because it fails to protect their rights adequately against the infallible nature of the doping reports from the laboratories.¹⁸⁸ In addition, WADA places the burden of proving test invalidity on the athletes without explicitly offering them access to discovery, and opportunity to dispute the test from WADA accredited labs scientifically, in order to prove their innocence. The expedited nature of the hearings as demanded by the WADA code also denies athletes time and opportunity to assemble finances necessary for acquiring proficient legal representation.¹⁸⁹

The standard of care demanded by the WADA code and evidenced in rulings of the CAS indicate the disregard to non-intentional cases of doping among athletes. This opened way for non-analytical prosecutions witnessed in the Bay Area Laboratory Co-Operative (BALCO) scandal. USADA successfully prosecuted and succeeded in doping cases against athletes without evidence of positive drug test but on mere reliance on circumstantial and corroborated evidence. The cases of *USADA v Collins* and *USADA v Montgomery* illustrated the infringement of the right to a fair trial for athletes by anti-doping agencies.¹⁹⁰ Furthermore, the decision of CAS to uphold the decision against Montgomery because of non-analytical positive reneged the measures to protect athletes' rights to a fair trial in doping proceedings. Therefore, looking at some international practices such as the prosecution of athletes by agencies on sole reliance to non-analytical results also promote the derogation of the right to a fair trial for athletes. In most cases, the CAS only rubberstamps the decisions made by national anti-doping agencies, creating a weak jurisprudence for protection of athletes accused of doping by these agencies. The weak jurisprudence in relation to the protection of the right to a fair trial for athletes has derogated the respect for CAS among many athletes internationally.¹⁹¹

5.3 RECOMMENDATIONS

The problem of fair hearing for athletes during doping proceedings by national anti-doping agencies as well as international tribunals remains a critical problem in the global sporting industry. The strict application of WADA code by anti-doping agencies plays a big role in denying athletes the opportunity to have a fair hearing on the allegations of doping made against them. As evident above, even though the WADA code purports to guarantee the "right

¹⁸⁸ De-Montmollin and Dmitry, "Do Athletes Really Have the Right to a Fair Trial," 196-223.

¹⁸⁹ Greene P, "United States Anti-Doping Agency v. Montgomery," 149.

¹⁹⁰ Greene P, "United States Anti-Doping Agency v. Montgomery," 149.

¹⁹¹ Greene P, "United States Anti-Doping Agency v. Montgomery," 149.bhijkl

to a fair trial” to all athletes caught in anti-doping proceedings, it in fact suppresses this right through its substantive and procedural dictates.¹⁹² Therefore, it is important to take reasonable measures to curb the problem of doping which continues to grow in magnitude by adopting and upholding fair hearing procedures. Athletes, federations, and National as well as international sporting agencies must combine efforts to entrench fair practices in the hearing of doping cases across the globe.

The following measures are important in entrenching the right to a fair trial for athletes in doping proceedings before anti-doping agencies and tribunals in Kenya and across the globe.

a) **Provision for discovery rights to athletes**

International sporting stakeholders need to make a wholesome amendment of the WADA code to provide athletes with an opportunity to discover evidence by extending to them the rights to access the vast range of information, witnesses and scientific experts necessary for their defense.¹⁹³ This would also include the right to depose lay or expert witnesses by athletes as means of testing the veracity of their statements. The inability to depose adverse witnesses inadvertently works against athletes as seen in Landis Case where former Tour de France winner Greg Lemond testified against Landis but refused to answer questions in cross-examination. Since anti-doping hearings are civil in nature, deposition are critical elements of civil proceedings, which stakeholders must entrench in the WADA code. In most doping proceedings, additional discovery is relevant and necessary to permit a fair hearing.

b) **Entrenching ability of athletes to access laboratory directors as witnesses**

The rules of WADA code should promote ability of athletes to call WADA laboratory directors to testify on their behalf during the anti-doping proceedings. Up to January 2009, laboratory directors could not testify in defense of athletes. This rule created an impermissible conflict of interest, restricting an athlete’s ability to meet his or her burden of establishing errors in the testing procedures. This rule left athletes with access to experts not affiliated with WADA laboratories and thus, could not offer opinions on whether the WADA laboratory complied with WADA rules of testing. After the Landis Case WADA amended its rules permitting laboratory directors to appear as witnesses only to provide independent testimony without assisting any party.¹⁹⁴ In practice, this rule has continued to perpetuate the use of laboratory directors as witnesses for anti-doping agencies against athletes. It is thus important to amend

¹⁹² Henning and Paul, "The complexities of anti-doping violations," 159-162.

¹⁹³ Boye et al, "Doping and drug testing" 353.

¹⁹⁴ Boye et al, "Doping and drug testing" 353-354.

WADA rules in order to allow athletes to call WADA laboratory directors as their witnesses in order to discharge their burden of proof. This will go a long way in entrenching the right to a fair hearing, which allows a party to adduce evidence challenging the evidence adduced against him.

c) **Eliminating the burden of proof placed on athletes**

Amending the problems of the shifting burden of proof in anti-doping proceedings will go a long way in streamlining these proceedings against athletes by entrenching the right to fair trial. The presumption in law that, ‘he who alleges must prove’ remains a critical pillar of fair trial in both civil and criminal proceedings. Therefore, the burden to prove the guilt of an athlete for doping should squarely lie on anti-doping agencies and never should the burden shift to athletes to prove their innocence. Anti-doping agencies should discharge their burden of proving that the athlete intentionally used prohibited substance to subvert competition or gain an unfair advantage. In addition, the balance of power, resources and information tilts towards the anti-doping agencies, fact which makes athletes “underdogs” in doping proceedings; hence, the need anti-doping agencies to bear the full burden of proving the guilt of an athlete.¹⁹⁵ An athlete should not bear the burden of proving his or her innocence because WADA not only terms doping proceedings are civil proceedings, but also because anti-doping agencies have the responsibility of enforcing WADA rules, thus the need for them to prove disobedience of those rules.

d) **Amendment of the presumption of the validity of WADA laboratory reports**

Stakeholders must ensure amendment of the presumption of validity of WADA laboratory reports in order to entrench fair trial in doping proceedings. The presumptions of validity imposes a greater burden on the athlete to prove both a departure from the International Standards for Laboratories (ISL) and that such a departure reasonably caused Adverse Analytical Finding. This presumption violates the tenets of fair trial by placing the burden of the accuser on the accused. Anti-doping agencies, which allege doping against athletes, should have the burden of adducing evidence to support WADA laboratory reports that indicate a positive doping test against an athlete.¹⁹⁶ In addition, they should also prove that in coming up with the Adverse Analytical Finding; the WADA accredited laboratory complied with all ISL necessary to produce valid results. An athlete should only adduce evidence to contradict

¹⁹⁵ Dawer D, “Levelling the Playing Field,” 2008.

¹⁹⁶ Dawer D, “Levelling the Playing Field,” 2008.

evidence already presented by anti-doping agencies, supporting WADA laboratories compliance with ISL as opposed to adducing evidence to challenge a presumption.¹⁹⁷

e) [Material non-compliance with ISL factors should collapse a doping allegation](#)

Any evidence supporting a claim that WADA laboratories departed from ISL factors should have the effect of collapsing doping allegation athletes. However, such evidence must demonstrate significant departure from the ISL factor or that fact that the departure resulted in Adverse Analytical Finding. This would prevent findings such as the one obtained in Landis Case, where majority agreed that Landis legal team had demonstrated non-compliance by the French laboratory, but the panel still upheld the ruling of USADA that disqualified him for sporting. This would promote fair trial of athletes by blocking the use of evidence obtained through a process that does not conform to the ISL factors requisite for obtaining a valid Adverse Analytical Finding.¹⁹⁸

f) [Prohibiting the use of non-analytical findings in doping cases](#)

Prohibiting the use of non-analytical findings to hold an athlete liable for doping as in *USADA v Montgomery* will help in promoting fair trial for athletes in doping proceedings. Reversing this precedent created by CAS will help in promoting fair trial by eliminating the use of circumstantial and corroborated evidence in admonition of athletes for doping.¹⁹⁹ The basis for admonition of athletes for doping should remain the tests conducted in WADA laboratories that disclose an Adverse Analytical Finding and done in compliance with all the ISL factors.

g) [Adoption of the recommendation by the anti-doping convention working group](#)

States should adopt the recommendations of the anti-doping convention-working group on entrenchment of the right to fair trial through creation of independent panels, managed by independent arbiters to promote fair hearing. These panels should extend right of appeal, public hearings and right to receive written notifications of decisions to the athlete.

¹⁹⁷ Feidler S, "Fundamental Rights of International Athletes," 9.

¹⁹⁸ Boye et al, "Doping and drug testing" 18 EMBO 354.

¹⁹⁹ Henning and Paul, "The complexities of anti-doping violations," 164-166.

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