

PANEL OF THE IAAF ETHICS BOARD

Mr Lauri Tarasti (Chairman)

Mr Akira Kawamura

Mr Juan Pablo Arrigada

In the matter of MAJOR MICHAEL ROTICH and the IAAF Code of Ethics

DECISION

Record

IAAF Ethics Board Legal Secretaries: Jana Sadler-Forster and Natasha Simonsen.

The matter was determined without a hearing pursuant to Ethics Board Procedural Rule 13(18).

Introduction

1. This decision concerns allegations that the Defendant, Major Michael Rotich, agreed to provide advance notice of drug tests to athletes and/or coaches in exchange for money. The allegation is that he knew when doing so that this would allow athletes to flush banned substances from their systems in order to circumvent doping tests. It is also alleged that the Defendant suggested excuses which athletes could use to avoid being penalised for missing a drug test.
2. At all relevant times, Major Rotich was the Head of Athletics Kenya North Rift Province and he was the Head Coach of the Kenyan Athletics team for the Olympic Games in Rio de Janeiro held from 5 - 21 August 2016.

Procedural history

3. The allegations arose from an article entitled “Rio Olympics hit by new doping scandal” (the “**Article**”) and accompanying video footage (the “**Footage**”), both of which were published by the Sunday Times on 7 August 2016. The Footage and the Article are described further below.
4. On 12 August 2016, the Chairman of the Ethics Board, the Honourable Michael Beloff QC (the “Chairman”) informed Major Rotich that he had concluded that there was a prima facie case against him (i.e. a matter warranting investigation concerning a breach of the IAAF Code of Ethics). In accordance with Rule 13 of the Ethics Board’s Procedural Rules (the “**Rules**”), the Chairman appointed Mr Sharad Rao, a former Director of Public Prosecutions in Kenya, to investigate the matter further.
5. Also on 12 August 2016, Major Rotich was provisionally suspended from holding any office in the IAAF or Athletics Kenya pursuant to Rule 13(27). The initial period of Major Rotich’s provisional suspension was 180 days as provided for in Rule 13(29). The provisional suspension has been renewed on three occasions, and the current period of expires on 25 July 2019.
6. On 25 April 2017 the Investigator wrote to Major Rotich asking him to provide a response to the allegations as recorded in the letter of provisional suspension dated 12 August 2016. Major Rotich was invited to provide a response by 12 May 2017.
7. By letter dated 4 May 2017 (receipt of which by the Investigator appears to have been delayed until 9 May), lawyers representing Major Rotich acknowledged receipt of the Investigator’s email of 25 April 2017 and said, *‘Before our client response (sic) to the contents of your letter, we would wish to examine the constitutionality of your decision to institute an inquiry yet already criminal proceedings of similar charges are ongoing in a court of law. We strongly believe that such action undermines and violates the rights of our client as enshrined in our constitution which is the supreme law.’*
8. By email dated 9 May 2017, the Investigator asked Major Rotich’s legal representatives to provide details of the charge or charges pending against their client in the Kenyan courts.
9. On 24 May 2017, having received no reply to his email of 9 May 2017, the Investigator sent a further email to Major Rotich’s legal representatives expressing concern as to their failure to respond to the Investigator. An email exchange followed on that day and the following day in which the case number was provided but Major Rotich’s lawyers claimed not to have a copy of the charge sheet.

10. On 4 June 2017, the Investigator wrote again to Major Rotich's representatives stating that he was unable to suspend the investigations any further and that a response to the allegations must be filed by 9 am on 19 June 2017. The letter noted that such response could be provided without prejudice to any valid constitutional or legal objection that Major Rotich may wish to make to the IAAF investigation.
11. Major Rotich then sought to challenge his provisional suspension in the High Court in Kenya (Judicial Review Application No 433 of 2017). The Investigator was named as a Respondent. However, the application was dismissed by the Kenyan High Court in July 2017.
12. On 9 August 2017 the Investigator again wrote to Major Rotich's legal representatives, offering a further period of 14 days to provide a response to the allegations against him, now that his application to the Kenyan courts had been dismissed. No reply was received.
13. A further letter along similar lines was sent by the Investigator on 24 February 2018, this time by email direct to Major Rotich.
14. On 7 March 2018 a new legal representative, Mr Ham K Lagat, wrote to the Investigator on behalf of Major Rotich. The substance of the letter bears repeating in full:

"Firstly, our client has since taken a decision to peacefully retire from his previous position at Athletics Kenya and IAAF after an illustrious career in athletics spanning for over forty(40) years.

Secondly, our client is no longer interested in the activities of Athletics Kenya. Our client has never again been involved, nor does he harbour any intention to take part in any activities of Athletics Kenya and IAAF.

Thirdly, all the allegations put against our client have never been crystallized into any substantive charge to the appointed investigator and therefore our client is of the view that you should proceed and close the file."
15. On the same date, the Investigator acknowledged receipt of this response and stated that his report would be provided to the IAAF Ethics Board on the basis of the information available to him, and that Major Rotich's response would be included in the report.
16. On 30 September 2018, the Investigation Report was provided to the Ethics Board in accordance with Rule 13(9). The Investigator recommended that the case against the Defendant should proceed to adjudication on the basis that Major Rotich's conduct as

recorded by the Sunday Times breached one or more of the following provisions of the Code:

- a. Article C1 (11) (Integrity): Persons subject to the Code shall not act in a manner likely to affect adversely the reputation of the IAAF, or the sport of Athletics generally, nor shall they act in a manner likely to bring the sport into disrepute.
- b. Article C1 (12) (Integrity): Persons subject to the Code shall act with the utmost integrity, honesty and responsibility in fulfilling their respective roles in the sport of Athletics.
- c. Article C1 (15) (Integrity): Persons subject to the Code, shall not offer, promise, give, solicit or accept any personal or undue pecuniary or other benefit (or the legitimate expectation of a benefit irrespective of whether such benefit is in fact given or received) in connection with their activities or duties in Athletics.
- d. Article C4 (20) (Good Faith): Members of the IAAF Family shall act in good faith towards each other with mutual trust and understanding in all their dealings.

17. Following receipt of the Investigation Report, the Chairman of the Ethics Board appointed a member of the Ethics Board, Mr Tom Murray, to review the Investigator's final report and files in accordance with Rule 13(10). The reviewing member agreed that the charges should proceed to adjudication.

18. In accordance with Rule 13(12), the Chairman then directed that adjudicatory proceedings be commenced against the Defendant. A Panel of the Ethics Board was duly constituted by the Chairman. The Members were Lauri Tarasti (Chairperson of the Panel (Finland)), Akira Kawamura (Japan) and Juan Pablo Arriagada Aljaro (Chile).

19. On 15 January 2019, in accordance with Rule 13(14), the Chairman of the Ethics Board issued a Notification of Charge to Major Rotich of violation of the following provisions of the Code:

- a. Article C1 (11) (Integrity), namely acting in a manner likely to affect adversely the reputation of the IAAF or the sport of Athletics generally, or in a manner likely to bring the sport into disrepute;
- b. Article C1 (12) (Integrity), namely failing to act with the utmost integrity, honesty and responsibility in fulfilling his role(s) in the sport of Athletics; and
- c. Article C1 (15) (Integrity), namely soliciting or accepting any personal or undue pecuniary or other benefit (or the legitimate expectation of a benefit irrespective of

whether such benefit is in fact given or received) in connection with his activities or duties in Athletics.

20. The allegation of breach of Article C4 (20) was not included in the Notification of Charge.
21. The notification of charge was sent by email to Major Rotich and his lawyer Mr Lagat on 15 January 2019. The deadline for filing a defence was 12 February 2019.
22. On 12 February 2019 the Ethics Board received (via its Legal Secretaries) a reply from Mr Lagat stating that he was no longer instructed to act for Major Rotich in these proceedings (though he continues to act for Major Rotich in respect of the domestic criminal proceedings against him in Kenya).
23. On 24 February 2019, the Ethics Board (via its Legal Secretaries) contacted Major Rotich to explain that the deadline for filing his defence had now passed but that if he wished to apply for an extension of the deadline he should do so as soon as possible and in any event within 7 days. The Defendant was informed that if he did not file a defence the Panel would proceed to an adjudication based on the materials available to them.
24. Major Rotich has not filed a defence to the charges or made any other appearance.
25. In these circumstances, and in accordance with Rule 13(18), the Chairman of the Panel determined that the Panel should proceed to an adjudication of the available evidence without a hearing.

Applicability of the IAAF Code of Ethics to the Defendant

26. The current version of the IAAF Code of Ethics (the “Code”) has been in force since November 2015 and it applies to the matters in issue in these proceedings.
27. Principle A1 of the Code provides: *‘The Code applies to the following individuals (collectively referred to as the “IAAF Family”): [...] c. “Participants” meaning all Athletes, Athlete Support Personnel, competition officials, officials, managers or other members of any Athletics delegation, referees, jury members and any other person who is or has been accredited to attend or participate in an International Competition’.*
28. As explained in paragraph 2 above, Major Rotich was at all relevant times the Head of Athletics Kenya North Rift Province and the Head Coach of the Kenyan Athletics team for the Rio Olympic Games in 2016.
29. It follows that Major Rotich was a Participant within the meaning of Principle A1(c) of the Code of Ethics, being an athletics support person or other official (namely, a coach). He

was also a member of the Athletics Kenya delegation to the Rio Olympics, and a person accredited to attend the Olympics, and so was a Participant on these additional bases.

30. Accordingly Major Rotich was at the relevant times a member of the IAAF Family and he was subject to the Code.

The allegations

31. The provisions of the Code which Major Rotich is alleged to have breached are Articles C1(11), C1(12) and C1(15) (which are set out in full in paragraph 16 (a) to (c) above).

32. The specific charges which support those allegations, as set out in the Notification of Charge, were as follows:

- a. That Major Rotich agreed to provide advance notice (directly or indirectly) of drug tests to athletes/coaches in exchange for payments (the “**Agreement**”). When offering to provide such advance notice, Major Rotich knew that it would allow athletes to flush banned substances out of their systems and thereby circumvent the doping control process; and
- b. That Major Rotich suggested excuses which athletes could use to avoid being penalised for missing a drug test.

Standard of proof

33. Rule 11(7) provides:

“The standard of proof in all cases shall be determined on a sliding scale from, at minimum, a mere balance of probability (for the least serious violation) up to proof beyond a reasonable doubt (for the most serious violation). The Panel shall determine the applicable standard of proof in each case.”

34. Accordingly, the first issue which the Panel must determine is the applicable standard of proof. As Rule 11(7) makes clear, the key consideration is the seriousness of the disciplinary charges in issue. The least serious violation may be established on the balance of probability. The most serious violation must be established to the criminal standard, being proof beyond a reasonable doubt.

35. The Panel also notes that in previous decisions, the Ethics Board has observed that the “conventional standard for sports disciplinary proceedings is that of ‘comfortable

satisfaction’ which in the context of sports law, has its origins in *Andrei Korneev v International Olympic Committee*”.¹

36. The Panel considers that the charges in this case are serious. However they are not within the category of the “most serious violations”. The Ethics Board has previously held that this category should be reserved for serious criminal conduct.² If the charges are established they will show that Major Rotich was prepared to assist athletes to evade doping controls in exchange for money – but they will not necessarily show that he did so. In the circumstances, the Panel considers that the appropriate standard of proof is proof to its comfortable satisfaction.

The Facts

37. In January 2016, George Arbuthnott and David Collins, two undercover reporters from the Sunday Times, met Joseph Mwangi and Major Rotich in Kenya. The journalists purported to be the sports manager and coach of a fictional team of British athletes. Mr Mwangi offered to sell the reporters the banned substance EPO for use by their athletes.

38. The reporters met with Major Rotich on 21 January 2016, 22 January 2016 and 21 February 2016. During those meetings, which were secretly filmed, the reporters explained that they planned to dope eight British athletes with EPO and asked Major Rotich’s assistance to protect their athletes from testing.

39. Footage obtained from those meetings was published by the Sunday Times on 7 August 2016 (the “**Footage**”). It was accompanied by a news article of the same date (the “**Article**”).

40. The Footage depicts Major Rotich making the following statements:

- a. That he knew “*the process*”, “*the requirements*” and “*when they [drug tests] are done*”;
- b. That there was a British couple who conducted the tests, whom he knew “*very well*”, and that they had “*a list that says, I’m going to test so and so*”;
- c. When asked whether this couple would “*let [him] know [of planned drug tests]*”, he replied, “*oh yeah*”;

¹ 6 CAS OG 003-4, 1996, quoted in Ethics Commission Decision 02/2016 VB, AM, GD & PMD at para 14(i) and Ethics Board Decision No 10/208, DO, JK at para 45.

² See Ethics Board Decision No 10/208, DO, JK at para 46.

- d. The reporters asked, *“How would it work? You would hear from... say the couple. Would you then call Joseph [Mwangi], warn him, he would then warn us and the athletes?”*. Major Rotich replied, *“That is possible. That’s possible. That is the best way, I think.”*
- e. When told by Mr Mwangi that the athletes would need 12 hours’ notice in order to flush their systems of banned substances, the reporters asked, *“Do you think that we might have that much notice? Twelve hours? Does that sound reasonable?”*. Major Rotich replied, *“That’s very reasonable.”*
- f. Major Rotich suggested that the undercover reporters should make him an offer of money. They said, *“If we were therefore to give you a three month lump payment of say £9,000, would that, would that suit you?”*. Major Rotich replied, *“That would be fine. I’ve no problem. Even ten [thousand]. It would be a round figure. With that I will endeavour to go to this British family... Not even tell them everything. I have athletes there and I am in charge of the region. Would you mind to...from time to time... let me know if you are coming to test.”*

41. The Article alleged that Major Rotich also made the following statements to the journalists during the three meetings described above:

- a. *“So what we are saying is, we can work together as much as possible. This [the drug testing] is something that everybody wants to avoid.”*
- b. *“I may be going to the Olympics in Rio as the team manager of Kenya. So I wouldn’t like to mess my reputation. I don’t know who is with you and I know everybody’s investigating in Kenya.”*
- c. In relation to drug testing in Kenya, *“Here it is not likely and if it was then we would know.”*
- d. That he would find out when tests were due to take place so that he could tip off the team of doping athletes. He said, *“When I have interest [money], I will be able to find ways and means of doing that.”*
- e. If the testers refused share their list of targeted athletes with him, Major Rotich claimed that he could talk to the testers *“on the side”*, and that he would tell them *“I am in charge of the region. Would you mind from time to time let me know if you are coming to test our own athletes or international athletes that I’m training here or something. And they will oblige.”*

42. George Arbuthnott has provided a witness statement confirming that the footage was genuine.
43. Major Rotich has not denied that the person in the Footage was him. Nor has he denied making the statements depicted in the Footage and described in the Article.
44. On the contrary, when Major Rotich was confronted with the Footage by the reporters, the Article claims that he said he had gone along with the interview because he was investigating the reporters and Mr Mwangi because he wished to protect his athletes. He said that he had *“cooperated”* with the reporters because he *“wanted to get to the bottom of”* the inquiries, and because *“There were a lot of white people in Iten who were actually moving drugs and doing all those things. So this was an opportunity.”*
45. When asked by the reporters why, if this was the case, he had not alerted anyone else to this, Major Rotich initially said that he had shared the information from his inquiries with *“other agencies”*. However he subsequently changed his story, saying that he had not told anyone else *“because it was not necessary”*. He also claimed that he had taken no action (despite meeting the reporters three times in the space of one month) because he was waiting for the doping to take place before doing so.

Analysis

46. The Panel is satisfied that the person in the Footage is Major Rotich. Indeed there has been no suggestion that it is anyone else.
47. The Panel is also satisfied that the Major Rotich agreed to provide advance notice of planned doping tests to certain (fictional) athletes in exchange for money. The purpose of this agreement was plain: it was to assist those athletes to flush their systems of banned substances before taking doping tests.
48. The Panel does not find the explanation provided by Major Rotich to the reporters credible. It is not plausible that Major Rotich entertained the discussions depicted in the Footage because he was seeking to conduct his own investigation of the reporters. Had this been the case, the Panel considers that he would have informed other persons or authorities that these conversations had taken place. There is no evidence that he has done so.

49. Moreover, the fact that Major Rotich also suggested a number of excuses which athletes could use to avoid having to take a doping test is totally inconsistent with Major Rotich seeking to investigate wrongdoing by the reporters.
50. Major Rotich sought to obtain personal pecuniary benefit from the deliberate subversion of anti-doping controls, thereby distorting competition. This conduct plainly contravenes Principle C1(15) of the Code, which prohibits the solicitation or acceptance of any personal or undue pecuniary or other benefit in connection with Athletics. The Panel unanimously so finds.
51. The Panel also finds, unanimously, that this conduct is such as is likely to affect adversely the reputation of the IAAF or the sport of Athletics generally, and it is likely to bring the sport into disrepute, contrary to Principle C1(11) of the Code.
52. The Panel also finds, unanimously, that this conduct violates Principle C1(12) of the Code, which obliged Major Rotich to act with the utmost integrity, honesty and responsibility in fulfilling his roles within the sport of Athletics. He used his position of responsibility to undermine anti-doping controls and to subvert the integrity of Athletics competitions while obtaining a personal benefit for himself.
53. As to the provision of excuses which would enable athletes to avoid taking doping tests, the Panel finds unanimously that this conduct contravenes Principles C1(11) and C1(12) of the Code. This cynical and corrupt conduct is likely to adversely affect the reputation of the IAAF or the sport of Athletics generally, and it runs directly counter to the obligation to act with integrity, honesty and responsibility in fulfilling his role, including as coach within Athletics Kenya.
54. Major Rotich has not answered all the questions presented by the Investigator of the Case, nor has he sent (in spite of many requests) any statement of defence to the Panel, which has in accordance with the Rule 7(3) of the Procedural Rules of the Ethics Commission (now Ethics Board) the right to reach a decision when a party has failed to co-operate. Major Rotich has written to the Investigator that the Case should be closed because Rotich has left all activities in athletics. This is, however, not possible when the adjudicatory proceedings have been started and nor would it be consistent with ordinary juridical principles. A (non-binding) declaration of intent to retire from positions in athletics does not ameliorate or atone for the serious violations of the Code which the Panel has found to be established.

55. Nor does the Panel consider there to be any merit in the suggestion by Major Rotich's legal representatives that there is a risk of conflict between the ongoing criminal proceedings in Kenya and these proceedings before the Ethics Board (see paragraph 7 above). The Panel is not concerned with whether the conduct of Major Rotich violates the Kenyan criminal law (which is a matter which rather the Kenyan courts can determine) but rather with the distinct question whether his conduct violates the IAAF Code of Ethics.

Appropriate sanction

56. It remains for the Panel to determine the appropriate sanction.

57. The available are set out in Article D(17) of the Statutes of the IAAF Ethics Commission (now renamed the Ethics Board). Pursuant to that Article, the Ethics Board has the following powers:

- a. To caution or censure;
- b. To issue fines;
- c. To suspend a person (with or without conditions) or expel the person from office;
- d. To suspend or ban the person from taking part in any Athletics-related activity, including Events and Competitions;
- e. To remove any award or other honour bestowed on the person by the IAAF;
- f. To impose any sanctions as may be set out in official Rules;
- g. To impose any other reasonable sanction that it may deem to be appropriate, including community service within athletics and/or restitution.

58. The Panel reiterates that the charges which it has found to be established are serious. The conduct of Major Rotich was dishonest and corrupt. He sought to undermine anti-doping controls and to obtain a personal financial benefit in doing so.

59. The Panel notes that there is no evidence that Major Rotich did in fact provide advance notice of doping tests to specific athletes, nor that any payments actually changed hands. However the Panel has found that Major Rotich acted corruptly and in deliberate violation of core principles of the Code. This conduct is not compatible with Major Rotich continuing to hold positions of responsibility within the sport of Athletics in the foreseeable future.

60. In these circumstances the Panel has concluded that Major Rotich should be banned for 10 years from taking part in any athletics-related activity including holding any relevant office in athletics. The Panel imposes this sanction with the effect from the date of this decision.
61. In addition, the Panel has levied a fine upon Major Rotich. He is ordered to pay the sum of USD 5,000 dollars to the IAAF.

Costs

62. Rule 16(2) provides:

If the Panel has determined that there has been violation of the Code of Ethics, the procedural costs shall be borne by the party that has been sanctioned. The procedural costs imposed on the sanctioned party may be reduced or waived in exceptional circumstances in particular taking into account the parties' financial circumstances.

63. The Panel has found that Major Rotich has committed violations of the Code of Ethics and accordingly the general rule is that the procedural costs should be borne by him.
64. Major Rotich has not identified any exceptional circumstances such as would warrant the costs being reduced or waived.
65. When the Panel had noted that it has not been necessary to hold a hearing because of the nature of the evidence, which was contained entirely in documents and footage, and because of the Defendant's failure to file a Defence in these proceedings, the costs incurred by the IAAF Ethics Board are more limited than they might otherwise have been.
66. The total procedural costs incurred by the Ethics Board are USD 14,000.
67. The Panel determines that the fines and costs set out above (totalling USD 19,000) should be paid within 90 days of the date of this decision.

Right of Appeal

68. The Defendant has a right of appeal against this decision to the Court of Arbitration for Sport, within 21 days of the date of this decision, in accordance with the procedure set out in rule R47 et seq. of the CAS Code of Sports-related arbitration (<http://www.tas-cas.org/en/arbitration/code-proceduralrules.html>).

Signed:

Mr Lauri Tarasti

Mr Akira Kawamura

Mr Juan Pablo Arriagada Aljaro

Date: **22 May 2019**