

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCE BY **EDWIN SHIMENGA (KENYA)** CONTRARY TO REGULATION 21

BEFORE A BOARD JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.20 and 21.21 CONSISTING OF:

Judicial Committee:

Gregor Nicholson (Scotland)

Barry O'Driscoll (Ireland)

Graeme Mew (Canada – Chair)

Appearances and Attendances:

Ilaria Baudo (Administration Assistant, International Rugby Board)

For the Board:

Susan Ahern (Counsel)

For the Player

Edwin Shimenga (the Player)

Aggrey Chabeda (Secretary – Kenya Rugby Football Union)

Fred Ollows (Development Manager - Kenya Rugby Football Union)

Max Maniafu (Director of Kenya Rugby)

Heard: Monday 13 June 2005 (by way of telephone conference)

DECISION OF THE JUDICIAL COMMITTEE

1. The International Rugby Board (the “Board”) alleges that the Player, Edwin Shimenga, a member of the Kenyan Men’s Sevens team, committed a Doping Offence, contrary to Regulation 21 of the Regulations Relating to the Game (the “Regulations”) when a urine sample provided in the course of a doping control test taken at the Rugby World Cup Sevens 2005 in Hong Kong on 15 March 2005, was found to have contained a Prohibited Substance, namely metabolites of hydrochlorthiazide.
2. The Board has no record of a Therapeutic Use Exemption (“TUE”) on file for the Player for the use of this substance.

3. Hydrochlorthiazide is classified by the World Anti-Doping Agency (“WADA”) on its list of “Prohibited Substances” as a diuretic (“S5. Diuretics and Other Masking Agents”). Masking agents are prohibited. They are products that have the potential to impair the excretion of other Prohibited Substances, to conceal their presence in urine or other samples used in doping control, or to change haematological parameters.
4. Clinically, hydrochlorthiazide is used to control hypertension, to reduce oedema and as an adjunct in treating congestive heart failure.
5. The Declaration of Medication on the Doping Control Form completed by the player disclosed his use of “Ibufen 400 ml x 2 days”. Ibufen is a non-steroidal anti-inflammatory which is often used for pain relief. It does not contain hydrochlorthiazide.
6. The Player’s urine specimen was divided into “A” and “B” samples and sent to the World Anti-Doping Agency (“WADA”) accredited laboratory at the Institut Municipal d’Investigació Mèdica in Barcelona, Spain. The laboratory subsequently provided the Board with an analytical report dated 21 April 2005 indicating an adverse analytical finding from testing of the Player’s “A” sample for hydrochlorthiazide.
7. Following a preliminary review undertaken pursuant to Regulation 21.20.1., the Player was notified by a letter to him care of the Kenya Rugby Football Union (the “Union”) dated 22 April 2005 that the “A” sample of the specimen he had provided had resulted in an Adverse Analytical Finding for the presence of hydrochlorthiazide. The Player was given the option of having the “B” sample of his specimen analysed and was notified that pursuant to Regulation 21.19.1 he was provisionally suspended pending the outcome of the case. It was subsequently confirmed by the Union on 5 May 2005 that the Player had been provisionally suspended from all rugby activity pending the outcome of his case and that his club had been informed.
8. Through his Union, the Player accepted the results of the “A” sample and therefore did not request that the “B” sample of his specimen be analysed.
9. On 6 May 2005 the Union forwarded to the Board a completed abbreviated TUE application form completed by the Player and his cardiologist, Dr. Omondi Ogada, on 4

May 2005. This application indicated the use of hydrochlorthiazide on a daily basis for the treatment of hypertension. The BJC notes that the abbreviated TUE application procedure is only applicable to the use of Beta 2 Agonists and Glucocorticosteroids (Regulation 21.5.1): a TUE for hydrochlorthiazide requires a “full” application in accordance with the International Standard set out in Schedule 3 to Regulation 21.

10. In a letter to the Board dated 12 May 2005, the Player admitted taking a prescription medication called “Atacand Plus” for the treatment of hypertension, which he had subsequently discovered to have contained hydrochlorthiazide.

11. By a letter to the Player (via the Union) dated 10 May, the Player was informed that a Board Judicial Committee (“BJC”) would be appointed to consider his case, that it was proposed that the BJC should meet by way of telephone conference and that he would be given the opportunity to make any submissions and to present any evidence which he believed to be relevant to his case, including any mitigating factors and that he could do so by being present on the conference call and/or by making a written submission in advance.

12. The Player elected to participate in the hearing before the Judicial Committee by telephone and was subsequently notified of the hearing details. Officials of the Union also participated in the hearing. In addition to the oral evidence and submissions provided at the hearing, the Judicial Committee also considered the documents placed before it, including the following:

- a) Preliminary Review Report
- b) Laboratory Analysis Report
- c) Doping Control Form
- d) Letter from the Player to the Board dated 12 May 2005
- e) Email from the Player to the Board dated 19 May 2005
- f) Bundle of email correspondence between the Board and the Union
- g) Letters from the Board to the Player via the Union
- h) Copy of Doctor’s Prescription dated 3 March 2005 in respect of Atacand Plus
- i) Abbreviated TUE Application Form dated 4 May 2005

- j) Email from Oscar Osir dated 21 June 2005
- k) Email from Mark Andere dated 20 June 2005
- l) Email from the Player to the Board dated 5 July 2005
- m) Blank Player Consent and Agreement Form, Rugby World Cup Sevens 2005
Tournament

13. The hearing was conducted by telephone conference on 13 June 2005. Following the hearing the BJC requested written statements (if available) from a relevant person in the Union (e.g. the Sevens Team Manager) and another witness (e.g. another team official or player) as to whether players in the Kenya team were asked to provide confirmation concerning any medications they were taking. Two statements (Mr. Osir, the team captain for Kenya and Mr. Andere, the Kenya Sevens Team Manager) were provided in response to this request. The Player was given the opportunity to make further submissions in respect but indicated he had nothing further to add and did not require the hearing to be reconvened.

Anti-Doping Rule Violation Established

14. At the outset of the hearing the Player confirmed his admission that he had used a Prohibited Substance. Accordingly, we are satisfied that the Player has committed an Anti-Doping Rule Violation due to the presence of a Prohibited Substance, namely hydrochlorthiazide, in the Player's urine sample.

The Player's Account

15. The Player said that he had started receiving treatment for high blood pressure in 2004. He was initially prescribed Moduretic (a diuretic/antihypertensive which contains hydrochlorthiazide and amiloride – also a Prohibited Substance) and Atacand (an angiotensin II receptor blocker used to help reduce high blood pressure). He was subsequently prescribed Atacand Plus, which is a combination of two medicines used in the treatment of high blood pressure: the angiotensin II receptor blocker candesartan cilexetil and the diuretic hydrochlorothiazide. It should be noted that there was some confusion in the Player's evidence as to exactly what he was taking and when. He suggested, for example, that he was taking Moduretic and Atacand Plus simultaneously,

which seems unlikely given the overlap between these two drugs. While all of these medications were effective, the Player claims that he stopped taking Atacand Plus on 12 March 2005 because the drug was too expensive for him to afford at that time.

16. The Player states that Dr. Ogada knew that he was an athlete, but did not warn him that hydrochlorothiazide was a Prohibited Substance.

17. The Player had also been prescribed diclofenac sodium by his Dr. Ogada after complaints of fever and painful knees. Diclofenac sodium is an anti-inflammatory with analgesic properties. Again, he claimed to have stopped taking it on 12 March. Having regard to his declared use of Ibufen, which the Kenyan team physiotherapist had recommended to him, the Player claimed he had not been told that Ibufen and diclofenac sodium were essentially used for the same condition. Nothing of significance turns on this.

18. While accepting full responsibility for his use of hydrochlorothiazide, the Player vehemently denied knowingly doing so. He claimed that he was a victim of the failure of others to provide information concerning anti-doping. While he acknowledged knowing about drug use to boost strength and endurance, he says he did not really have any idea of what kind of substances were prohibited by WADA and the Board. He asked for leniency from the BJC under such circumstances.

19. The Player also denied that he and his team members were asked by Kenyan team officials, either before travelling to Hong Kong or after arrival, whether they were using any prescription medication. He denies that a Kenyan team doctor or physiotherapist had ever told him to check with them first before taking medication.

20. The Player has played in a number of IRB World Sevens Series Tournaments since 2003 and has been drug tested previously. He did not dispute information provided by the Board that he had signed a Player Consent & Agreement Form relating to his attendance at and participation in the Rugby World Cup Sevens 2005 (although he had no specific recollection of having done so and the Board was unable to produce a copy of a

document signed by the Player). He said he did not read the Tournament Manual and took it for granted that the medication he was taking was alright.

The Union's Evidence

21. Portions of the Player's account are at odds with evidence supplied by the Union.

22. Mr. Chabeda, the secretary of the Union, advised the BJC that his Union has taken a strong anti-doping stance. Anti-doping information has been disseminated to players through team management. Players are aware of anti-doping rules and were routinely asked about any prescriptions at training.

23. Mr. Andere, the Team Manager for the Kenya Sevens, stated the following:

“The issue of Doping form declarations was very widely covered during the final team Briefing Session on the 11th of March at the Krfu Offices. The only absentee in the final meeting was our team physiotherapist who had excised [*sic*] herself. Edwin Shimenga was very much present as were all the other team members going for the world cup. He did not mention that he was taking or had taken medication of any kind to warrant a declaration form to be completed. Only one player ... declared having taken some medication, which on cross checking did not require the Declaration form filled.

“It is worth noting that the players are adequately briefed on all changes/updates provided in relation to anti doping procedures. A reference pamphlet was also provided to all team members for their records. It is worth noting that this issue [*sic*] was well covered a week before travel as we had an out of competition testing which involved five other players”.

24. Mr. Andere's account is corroborated by Oscar Osir, the team captain of the Kenya Sevens. Mr. Osir stated that:

“...prior to our departure to Hong Kong and more specifically on the Friday 11th of March, there was a team briefing in regards to the 7s world cup and what was to be expected. Among the issues brought forward by the team manager as had been done in the past was the issue of random doping, where members of the team were advised to declare if they were under any medication or any type of supplementation. We were each given material to read in regards to the conditions under which we were to play in the tournament . We were informed that the information would be required by IRB should any of us be randomly selected for doping, a couple of the players approached the management and made their declarations where necessary.”

Player Consent & Agreement Form

25. Any Player at any level of the Game is subject to the anti-doping rules contained in Regulation 21. It is not a necessary prerequisite to the implementation of doping control in rugby that a player has expressly consented. Nevertheless, as a matter of practice at many levels of the Game, forms of agreement and acknowledgment are used to reinforce players' commitment to and acceptance of doping control. The Player Consent & Agreement Form which the BJC was advised each and every player at the Rugby World Cup Sevens 2005 tournament signed included the following terms:

1. GENERAL ACCEPTANCE AND AGREEMENT

1.1 [I] accept the invitation to take part in the Tournament in accordance with the Participation Agreement and the Tournament Manual ("Terms of Participation") for the Tournament, a copy of which has been provided to the Union of which I am a Team Member and for which I shall be playing and which I have had an opportunity to read, and have read and understood;

1.2 shall observe and abide by in every respect provisions of the IRB Regulations relating to the Game, the Terms of Participation and any rule or direction of the Tournament Director or Rugby World Cup Limited (the "Company") and any decision of the Company (or its designee), the Tournament Director, the Disputes Committee or of any officer or body appointed or established by the Company pursuant to the Disciplinary Procedures and Anti-Doping Programme set out in the Tournament Manual or otherwise in accordance with this Agreement and, save where the contrary is expressly stated, any such rules, directions or decisions shall be binding on me and I acknowledge that I shall not have the power to revoke or alter any such decisions;

2. ANTI-DOPING

2.1 [I] consent and agree to comply with and be bound by all of the provisions of the Tournament Anti-Doping Programme from time to time in force and all International Standards incorporated in the IRB Anti-Doping Regulations;

2.2 acknowledge and agree that the IRB and/or the Company has jurisdiction to impose sanctions as provided for in the Tournament Anti-Doping Regulations. I also acknowledge and agree that any dispute arising out of a decision made pursuant to the Tournament Anti-Doping Programme, after exhaustion of the process expressly provided for in such Programme, may be appealed exclusively as provided in IRB Regulation 21.27 to an appellate body for final and binding arbitration, which in the case of International Level Players is the Court of Arbitration for Sport (CAS);

2.3 acknowledge and agree that the governing law of the appeal heard by CAS shall be English law and that the decisions of the arbitral appellate body referenced above shall be final and enforceable;

2.4 agree that I will submit a Therapeutic Use Exemption form if I am required to do so under the Tournament Anti-Doping Programme or otherwise;”

Anti-Doping Rule Violations

26. Under Regulation 21.2.1, the “presence of a Prohibited Substance or its Metabolites or Markers in a Player’s bodily Sample” constitutes an anti-doping rule violation.

27. Regulation 21.22.1 provides, in respect of sanctions:

Except for the specified substances identified in Regulation 21.22.2, the period of Ineligibility imposed for a violation of Regulation 21.2.1 (presence of Prohibited Substance or its Metabolites or Markers), Regulation 21.2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Regulation 21.2.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: Two (2) years' Ineligibility.

Second violation: Lifetime Ineligibility.

However, the Player or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Regulation 21.22.4.

28. It was confirmed that this is the Player’s first anti-doping rule violation.

29. Regulation 21.22.4 contains provisions for the elimination or reduction of a period of Ineligibility based on “Exceptional Circumstances”.

30. Two categories of exceptional circumstances are identified. In the first, if a Player can establish that he “bears No Fault or Negligence for the violation” and can establish how the Prohibited Substance entered his system, the period of Ineligibility can be eliminated. “No Fault or Negligence” means:

“The Player’s establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance”.

31. The second category is where the Player “bears No Significant Fault or Negligence” in which case the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. The definition of the term provides:

“The Player’s establishing that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to an antidoping rule violation”.

32. A footnote to the corresponding provision of the *WADA Code* makes it clear that only in truly exceptional cases and not in the vast majority of cases will these provisions operate to eliminate or reduce a sanction. An example of where the elimination of a sanction might be justified would be where a Player was sabotaged by a competitor. The administration of a Prohibited Substance by an athlete’s personal physician without disclosure to the athlete, in circumstances where the athlete had told the doctor that he could not be given any Prohibited Substance could, depending on the unique facts and circumstances of a particular case, result in a reduced sanction.¹

¹ The commentary to Article 10.5 of the WADA Code provides:

To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete’s personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete’s food or drink by a spouse, coach or other person within the Athlete’s circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)

Sanctions

33. We are bound to impose a period of ineligibility of two years unless we are satisfied that The Player has established that he bore “No Fault or Negligence for the violation” or that he bore “No Significant Fault or Negligence”.

34. The Player, who is presently 25 years old, is a member of the Nakuru rugby club. He played for Kenya at the Under 21 level in 2000 and, since 2002, has represented his country at the senior level in both sevens and fifteen-a-side matches. As a result of his interim suspension he has already been passed over for selection for a Rugby World Cup 2007 Qualifier match.

35. We accept that the player did not knowingly commit a doping offence. While he knew that he was taking prescription medication, he unfortunately did not think to ask anyone – his doctor, his club, his Union or any team health care professionals – about whether his medication posed any concerns from a doping standpoint.

36. The Player asks that we exercise leniency in his case. He describes himself as a young person with ambition to play the game at a high level. He undertakes to inform his community about doping issues so that they will not make the same mistake he has made. He observes that his club has the only First Division team in the “upcountry” and that his club and community are dependent on him for coaching and on the pitch.

37. The Player has fully cooperated with the Board in its inquiry into this matter and with the BJC in respect of the conduct of this hearing.

38. While all of these factors might be regarded as mitigating circumstances, we are required to look at the criteria in Regulation 21.22.4 relating to the elimination or reduction of the otherwise applicable period of ineligibility based on exceptional circumstances.

39. The Player clearly cannot establish that he bore No Fault or Negligence. He did not take all due care to prevent this violation.

40. With respect to the question of whether the Player bears “No Significant Fault or Negligence”, we have to view the totality of the circumstances, taking into account the criteria for No Fault or Negligence (i.e. whether the Player knew or suspected, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance), and then conclude that the Player’s fault or negligence was not significant in relationship to the antidoping rule violation.

41. The Player should have done more than he did to alert his doctor to his status as an elite athlete, to advise the doctor that he could not be prescribed any Prohibited Substance and to ensure that the medication prescribed by his doctor did not, in fact, contain a Prohibited Substance. It is nevertheless understandable why the Player might have assumed that use of his prescribed medication was legitimate and not in violation of anti-doping rules.

42. What is harder to understand is why the Player failed to inform national team officials about his prescription medication. In this regard we accept and prefer the evidence of the Union’s representatives where it conflicts with the Player’s evidence (even though we did not have the benefit of hearing from the Player in person, which is preferable in situations where there are issues of credibility, we note that the Player did not seek to challenge the statements of Mr. Andere or Mr. Osir), and conclude that the Player was asked at a team meeting on 11 March to declare to team officials if he was taking medication or any type of supplementation. He did not come forward. Yet, by his own evidence, he was still, at the time, taking Atacand Plus (he stopped taking it the next day).

43. We also feel that the Player’s assertion that he had not received anti-doping information from his Union (which is contradicted by the Union’s evidence) does not help his cause. In view of the fact that five members of the Kenyan team had just been subjected to out-of-competition testing, it is hard to imagine that the Player’s consciousness of doping issues would not have been elevated around that time.

44. In short, despite having some sympathy for the Player, and while recognising the contribution he has made to the Game in Kenya, he has not demonstrated to our

satisfaction that his is one of the truly exceptional cases that would warrant a reduced penalty under Regulation 21.22.4.

45. We have, accordingly, decided, and so order, that the Player is suspended for a period of two years commencing on 4 May 2005 (the date of his provisional suspension). During that time he will be subject to the conditions of ineligibility provided in Regulation 21.22.7.²

46. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.9, written submissions should be provided to the Judicial Committee and to the Player by 17:00 Dublin time on 5 August 2005, with any written submissions by the Player in response to be provided to the Board (which shall be responsible for forwarding such submissions on to the Judicial Committee) by no later than 17:00 Dublin time on 19 August 2005.

25 July 2005

A handwritten signature in black ink, appearing to read 'Graeme Mew' with a stylized flourish at the end.

Graeme Mew (for and on behalf of the Board Judicial Committee)

Gregor Nicholson

Barry O'Driscoll

² For avoidance of doubt, Regulation 21.22.7 provides:

No Player or Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Match, Series of Matches and/or Tournament (international or otherwise) or activity (other than authorised anti-doping education or rehabilitation programs) authorised or organised by the Board or any Member Union. Such participation includes but is not limited to coaching, officiating, selection, team management, administration or promotion of the Game, playing, training as part of a team or squad, or involvement in the Game in any other capacity in any Union in membership of the IRB. In addition, for any anti-doping rule violation not involving specified substances described in Regulation 21.22.2, some or all sport-related financial support or other sport-related benefits received by such Player or Person will be withheld by the Board and its Member Unions.