Decision Number: 11/2018 **6 September 2018**

PANEL OF THE IAAF ETHICS BOARD

Ms Catherine M.E. O'Regan (Chairperson)

Mr Kevan Gosper

Ms Annabel Pennefather

In the matter of DAVID SIYA OKEYO and Mr ISAAC MWANGI KAMANDE and the IAAF Code of Ethics

Record

Legal Secretaries: Tom Mountford and Jana Sadler-Forster

Appearances

Prosecutor: Ms Kate Gallafent QC

Counsel for Mr Okeyo: Mr James Ochieng' Oduol and Mr Justus Obuya

Counsel for Mr Mwangi Kamande: Mr Kithinji Marete and Mr Kithinji Mathiu

DECISION

Introduction

1. This decision concerns the alleged extortion of money by two officials of Athletics Kenya, from Kenyan athletes who had failed doping tests, in return

for a promised reduction in the length of their sentences or for other influence in the outcome of their cases. The Defendants are Mr David Siya Okeyo, a former Secretary-General and Vice President of Athletics Kenya, as well as a Council Member of the International Association of Athletics Federations (IAAF), and Mr Isaac Mwangi Kamande, (Mr Mwangi), former Chief Executive Officer of Athletics Kenya. Mr Okeyo was also charged before this panel with an offence relating to the diversion of funds belonging to Athletics Kenya for his own direct or indirect personal benefit. The Panel has issued a separate decision in relation to that charge.

Procedure

2. On 16 March 2015, a member of the IAAF Medical and Anti-Doping Department wrote to the Secretary of the IAAF Ethics Commission, as it was then called, stating that he had information about accusations levelled at Mr Okeyo concerning extortion of money from athletes who had tested positive on the basis that he can "help them". This Panel notes that the name of the IAAF Ethics Commission has since been changed to the IAAF Ethics Board and to avoid confusion it is referred to as the IAAF Ethics Board for the remainder of this decision.

3. On 29 November 2015, the Chairperson of the IAAF Ethics Board, the Honourable Michael Beloff QC ("the Chairperson") informed Mr Okeyo that he had concluded that there was a prima facie case against him concerning a breach of the IAAF Code of Ethics, that he had appointed Mr Sharad Rao (a former Director of Public Prosecutions in Kenya) to investigate the matter further and that he was provisionally suspended from the office he held in the IAAF or Athletics Kenya.

4. On 21 February 2016, the Chairperson wrote to Mr Mwangi to inform him that he had concluded that there was a prima facie case (meaning a matter warranting investigation) that he had breached the IAAF Ethics Code and that he had appointed Mr Rao to investigate the matter further. Like Mr Okeyo, Mr

Mwangi was provisionally suspended. In the case of both Mr Okeyo and Mr Mwangi, the allegations of breaches of the IAAF Code of Ethics concerned the extortion of money from Kenyan athletes.

5. During the course of 2016, Mr Sharad Rao investigated the allegations against both Mr Okeyo and Mr Mwangi in terms of the Rules of the IAAF Ethics Board. Following the completion of his investigation, he presented the Chairperson of the Ethics Board with two reports. In the report concerning Mr Okeyo, the Investigator stated he had investigated the complaint that Mr Okeyo had sought to suppress positive doping tests of Kenyan athletes and sought to extort money from athletes who had failed doping tests in order to conceal their positive test results. He recommended that Mr Okeyo be charged with breaches of the Ethics Code because, he stated, if proven the conduct would be in breach of the Code. In the report concerning Mr Mwangi, the Investigator concluded that there was sufficient evidence against Mr Mwangi to recommend that the matter proceed to adjudication.

6. Following receipt of the reports, the Chairman reviewed the investigation files and reports in terms of Procedural Rule 13(10).[1] The Chairman then directed that adjudicatory proceedings be commenced against Mr Okeyo and Mr Mwangi in relation to the charges of extortion from athletes.

7. Accordingly, on 28 February 2017, Mr Okeyo and Mr Mwangi were informed that they were being charged in terms of Rule 13(4) of the IAAF Ethics Board's Procedural Rules[2] with breaches of the IAAF Ethics Code. A copy of

[1] Procedural Rule 13(10) provides "*The Chairperson of the Ethics Board shall appoint a member of the Ethics Board to review an Investigator's final report and the investigation files.*" The question whether it was appropriate for the Chairman to review the files in terms of Rule 13(10) was raised on behalf of the Defendants and the matter is dealt with at para 33 below.

[2] Procedural Rule 13(4) provides, "*If the evidence submitted with or subsequent to any complaint is found by the Chairperson of the Ethics Board to establish a prima facie case, the Chairperson shall cause an investigation to be commenced and shall appoint an investigator in each case, unless in the view of the Chairperson in consultation with the Board there is some good reason not to cause an investigation to be commenced or an investigator to be appointed immediately or at all.*"

the relevant Investigator's report was provided to both Mr Okeyo and Mr Mwangi at the time they were notified of the charges.

8. The notification of charge furnished to Mr Okeyo stated that the specific charge against him was that he "sought to extort money from athletes who had failed … doping tests, in return for reducing the length of their suspensions and or otherwise influencing the outcome of their cases, alternatively by promising to do so". The notification of charge referred to four athletes: Mr Ronald Chipchumba[3], Ms Peris Jepkorir, Ms Viola Kimetto and Mr Wilson Erupe and provided details of the relevant allegations. The notification stated that the conduct was in breach of the following provisions of the various iterations of the IAAF Ethics Code:

May 2012 Code

(i) Article C (Fair Play) (6) "Betting on Athletics and other corrupt practices relating to the sport of Athletics by IAAF officials or Participants, including improperly influencing the outcomes and results of an event or competition are prohibited. In particular, betting and other corrupt practices by Participants under Rule 9 of the IAAF Competition Rules are prohibited."

(ii) Article H (Implementation) (18) "It is the duty of all persons under this Code to see to it that IAAF Rules and this Code of Ethics are applied."

January 2014, January 2015 and Current Code

(i) Article C1 (Integrity) (11) "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."

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[3] It appears that this was a typographical error and should have been Ronald Kipchumba.

(ii) Article C1 (Integrity) (12) "Persons subject to the Code shall act with the utmost integrity, honesty and responsibility in fulfilling their respective roles in the sport of Athletics."

(iii) Article C1 (Integrity) (15) "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."

(iv) Article C4 (Good Faith) (20) "Members of the IAAF Family shall act in good faith towards each other with mutual trust and understanding in all their dealings."

(v) Article D2 (Improper Benefits) (25) "IAAF Officials shall not, directly or indirectly, solicit, accept or offer any form of improper remuneration or commission, or any concealed benefit or service of any nature, connected with the organization of any Athletics event or election or appointment to office."

9. The notification of charge against Mr Mwangi formulated the charge in identical terms to the charge against Mr Okeyo (as set out in the previous paragraph). It also identified four athletes who it alleged had been subjected to extortion. They were Ms Joy Sakari, Ms Francesca Koki, Ms Peris Jepkorir and Mr Wilson Erupe and provided brief details of the allegations. The notification stated that the relevant provisions of the IAAF Ethics Code that had been breached were Articles C(6) and H(18) of the May 2012 Code (set out in the previous paragraph) and Article C1(11), C1 (12), C1(15) and C(4) of the January 2014 Code, January 2015 and current Codes. These provisions matched those referred to in the notification of charge to Mr Okeyo save in one respect, they did not mention Article D2(25) of the January 2014, January 2015 and Current Codes.

10. Both Mr Okeyo and Mr Mwangi denied the charges and lodged statements of defence.

11. There were several unsuccessful attempts to allocate dates for a hearing of the matter during 2017. The IAAF Ethics Board originally proposed that the hearing would take place in Cape Town, but at the request of the Defendants it was decided that the hearing would take place in Nairobi.

12. On 14 December 2017, the Chairperson wrote separately to Mr Okeyo and Mr Mwangi informing them that the matter had been enrolled for hearing in Nairobi for the week of 29 January 2018. On the same date, they were furnished with a witness statement by Mr Kyle Barber of the IAAF Integrity Unit, and a note of an interview with Mr Emmanuel Rerimoi.

13. The day before the hearing commenced, the Prosecutor furnished Mr Okeyo with several new statements. Two were from new witnesses, Mr Mathew Kisorio and Ms Agatha Jeruto, alleging separate instances of extortion. The Prosecutor also provided Mr Okeyo with an updated statement deposed to by Mr Kipchumba and Mr Mwangi with additional statements deposed to by Ms Joy Sakari and Ms Francesca Koki Manunga. At the commencement of the hearing on 29 January 2018, the Prosecutor intimated that she intended to apply for an amendment of the notification of charge relating to Mr Okeyo to include the allegations made by Mr Kisorio and Ms Jeruto. She also noted that she would be leading neither Mr Erupe nor Ms Jepkorir as witnesses and would therefore not be proceeding with the allegations concerning Mr Erupe or Ms Jepkorir against either of the Defendants. The Prosecutor repeated her application to amend the factual allegations in the Notification of Charge relating to Mr Okeyo in her written submissions.[4]

Hearings

14. On Monday 29 January 2018, the hearing in the matter commenced in

[4] For ease of reference, see Prosecutor's Written Submissions para 78.

Nairobi. Both Mr Okeyo and Mr Mwangi were present and they were both legally represented. Mr Okeyo was represented by Mr James Ochieng' Oduol and Mr Justus Obuya and Mr Mwangi was represented by Mr Kithinji Mathieu. Later in the proceedings Mr Mwangi was also represented by Mr Kithinji Marete.

15. The proceedings were not concluded by 2 February 2018 and the matter was set down for a further three days from Monday 28 May 2018 to Wednesday 30 May 2018, again in Nairobi. Again, both Mr Okeyo and Mr Mwangi were represented by their counsel.

Prosecutor's application to amend Notification of Charge

16. As mentioned above, at the commencement of the hearing on 29 January 2018 the Prosecutor launched an application to amend the Notification of Charge against Mr Okeyo by adding to its description of the relevant facts new allegations made by two athletes, Mr Mathew Kisorio and Ms Agatha Jeruto. The application was not formally determined by the Panel during the hearing and was renewed by the Prosecutor in her written submissions. It was argued on behalf of Mr Okeyo that it would be unfair to permit the Prosecutor to amend the facts upon which the charge was based.

17. The Panel confirms that the Prosecutor seeks to amend the facts upon which the charges are based, and not the charge itself. In the view of the Panel, there is nothing in the Rules that prevents the Prosecutor from applying to amend the facts upon which the charges are based, as long as the relevant defendants are given adequate opportunity to consider and challenge the new evidence. In this case, the Panel notes that the new statements were provided to Mr Okeyo on 28 January 2018 and that the application to amend the notification of charge was made the following morning. One of the new witnesses, Ms Agatha Jeruto testified (and was cross examined on behalf of Mr Okeyo) on Friday 2 February 2018 and the other, Mr Mathew Kisorio, testified on Monday 28 May 2018 and was again cross-examined on behalf of Mr Okeyo. Moreover the

Panel notes that nearly four months elapsed between the tendering of the new evidence in January and the resumption of the proceedings in May 2018 which meant that Mr Okeyo was afforded ample time to consider whether he wished to call any witnesses to rebut the evidence of the new witnesses. In the view of the Panel, the Prosecutor's application should be granted and it is accordingly allowed.

Preliminary Objections

18. At the commencement of the hearing, the Defendants in this matter and the matter concerning diversion of funds in which Mr Okeyo was a defendant with Mr Joseph Kinyua raised a series of preliminary objections. All the preliminary objections that related to procedure were dismissed before the hearing commenced, and most of the objections to the admission of evidence were dismissed. An abridged copy of that ruling insofar as it has relevance to these proceedings is annexed to this decision. When the ruling dismissing the procedural objections was made, it was stated that reasons for the dismissal would be provided with this decision and those reasons are given both in this decision and the decision in the other matter.[5]

19. In relation to this matter, the preliminary objections can be divided into two: the first group relates to the procedures by which these disciplinary proceedings were brought, and the second concerns objections to the admission of evidence tendered by the Prosecutor. Each category of objections will be discussed separately.

Objections to the procedure

20. The first group of objections related to the procedures whereby these proceedings have been brought. They included an objection that the original complaint was not brought in terms of the Procedural Rules; objections to the

[5] See the decision of the Ethics Board in *IAAF v Okeyo and Kinyua* 10/2018 dated 30 August 2018 at paragraphs 13 – 41.

manner in which the Investigation was conducted by Mr Sharad Rao, including the fact that he did not interview Mr Mwangi or provide him with a copy of the video clip in which Ms Sakari and Ms Koki Manunga made their allegations, and in relation to the role that Mr Julius Ndegwa played in the investigation; objections to the conduct of the Chairperson of the IAAF Ethics Board in reviewing the Investigator's Report in terms of Procedural Rule 13(10), and his subsequent conduct; an objection to the fact that the Prosecutor continued the investigation of the charges after Mr Rao's investigation report was complete and produced new witnesses' statements as a result; and an objection that Mr Sharad Rao and others involved in the investigation were not called as witnesses which meant that counsel for Mr Mwangi could not cross examine them.

21. Before considering the individual objections, the Panel commences by observing that the relevant rules of procedure are the current Rules of Procedure, adopted in 2015 and annexed to the IAAF Code of Ethics 2015, which is now in force. All references to Procedural Rules in the following paragraphs are therefore references to the Procedural Rules of the IAAF Ethics Board that are annexed, as Appendix 7, to the IAAF Ethics Code 2015 that came in to force on 16 November 2015.

22. The first objection relates to the manner in which the complaint was brought to the attention of the Ethics Board. It was argued on behalf of Mr Mwangi that Procedural Rule 13(1) had not been observed in regard to the original complaint to the Ethics Board. In particular, it was argued that the complaint arose from the airing of a press interview in February 2016 that was given by Ms Francesca Koki Manunga and Ms Joy Sakari to Associated Press. The objection is that complaints arising from the broadcasting of the interview are not complaints that comply with Procedural 13(1), which requires complaints to be brought by a person subject to the Code.

23. Rule 13(1) provides that "any person subject to the Code may file a complaint regarding potential violations of the Code with a Legal Secretary of the Ethics Commission". The Panel notes that it is common cause that it was the airing of the Associated Press interview, and subsequent press reports relating to the interview, that led the Chairperson to initiate these proceedings.[6] The relevant rule in this case is not Rule 13(1) but Rule 13(5), which provides that:

> "The Chairperson may initiate investigation proceedings in the absence of a complaint referred to in Rule 13(1) above if he or she considers that other information that has come to his or her attention establishes a prima facie case of a serious infringement of the Code, having consulted with the members of the Commission. Grounds do not need to be given for the initiation of investigation proceedings and the decision may not be contested."

24. This was a case in which the Chairperson considered that it was appropriate to commence investigation proceedings in the absence of a complaint, as he was entitled to conclude pursuant to Rule 13(5). The Panel notes that Procedural Rule 13(5) states that "grounds do not need to be given for the initiation of investigation proceedings and the decision may not be contested", which in the view of the Panel puts an end to this objection.

26. The next set of objections that were made on behalf of the Defendants concerned the manner in which Mr Sharad Rao conducted the investigation. It was argued that Mr Rao conducted his investigation in an improper manner with the consequence that the proceedings before this Panel were tainted. Both Defendants argued that one of the people who had assisted Mr Rao, Mr Julius Ndegwa, was a person who had been disgruntled with Athletics Kenya and the

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[6] See decision of the Ethics Board in relation to Mr Mwangi's appeal against his provisional suspension,

leadership of Athletics Kenya. They submitted that his involvement in the investigation process had tainted the investigation. It was also argued, on behalf of Mr Mwangi, that Mr Rao had not observed the principles of natural justice in conducting the investigation because he had never interviewed Mr Mwangi, nor had he shown Mr Mwangi the video clip of the Associated Press interview that was broadcast.

27. The Panel notes again that investigators appointed in terms of the Procedural Rules are under a duty to act in a procedurally fair manner. However, the Panel also notes that a panel of the Ethics Board in determining disciplinary charges brought against a defendant is not bound by any factual findings in an Investigator's Report. The panel must be satisfied on evidence before it that a breach of the Ethics Code has been established and a panel of the Ethics Board also bears the duty to act fairly.

28. The Panel accepts that on the record before it, it has been established that Mr Ndegwa did assist Mr Rao in identifying athletes to testify about the extortion charges. Mr Ndegwa was not called upon to testify before the Panel and the Panel does not consider it appropriate on the evidence before it to make any factual findings concerning Mr Ndegwa's relationship with Athletics Kenya. Nevertheless, even if the defendants are correct that the Investigator erred in procuring Mr Ndegwa to assist him, because of a disagreement between Mr Ndegwa and Athletics Kenya, and that the consequence of the error was that the report prepared by the Investigator was in some way biased or tainted, something this Panel does not decide, the Panel would nevertheless not conclude that the effect of such an error would taint these proceedings.

29. The Panel also notes that the principles of natural justice are reflected in the procedural rules, including the right of a person subject to investigation to make a written statement to the Investigator. The Panel notes that Mr Mwangi

did provide a full statement to the Investigator, which formed part of the record before the Panel.

30. A panel of the Ethics Board is not bound to accept the facts contained in the investigation report, nor is it confined to facts and enquiries made during the course of the investigation, but is bound instead to determine on the evidence placed before it and in a procedurally fair manner, whether the disciplinary charges have been proven. Accordingly even were an investigator not to act procedurally fairly, the ensuing disciplinary proceedings would ordinarily not be tainted by any such unfairness. It follows that the objections raised by the Defendants about the conduct of the investigation, even if they correctly assert a breach of the principles of natural justice, do not lead to a conclusion that these proceedings are tainted. These objections were therefore dismissed as having not tainted the proceedings before this panel.

31. A further preliminary objection raised by the Defendants concerned the fact that the Chairperson of the Ethics Board appointed himself to review the Investigator's report and files, which, it was argued, is not permitted by Procedural Rule 13(10). The provisions of Procedural Rules 13(10) – 13(13) are as follows:

> "10. The Chairperson of the Ethics [Board] shall appoint a member of the Ethics [Board] to review an Investigator's final report and the investigation files.
>
> 11. If the member of the Ethics [Board] deems that there is insufficient evidence to proceed, he may make a recommendation to the Chairperson of the Ethics [Board], who may close the case or reconsider the matter and reach a fresh decision. If necessary, the member of the Ethics [Board] may in consultation with the Chairperson of the Ethics [Board] return the final report to the Investigator for amendment or completion. If the

Chairperson of the [Board] considers it appropriate, a notice of the closure of the investigation and the case may be published by the [Board].

12. If the member of the Ethics [Board] deems that there is sufficient evidence to proceed, he shall send his recommendation, together with the Investigator's final report and the investigation files, to the Chairperson of the Ethics [Board], who shall direct that adjudicatory proceedings be commenced.

13. The member of the Ethics [Board] who reviewed the Investigator's final report and the investigation files shall not take part in any further aspect of the proceedings."

32. The Panel notes that the Chairperson of the Ethics Board is a member of the Board and that Procedural Rule 13(10) could therefore be read to permit the Chairperson to appoint himself as the Reviewer of the Investigator's final report and the investigation files. However, the Panel also notes that this interpretation fits uneasily with the provision of Procedural Rule 13(11), which contemplates that even if the reviewing member deems there to be insufficient evidence, the Chairperson may nevertheless "reconsider the matter and make a fresh decision". This provision suggests that the Chairperson may not be the reviewing member, because it contemplates the Chairperson exercising a power even where the reviewing member recommends that no disciplinary proceedings are warranted. In the view of the Panel, the provisions of Procedural 13(11) imply that the Chairperson of the Ethics [Board] may not appoint himself as the reviewing member in terms of Rule 13(10) because then the power reserved to the Chairperson in Procedural Rule 13(11) may not be meaningfully exercised.

33. The Panel therefore concludes that the Chairperson erred in this case in appointing himself to be the reviewing member of the Investigator's final report. However, this error does not necessarily constitute a bar to these proceedings, for the next question that arises is whether the Defendants were

materially prejudiced by the Chairperson's mistake. In the view of the Panel they were not. The Chairperson is a member of the Ethics Board and is therefore competent to undertake a review of the Investigation report. The one clear procedural consequence of the Chairperson undertaking the review of the report is that the power in terms of Rule 13(11) may not sensibly be exercised. In this case, the Chairperson did not think there was insufficient evidence to institute proceedings, and so the power in Rule 13(11) had no application and the defendants were therefore not prejudiced by the Chairperson's decision to review the report himself. We add, for the sake of completeness, that even if the Chairperson had found there was insufficient evidence, the effect of the error in appointing himself the reviewing member would have been to prevent him reconsidering the matter and deciding afresh. The exercise of that power could never serve as a benefit to defendants, because it makes possible the holding of a disciplinary enquiry, even where the reviewing member has concluded that the investigation report discloses insufficient evidence to proceed. The error made by the Chairperson therefore did not materially prejudice the defendants in the presentation of their defence in these proceedings and this objection accordingly failed.

34. The next procedural objection was an objection related to the fact that the Prosecutor continued to investigate the charges after Mr Rao's investigation report was complete and produced new witnesses' statements. It was submitted that the rules only contemplate the investigation of charges by an investigator appointed by the Chairperson and not by a prosecutor.

35. The Panel notes that it is clear that the rules contemplate the investigation of the charges by an Investigator, prior to the notification of charge,[7] who shall provide the Chairperson with a final report and a recommendation as to

[7] See Procedural 13(4) which states that that if the Chairperson of the Ethics Board considers a complaint that has been submitted to the Board to "establish a prima facie case" the Chairperson shall "cause an investigation to be commenced and shall appoint an investigator".

whether disciplinary charges should be laid.[8] It is also clear that where new evidence comes to light or it is otherwise appropriate, the Chairperson of the Ethics Board may ask the Investigator to reopen the investigation[9].

36. The argument raised by the Defendants was that the Procedural Rules contemplate that it is only an investigator who may investigate disciplinary charges and that once the investigator's report has been completed, no new evidence may be sought or introduced. In the view of the Panel, this reading of the Procedural Rules overlooks the fact that the Rules explicitly provide that a Prosecutor may be appointed to lead the evidence in the disciplinary proceedings. In the view of the Panel, the fact that an Investigator's report is prepared to assist the Chairperson to decide whether disciplinary charges should be initiated does not mean that once that decision has been taken, no further evidence may be gathered or presented by the Prosecutor. In our view, such a reading of the rules would constitute an undue and unnecessary restriction on the Prosecutor. Of course, defendants must be given a fair opportunity to challenge any evidence presented or led by the Prosecutor in the proceedings. But in the view of the Panel, there is nothing in the Rules, nor any reason of fairness, which would suggest that the gathering of evidence by the Prosecutor is impermissible. This objection was accordingly dismissed.

37. The final procedural objection was that the Prosecutor did not call Mr Sharad Rao and others involved in the investigation as witnesses which meant that counsel for Mr Mwangi could not cross examine them. In the view of the Panel, there was no obligation upon the Prosecutor to call Mr Rao or any other person to testify if she did not seek to rely on anything that they might say to prove the disciplinary charges. The Prosecutor, in the exercise of her discretion, chose not to lead Mr Rao or any other person involved in the investigation and the consequence is that the Panel will not rely on any statement that they made

[8] See Procedural Rule 13(9).
[9] See Procedural Rule 13(8).

which forms part of the record. It was always open to Mr Mwangi to call such witnesses as he wished, a right that he exercised. In the view of the Panel, Defendants do not have a right to insist that the Prosecutor calls any particular witness, as they have the right to call any witness they choose. This objection therefore was also dismissed.

<u>Objection to the admission of evidence tendered by the Prosecutor</u>

38. A range of objections were raised on behalf of the Defendants arguing that documents sought to be admitted in the proceedings had been tendered to the Defendants at a time that did not afford them adequate time to prepare. This objection was taken in relation to the following documents relevant to the charges in these proceedings:

(a) Statements from two new witnesses provided by the Prosecutor on 28 January 2018, one day before the hearing commenced. The new statements were made by Mr Mathews Kisorio and Ms Agatha Jeruto respectively.

(b) Supplementary statements of witnesses also provided by the Prosecutor on 28 January 2018. The supplementary statements were made by Mr Ronald Kipchumba, Ms Francesca Koki Manunga and Ms Joy Sakari.

(c) Chronology relating to Mr Mwangi prepared by the Prosecutor.

(d) All documents produced after the Notification of Charge.

Each of these objections will be dealt with separately.

39. The Panel has decided at para 17 above that the Prosecutor was entitled to amend the facts contained in the Notification of Charge and to introduce new allegations of extortion against Mr Okeyo, as long as the manner in which she did so afforded Mr Okeyo a fair opportunity to mount a defence. As noted above, the new statements were provided to Mr Okeyo on Sunday 28 January 2018, and Mr Okeyo had nearly four months thereafter to proffer new

documentary evidence or identify new witnesses to rebut the new allegations. The Panel concluded therefore that permitting the amendment of the facts contained in the notification of charge was not unfair and granted the Prosecutor's application in this regard. It follows, for the same reasons, that the statements upon which the new factual allegations were made should also be admitted. For the sake of completeness, the Panel notes that both witnesses testified and counsel for Mr Okeyo had the opportunity to cross-examine both. The objection to the admission of these statements was accordingly dismissed.

40. Both Defendants objected to the admission of supplementary statements signed by Mr Ronald Kipchumba, Ms Francesca Koki Manunga and Ms Joy Sakari and provided to the Defendants on 28 January 2018. The Panel notes that all three of these witnesses subsequently testified before the Panel and counsel for the Defendants had a full opportunity to cross-examine them. Moreover, given that the hearings were not concluded till late May 2018, the Defendants had an adequate opportunity to present documentary evidence and to lead any witnesses to rebut the evidence of the three witnesses. This objection too was dismissed.

41. Thirdly, on the morning of 19 January 2018, the Prosecutor tendered a chronology of events in relation to Mr Mwangi, and in particular, in relation to the events of 16 October 2015. The admission of this chronology was opposed. The chronology was admitted on the basis that it formed part of the submissions made by the Prosecutor, which counsel for Mr Mwangi could address in his submissions to the Panel.

42. Finally, it was submitted that it was unfair for the Prosecutor to have produced any new documentary evidence or identified any new witnesses following the service of the notification of charge. The argument was that the documents and statements attached to the notification of charge constituted the only issues that could be considered in the proceedings. Consistent with its

earlier decision, the Panel concludes that it would be unduly restrictive in disciplinary proceedings to limit the evidence tendered or witnesses led in proceedings to that evidence or those witnesses identified in the notification of charge. There is no reason why evidence whether testimonial or documentary not contained in the notification of charge should not be placed before a panel of the Ethics Board as long as it does not unfairly deprive defendants of their right to mount a meaningful defence. This objection too was therefore dismissed.

The Hearings

43. Following the dismissal of the majority of the preliminary objections, the hearing commenced. In relation to the charge against Mr Okeyo under consideration in this matter, the Prosecutor led Ms Agatha Jeruto, Mr Matthew Kisorio and Mr Ronald Kipchumba. One witness was called on behalf of Mr Okeyo, Mr Elias Kiptum Maindi, and Mr Okeyo himself testified. In relation to the charge against Mr Mwangi, the Prosecutor led Ms Joy Sakari and Ms Francesca Koki Manunga. Mr Emmanuel Rerimoi testified on the basis that he addressed questions from the Panel followed by questions from the Prosecutor and the Defendants' legal representatives. The following witnesses were called on behalf of Mr Mwangi: Ms Charlotte Kurgoy, Ms Viola Chepchumba and Ms Karen Gachahi. Mr Mwangi himself also testified.

Missing Transcript of evidence of Ms Francesca Koki Manunga

44. The proceedings were transcribed, but in the case of one witness, Ms Francesca Koki Manunga, the recording equipment failed, and no verbatim transcription of her evidence could be produced. When this became known, as a matter of courtesy, the Chairperson of the Panel made her handwritten notes of the witness's testimony available to the Prosecutor and counsel for Mr Mwangi and, subsequently, provided a typewritten copy of her notes.

45. It was nevertheless argued on behalf of Mr Mwangi that because the

recording equipment had failed, and no transcription of Ms Koki Manunga's evidence could be made, that her evidence should be disregarded by the Panel. For this submission, counsel relied upon two Kenyan decisions in the same long-running matter, *Kenya Commercial Bank v Muiri Coffee Estate and Another*.[10] In that case, the question was raised whether the fact that the record of the proceedings in the case in the court below had been mislaid gave rise to an issue in the public interest, sufficient to warrant consideration by the Kenyan Supreme Court. The Supreme Court observed that the proper maintenance of court records was "of great importance" for courts of record,[11] but nevertheless concluded given the circumstances of the case that the appeal should not be entertained. The various dicta in the decisions upon which counsel rely all quite properly affirm the importance of court records to the work of courts of record. However they do not address the issue crisply before this Panel, whether a disciplinary tribunal is bound to ignore evidence led before it in the presence of those charged with disciplinary offences on the basis that no transcription of that evidence was made.

46. The Panel is of the view that there is no reason of fairness why evidence that it heard, and Mr Mwangi and his counsel heard, should be disregarded by it. It was open both to Mr Mwangi and his counsel to keep their own notes of the testimony, but they appear to have chosen not to do so. The Chairperson of the Panel did keep contemporaneous notes of the testimony upon which the Panel has relied, together with its recollection of the evidence, in preparing this decision. Those notes have, as a matter of courtesy, been provided to the parties. None of the parties has suggested that they are inaccurate in any material respect. The Panel concludes therefore that there is no reason of fairness why it should disregard the testimony of Ms Koki Manunga and it

[10] The Supreme Court decision in this matter dated 19 May 2016 may be found on the Kenya Law repository here http://kenyalaw.org/caselaw/cases/view/122257/ The Panel notes that although these proceedings were heard in Kenya, Kenyan law is not applicable to the proceedings of the IAAF Ethics Board.
[11] Id. at para 99.

declines to disregard that evidence.

Disclosure of Minutes by Mr Mwangi

47. One further evidential matter remains. During the course of counsel for Mr Okeyo's cross examination of Ms Jeruto, he sought leave to print out minutes of Athletics Kenya's Medical and Anti-Doping Commission which had concerned Ms Jeruto. The Prosecutor objected to the admission of the minutes and the application for them to be admitted was withdrawn. Following this incident, the Prosecutor once again requested Athletics Kenya to provide all minutes of meetings of the Medical and Anti-Doping Commission in the relevant periods. Some further minutes were provided and circulated to the parties and the Panel. During her cross examination of Mr Okeyo, the Prosecutor asked him if he had any other minutes on his laptop, to which he responded that the laptop belonged to Mr Mwangi.[12] While Mr Mwangi was testifying, the Prosecutor asked him about the minutes that Mr Okeyo had found on his laptop.[13] He responded that he could not confirm which minutes were under consideration, "because in my laptop there are many documents".[14] The Prosecutor then asked Mr Mwangi to examine his laptop and to produce any minutes of meetings relevant to these proceedings that were missing from the record.[15]

48. At the end of the hearings, the Chair of the Panel asked Mr Mwangi to examine his laptop and to disclose any minutes as soon as possible but by no later than 4 June 2018. Mr Mwangi failed to lodge any further minutes, nor did he indicate that he had undertaken the examination of his laptop. On 25 June 2018, the Prosecutor requested the Chair of the Panel to remind Mr Mwangi of the direction. On 27 June 2018, the Chair reminded counsel for Mr Mwangi of the undertaking given on 30 May 2018 and requested that by 4 July 2018,

[12] For ease of reference, see Transcript Volume 7, p 168, lines 16 – 20.
[13] For ease of reference, see Transcript Volume 8, 125, lines 3 – 21.
[14] For ease of reference, see Transcript Volume 8, 125, lines 23 – 24.
[15] For ease of reference, see Transcript Volume 8, 126, lines 3 – 10.

counsel for Mr Mwangi confirm whether the checks for the missing minutes have been undertaken and whether any relevant minutes have been identified. On 5 July 2018, counsel for Mr Mwangi responded by stating that his client had checked for the minutes but that he was not in possession of them.

49. The Prosecutor submits that in all the circumstances the Panel should draw an adverse inference against Mr Mwangi in relation to this part of his evidence. This is a matter that is considered further below.

Standard of Proof

50. We turn now to consider the appropriate standard of proof in these proceedings. Rule 11(7) of the 2015 Procedural Rules provides that:

> "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."

51. It is clear from the language of the rule that the key consideration in determining the standard of proof in any case will be the seriousness of the disciplinary charges in issue. The least serious violation may be established, Rule 11(7) states, on a mere balance of probability, whereas the most serious violations must be established on the criminal standard, proof beyond a reasonable doubt.

52. The Prosecutor observed that in a previous decision of the Ethics Board, in which the Panel was chaired by the Chairperson of the Ethics Board, *Balachnichev, Melnickov, Dollé, and Massata Diack,*[16] charges involving a form of blackmail were held to constitute the most serious kind of charge and therefore required to be proved beyond reasonable doubt. For the purposes of the

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[16] See Ethics Commission Decision 02/2016 *VB, AM, GD & PMD* at para 14(i), The decision is available here https://www.iaafethicsboard.org/decisions

proceedings before this Panel, the Prosecutor accepted for reasons of comity this Panel would probably accept that conclusion and the Prosecutor accordingly accepted that the charges are of the most serious kind and that the standard of proof beyond reasonable doubt applies, but she reserved the right to re-open this issue on appeal before the Court of Arbitration for Sport. It was argued on behalf of both Defendants that the applicable standard of proof in this case is the criminal standard, that is, proof beyond a reasonable doubt.

53. The Panel considers that the charges in this case, which involve blackmail and extortion, are of the most serious kind for they constitute not only serious criminal conduct, but also the abuse of authority. The Panel accordingly considers that the appropriate standard of proof is proof beyond a reasonable doubt.

54. The Panel disagrees with the Prosecutor's position in accepting that the appropriate standard of proof is proof beyond reasonable doubt in this case, but reserving the right to argue differently before the Court of Arbitration for Sport. In the view of the Panel, if a Prosecutor considers that a principle arising from an earlier decision of the Ethics Board should be departed from, then the Prosecutor ought to make submissions to support that argument before the Panel so that the Panel has an opportunity to consider the argument. In this way, if a decision is appealed to the Court of Arbitration for Sport then that appellate body will have the considered views of the Panel of the Ethics Board on the question.

Applicability of the IAAF Codes of Conduct to Defendants

55. It is common cause that Mr Okeyo, at all material times, was bound by the provisions of the relevant Codes. It was initially submitted on behalf of Mr Mwangi[17] that as he had left the employ of Athletics Kenya he was no longer subject to the IAAF Code. In the written submissions tendered on his behalf,

[17] For ease of reference see defence lodged by Mr Mwangi, Bundle C, Tab 21, para 2.3.

however, the jurisdiction of the Panel to determine the charge against Mr Mwangi was not contested.[18] Instead, it is stated that Mr Mwangi submits himself to the jurisdiction of the Panel "in an effort to clear his name".

The Anti-doping rules

56. As will become clear below, all the charges of extortion related to athletes who had tested positive for banned substances in breach of the IAAF Anti-Doping Rules. These Rules are based on the World Anti-Doping Authority (WADA) Code. The WADA Code was first introduced in 2003, revised in 2009 and again in 2015. The incidents upon which the charges in this case are based relate to events in 2012 (in relation to Mr Kipchumba and Mr Kisorio) and 2015 (in relation to Ms Jeruto, Ms Koki and Ms Sakari). In relation to events that took place in 2012, the IAAF Competition Rules of 2012 – 2013, which were in force from 1 November 2011, are applicable. The anti-doping rules contained in the IAAF Competition Rules were based on the 2009 WADA Code.

57. The IAAF Anti-Doping Rules 2012-2013, which were based on the 2009 WADA Code, provided that the period of ineligibility for a first violation of the Code was two years.[19] The period of ineligibility could be both extended and reduced depending on the circumstances. Where the substance was a "Specified Substance" as defined, that is a subset of Prohibited Substances, the period could be reduced were where the athlete could establish when the substance entered his or her body and that the substance was not intended to

[18] For ease of reference see paras 81 – 83 of written submissions tendered on behalf of Mr Mwangi.

[19] See Rule 40.2 of chapter 3 of the IAAF Competition Rules 2012 – 2013 (based on the WADA Code 2009), which, provided that: "The period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of Prohibited Substance or its Metabolites or Markers) …, unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided for in Rule 40.6 are met, shall be as follows:
(a) First Violation: Two (2) years' Ineligibility." For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

enhance the athlete's sporting performance.[20] Other grounds for seeking a reduction in the period of ineligibility under the Code were on the basis that the athlete had acted without fault and negligence, or without significant fault and negligence or on the basis of Substantial Assistance.[21]

58. The Substantial Assistance rule provides that a period of ineligibility may be suspended in whole or in part where an athlete has provided substantial assistance to the IAAF, his or her national federation, an anti-doping organisation, criminal authority or professional disciplinary body, resulting in the discovery or establishment of the violation of an anti-doping rule by a different person.[22] To provide substantial assistance, the rules require an athlete to make a full disclosure in a signed written statement of all the information he or she possesses in relation to anti-doping rule violations and to co-operate fully with the investigation and adjudication of any case relating to that information.[23]

59. Under the 2009 WADA Code, the two-year period of ineligibility could be extended up to four years if aggravating circumstances were present.[24] Aggravating circumstances included where the violation had occurred as part

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[20] See Rule 40.4 of chapter 3 of the IAAF Competition Rules 2012 – 2013 (based on the WADA Code 2009); and see the definition of "Specified Substance" in the same Code at para 34.5. For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

[21] See Rule 40.5 of chapter 3 of the IAAF Competition Rules 2012 – 2013 (based on the WADA Code 2009). For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

[22] See Rule 40.5(c) in chapter 3 of the IAAF Competition Rules 2012 – 2013 (based on the WADA Code 2009). For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

[23] See the definition of "Substantial Assistance: in the Definitions section of Chapter 3 of the IAAF Competition Rules 2012 – 2013 (based on the WADA Code 2009). For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

[24] See Rule 40.6 of chapter 3 of the IAAF Competition Rules 2012 – 2013 (based on the WADA Code 2009). For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

of a scheme or conspiracy to commit anti-doping rule violations.[25]

60. The WADA Anti-Doping Regulations 2015, applied to all proceedings relating to anti-doping rule violations or any samples collected after 1 January 2015 and chapter 3 of the IAAF Competition Rules were amended with effect from January 2015 to incorporate the changed WADA rules.

61. The two key changes in 2015 were first, the base-line period of ineligibility was increased from two to four years in most circumstances[26] and secondly, the 2015 WADA Code did not provide for any increase in the period of ineligibility on the basis of aggravating circumstances. Just as in the 2012 Code, the 2015 Code provided that where an athlete provided substantial assistance, his or her period of suspension could be reduced, but provided that no more than three-quarters of the otherwise applicable period of ineligibility may be suspended.[27]

The Case against Mr Okeyo

62. The evidence presented by the Prosecution against Mr Okeyo concerns three separate allegations of extortion, relating individually to Mr Kipchumba, Mr Kisorio and Ms Jeruto. They will be considered separately.

Mr Ronald Kipchumba Rutto

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[25] See Rule 40.6(a) of the IAAF Anti-Doping Rules 2012 – 2013 (based on the WADA Code 2009). For ease of reference, the Rules are to be found in Bundle G2, Tab 4.

[26] See Rule 40.2 of chapter 3 of the IAAF Competition Rules 2015 (based on the WADA Code 2015), which provides that: ““The period of Ineligibility imposed for a violation of Rule 32.2(a) (Presence of a Prohibited Substance or Prohibited Method) …, shall be as follows, subject to potential reduction or suspension pursuant to Rules 40.5, 40.6 or 40.7:
(a) The period of Ineligibility shall be four years where:
(i) The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional;
(ii) The anti-doping rule violation involves a Specified Substance, and it can be established that the violation was intentional.
(b) If Rule 40.2(a) does not apply, the period of Ineligibility shall be two years.”

[27] See Rule 40.7(a)(i) of chapter 3 of the IAAF Competition Rules 2015.

63. Mr Ronald Kipchumba Rutto (Mr Kipchumba) is a Kenyan athlete. He testified and in addition there are four statements made by Mr Kipchumba on the record before the panel. Mr Sharad Rao took two of these statements during his investigation; the Ethics Board obtained one in January 2018; and the other "the disputed statement" was signed in disputed circumstances in April 2017. Save in regard to the disputed statement, Mr Kipchumba testified that he was familiar with the contents of the statements and confirmed their contents. Although there were questions raised during cross examination as to who had actually written and typed the statements, the Panel is satisfied that Mr Kipchumba did confirm the contents of the statements, other than the disputed statement, and that he had signed them. The circumstances of the disputed statement, the contents of which will be dealt with separately below.

64. Mr Kipchumba stated that he had tested positive for a prohibited substance following his participation in the Linz Marathon in Austria in 2012.[28] He acknowledged that three days prior to the marathon he had received an injection that he had been assured would not be "noticed".[29] He stated that he was convinced to have the injection because he had not been able to compete for a year due to injury. He ran well at Linz, placing second.

65. He stated that two weeks after the Linz Marathon, his manager, Mr Gianni Demadonna, called him to tell him that he had tested positive for a prohibited substance. The next day he received a call from Mr Okeyo asking him to come to the offices of Athletics Kenya in Nairobi. He travelled to Nairobi the following day and met with Mr Okeyo to whom he gave a copy of the medical certificate relating to the injection. Mr Okeyo told him that he would forward the certificate to the IAAF and that he should await feedback. These facts are,

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[28] For ease of reference, the four statements from Mr Kipchumba on the record are as follows: two he gave to Mr Sharad Rao dated 7 April 2016 and 13 May 2016 (both at Bundle F, Tab 5), one signed at the request of Elias Kiptum Maindi (according to Mr Kipchumba) and dated 11 April 2017, at Bundle F2, Tab 2, and one signed on 21 January 2018, also at Bundle F2, Tab 2.
[29] For ease of reference, see his first statement to Sharad Rao dated 7 April 2016 at Bundle F, Tab 2.

by and large, not disputed between the parties.

66. After his first meeting with Mr Okeyo at Athletics Kenya's offices, Mr Kipchumba stated that he had been called to Nairobi three more times by Athletics Kenya before he heard the outcome of the proceedings relating to his positive test for a prohibited substance. His statements as to what happened at these meetings are not entirely consistent as will be discussed briefly below, and the following account is based on his January 2018 statement. There he stated that at his third meeting with Mr Okeyo, Mr Okeyo asked him how much money he had in his bank account, suggesting that because Mr Kipchumba had won races, he might have Kenyan Shillings (KES) 500,000 in his account. Mr Okeyo told him that he could help with a reduction of the period for which he would be banned from athletics from four to two years if he "gave the money". Mr Kipchumba states that he told Mr Okeyo that he could not pay the money. Mr Okeyo then told him to come back again in a week's time for another meeting.

67. The following week, according to Mr Kipchumba, he appeared before a panel of five people including Mr Okeyo, Mr Kinyua, General Tuwei and two others who were unknown to him. At the end of the meeting, Mr Okeyo told him that he could have been banned for four years, but that he was being banned for two.

68. Mr Okeyo denies that he ever asked Mr Kipchumba for money. Moreover, he states that he did not have any authority to affect the period of Mr Kipchumba's ban as he was not a full member of the Medical and Anti-Doping Commission of Athletics Kenya. He also said that given the rules in place in 2012, the baseline ban was two years, and that therefore he would not have said that he could reduce the ban from four to two years.

69. There is a clear conflict between Mr Okeyo and Mr Kipchumba as to whether Mr Okeyo asked Mr Kipchumba for money. One of them is accordingly not telling the truth in this regard. Moreover as Mr Kipchumba is

the only witness relied upon for the Prosecution in relation to this incident and given the incidence of the burden of proof, in order for the charge to be made out, the Panel will have to find (to the applicable standard of proof) that Mr Kipchumba was telling the truth in this regard.

70. In assessing the credibility of Mr Kipchumba, the Panel will consider several issues: the first is the differences between Mr Kipchumba's statements made to Mr Rao, on the one hand, and made to the Ethics Board in January 2018 on the other; the second is the role (and testimony) of Mr Kiptum Maindi in relation to the allegations against Mr Okeyo (and Mr Kiplagat); the third is the fact that Mr Kipchumba signed statements which were wholly mutually contradictory (that is the disputed statement on the one hand and his other three statements on the other); and the fourth is whether Mr Okeyo's assertion that he could not have affected the ban imposed upon Mr Kipchumba carries any weight in the credibility analysis.

71. We turn first to consider the fact that there was some inconsistency between the statements given by Mr Kipchumba to Mr Sharad Rao, on the one hand, and the statement Mr Kipchumba gave to the Ethics Board in January 2018, on the other. In the former statements, he stated that Mr Okeyo's demand for money happened at his fourth meeting with Mr Okeyo, which was on the same day that he appeared before the panel described in para 67 above. In his January 2018 statement he corrected himself and said that Mr Okeyo had demanded money at his third meeting with Mr Okeyo and not on the day of his panel hearing. In explaining this inconsistency, Mr Kipchumba simply said that he did not know why the error had appeared in his earlier statement. The Panel observes that the existence of minor factual inconsistencies between one statement and another do not necessarily impair the credibility of a witness. In this case, the statements were all prepared in English, a language in which Mr Kipchumba is not comfortably literate. The Panel observes that the process of taking statements in such circumstances can often lead to small inaccuracies for various reasons other than dishonesty. Accordingly, in the view of the Panel

the relatively minor inaccuracies between Mr Kipchumba's written statements do not lead the Panel to conclude that he is an unreliable witness whose testimony should be rejected.

72. The second issue relating to credibility concerns what happened after Mr Kipchumba was served with a two-year ban from athletics. It is common cause between the parties that after his banning, Mr Kipchumba was approached to tell his story about being asked for money by Mr Okeyo to a German and a Dutch journalist, which he did. The journalists also interviewed several other Kenyan athletes who alleged that money was being extorted from them by senior Athletics Kenya officials in order for their bans for the use of prohibited substances to be reduced. One of the people who assisted the journalists in contacting and meeting athletes was a Kenyan athlete, Mr Elias Kiptum Maindi. The interviews with the journalists were subsequently aired on the German television channel, ARD. As mentioned, this much of the story is common cause.

73. What is disputed is what happened afterwards. Mr Kipchumba stated that Mr Elias Kiptum Maindi, who had previously been assisting the journalists, approached him in April 2017 to sign what is referred to above as the disputed statement. The contents of that statement state that Mr Kipchumba had given false information to the journalists and to Mr Rao and that he wished "to withdraw" the statement given to Mr Rao. It continued to assert that Mr Okeyo and Mr Kiplagat never asked him "for money to cover up doping" and that he wished to apologise to Mr Okeyo and Mr Kiplagat. In his January 2018 statement, Mr Kipchumba stated that he had signed the disputed statement because he "trusted" Mr Kiptum Maindi who had told him that everyone else would be withdrawing their statements.[30] In his testimony before this Panel, Mr Kipchumba disavowed the contents of the disputed statement in its entirety and stated that he had not read it before signing it. He provided no further

[30] For ease of reference, see statement made by Mr Kipchumba to the Ethics Board in January 2018, Bundle F2, Tab 2, paras 11 and 12.

explanation as to why he would have signed a statement that he now disavows.

74. Following these events, according to Mr Kipchumba, another Kenyan athlete approached him in November 2017 who told him that the IAAF Ethics Board would like to speak to him. Mr Kipchumba agreed to meet with the Ethics Board team. Shortly before the arranged date for the meeting in November, Mr Kipchumba stated that Mr Kiptum Maindi called him to tell him not to meet with the IAAF Ethics Board team in the light of the disputed affidavit. If correct, this is a serious matter. It is the obligation of all participants in the sport of athletics to cooperate fully and promptly with any investigation or disciplinary proceedings undertaken by the IAAF Ethics Board, or its successor institutions, the Athletics Integrity Unit and Disciplinary Tribunal. Any proven attempt to impede an ethics investigation in the sport can be expected to be heavily punished.

75. Mr Okeyo provided a statement made by Mr Kiptum Maindi in his defence to the notification of charge. That statement was signed on 6 April 2017, just over a month after the notification of charge was served on Mr Okeyo and a few weeks before Mr Okeyo lodged his defence. Mr Kiptum Maindi was called to testify in these proceedings by counsel for Mr Okeyo.

76. In his statement, Mr Kiptum Maindi admitted that he had been a key contact for the journalists when they came to Kenya during the summer of 2015 to interview a group of athletes who claimed that Mr Kiplagat and Mr Okeyo had extorted money from them and that Mr Kipchumba was one of the athletes who was interviewed by the journalists. Mr Kiptum Maindi claimed that the journalists asked him to ensure that when the athletes spoke on camera they stated that Mr Okeyo and Mr Kiplagat had asked for money from them. He said that the reason the journalists requested him to do so was because they were of the view that Mr Kiplagat and Mr Okeyo had been in office for a long time and there was a need to remove them, and that bad publicity would

achieve that aim.[31] Mr Kiptum Maindi also said that the journalists had paid at least some of the athletes for their stories. Mr Kiptum Maindi also denied contacting Mr Kipchumba in April 2017 and requesting him to sign the disputed statement.

77. In his testimony before the Panel, Mr Kiptum Maindi stated that no one had asked him to repudiate his earlier conduct assisting the journalists regarding the extortion allegations. He asserted that he had decided to "confess" of his own accord. When the issue was probed in cross examination, Mr Kiptum Maindi stated that the "issue of a doping cover up by Isaiah Kiplagat and Okeyo was just a creation of the media by ARD, and that was done personally and specifically by the athletes, including Ronald Kipchumba himself, so I decided to kind of withdraw and repent. I actually went to Kiplagat and asked for repentance …".[32] He told the Panel that he had gone to see Mr Kiplagat and Mr Okeyo shortly before Mr Kiplagat died in August 2016 to "repent" and that he had then decided to make a statement setting out his new stance. The Panel notes here that Mr Okeyo did not disclose the fact of this meeting in his statement of defence, although when questioned about it in the hearing, he acknowledged that it had taken place. Mr Kiptum Maindi stated that he had himself chosen lawyers to approach to assist him prepare his statement and that he was not asked by Mr Okeyo to make the statement. He also testified that he only realised a few days before the hearing that the lawyers he had consulted were the lawyers for Mr Okeyo in these proceedings.

78. The Panel finds Mr Kiptum Maindi's evidence on this issue to be improbable. His statement was included in Mr Okeyo's defence and was sent to the Ethics Board by Mr Okeyo himself on 2 May 2017. The likelihood that Mr Kiptum Maindi of his own accord decided to go to lawyers to prepare a statement absolving Mr Kiplagat and Mr Okeyo eight months after he had

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[31] For ease of reference, see Kiptum Maindi's statement in Bundle A tab 15, last document, para 7ff.
[32] For ease of reference, see Transcript Vol 6, p 149 lines 15 – 22.

allegedly met with Mr Okeyo and Mr Kiplagat, without any further contact with them and at the precise time that Mr Okeyo was putting together his defence to the notification of charge is an improbable coincidence, and that he lit upon the very lawyers that were preparing Mr Okeyo's defence of all the lawyers in Kenya is so improbable as to be implausible.

79. In evaluating Mr Kiptum Maindi's evidence in relation to these coincidences, the Panel also takes into consideration Mr Kipchumba's statement that it was Mr Kiptum Maindi who called him in April 2017 and asked him to sign the disputed statement, which was signed on 11 April 2017. As outlined above, Mr Kiptum Maindi denied that he had spoken to Mr Kipchumba or asked him to sign the disputed statement. The Panel again notes that the timing of the signature of the statements makes Mr Kiptum Maindi's version implausible. The disputed statement was signed on 11 April 2017, just five days after Mr Kiptum Maindi had on his version decided of his own accord to sign the statement that came to be presented by Mr Okeyo as part of his defence. Both statements were signed shortly before Mr Okeyo's defence was lodged.

80. After a consideration of all these circumstances, the Panel does not accept that Mr Kiptum Maindi decided of his own accord in April 2017 to approach lawyers to assist him to prepare a written statement confessing that he had been part of a group of athletes who had sought untruthfully to accuse Mr Okeyo of extortion. The Panel also does not accept that it was a mere coincidence that the lawyers he approached happened to be the very lawyers representing Mr Okeyo in these disciplinary proceedings who at the time would have been preparing Mr Okeyo's defence. Similarly, the Panel does not accept Mr Kiptum Maindi's denial that he approached Mr Kipchumba to sign the disputed statement shortly after he had signed his own.

81. The Panel now returns to assess the credibility of Mr Kipchumba. The difficulty with his credibility arises from the fact that he signed fundamentally

inconsistent statements: three statements that alleged that Mr Okeyo had asked him for money in exchange for the offer of a reduction in his ban and a fourth, the disputed statement, that repudiated these statements. Mr Kipchumba now disavows the disputed statement. He asserted that he did not read the disputed statement before he signed it, but this does not assist him for he acknowledged that he knew at the time that he signed the statement that the purpose of the disputed statement was to disavow his earlier allegation of extortion against Mr Okeyo. His only reason for signing the disputed statement, which in effect admitted that he had previously told a damaging untruth about Mr Okeyo, was that he "trusted" Mr Kiptum Maindi. In his evidence before the Panel, he provided no further detail for his willingness to sign fundamentally contradictory statements. The Panel is very conscious of the power imbalance between athletes and athletics officials in many jurisdictions worldwide. However, in this case Mr Kipchumba has not given evidence that such considerations affected his conduct in signing inconsistent statements. We shall return to the fact that Mr Kipchumba signed mutually contradictory statements in a moment.

82. The Panel now turns to Mr Okeyo's claim that he could not, as the rules stood at the time, have delivered on his alleged undertaking to reduce Mr Kipchumba's possible ban from four years to two years and that Mr Kipchumba's evidence to the contrary is therefore untrue. This claim was made on two grounds: first, that the 2012 IAAF Competition Rules prescribed a baseline ban of two years and permitted no variation, and secondly, that he was not a member of the Medical and Anti-Doping Commission of Athletics Kenya at the time and so could not have influenced the period of suspension.

83. The Panel notes that although, as set out above, the 2012 Competition Rules did provide for a two-year baseline period of suspension, the Rules also contemplated that that period could be both reduced and increased. Mr Okeyo's defence is therefore not a fully accurate account of the relevant rules and does not assist him in seeking to rebut Mr Kipchumba's claim.

84. Secondly, it is clear from the record that Mr Okeyo attended the hearing at which the period of suspension was imposed upon Mr Kipchumba. His attendance at the meeting of the panel would likely have conveyed to any athlete appearing before it that he participated in – and could therefore have influenced – the decision. Whether or not he did do so does not matter, the only question that arises is whether an athlete would think that Mr Okeyo had the power to affect the outcome. His regular attendance at meetings of the Medical and Anti-Doping Commission would suggest to athletes that he probably was in a position to influence its decisions.

85. Finally, the Panel notes in this regard that the period of suspension imposed upon Mr Kipchumba was two years, despite the fact that he did not pay the money he alleges that Mr Okeyo demanded. The prosecution asserts that this incident formed one in a series of extortionate demands made by Mr Okeyo on athletes facing periods of suspension for the use of prohibited substances. The Panel notes that it could be speculated that the fact Mr Kipchumba had received the more lenient period of suspension, despite his non-compliance with Mr Okeyo's demand, might have weakened any future attempts at extortion if it had come to be known.

86. The question now for the Panel is whether it has been established beyond a reasonable doubt that Mr Okeyo asked Mr Kipchumba for money in exchange for a pledged reduction in his period of suspension. In the view of the Panel, although it did not find Mr Kipchumba to be a dishonest witness, it is perturbed by the contradictions between Mr Kipchumba's statements, and particularly his failure fully to explain why he was willing to sign a statement that – according to his testimony before the Panel – he knew in broad outline to be false at the time that he signed it. The only reason he gives for his willingness to sign a statement that he acknowledges to have been untruthful is that he "trusted" Mr Kiptum Maindi. In the view of the Panel, this explanation does not, without more, provide a reasonable explanation for Mr Kipchumba's conduct in signing a statement he admits to be false. No claim

was made that he signed because he was afraid of the consequences of not doing so, or because he had been paid to do so or was otherwise coerced. The fact that Mr Kipchumba knowingly signed a statement completely disavowing what he had said before about Mr Okeyo (and now says again) without providing a full and candid explanation for his action raises a reasonable doubt in the mind of the Panel as to whether he is now telling the truth.

87. The Panel notes that the fact that it harbours a reasonable doubt as to whether Mr Kipchumba or Mr Okeyo is telling the truth does not mean that the Panel has concluded that Mr Kipchumba was lying, or that Mr Okeyo is telling the truth, when Mr Kipchumba said Mr Okeyo had asked him for money. On the contrary, the Panel considers that it may well be more likely than not that Mr Okeyo did ask Mr Kipchumba for money, but the standard of proof in these proceedings requires a higher level of certainty than that. In this regard, the Panel records its dissatisfaction with what it has found to be the mendacious testimony of Mr Kiptum Maindi on behalf of Mr Okeyo, which raises doubts in the minds of the Panel members as to the veracity of Mr Okeyo's version of events. However, the Prosecution bears the burden of proof in these proceedings, and that burden, as has been explained above, must be met on the standard beyond a reasonable doubt. Overall the Panel concludes that the high standard of proof required has not been met here.

Mr Matthew Kisorio

88. Mr Matthew Kisorio is a long-distance Kenyan athlete, who did not provide a statement to Mr Rao. His statement was one of the new statements submitted by the Prosecutor for admission on the morning of 29 January 2018.[33] In his statement, Mr Kisorio acknowledges that he tested positive for a prohibited substance during 2012 and that he heard of the ban from Mr Okeyo. Thereafter he attended between ten and fifteen meetings in relation to his ban at Athletics Kenya. On four occasions, as far as he could recall, he met with Mr

[33] For ease of reference, Mr Kisorio's statement is at Bundle F2, Tab 6.

Okeyo alone.

89. He stated that at the initial hearing, at which Mr Okeyo and General Tuwei were present, as well as two doctors, he was asked about how he had come to test positive for a prohibited substance and he explained what had happened. He recalled taking officials from Athletics Kenya to the doctor in Eldoret that had given him the prohibited substance. He stated that Mr Okeyo never asked him for money in any of the meetings, but he stated that "it became clear to me that he was trying to see if I would pay him some money … It is difficult for me to describe but I got the clear sense from what he was saying that he was looking for a payment".[34] Mr Kisorio then stated that he was informed sometime later that he was being banned for two years.

90. In his testimony before the Panel, Mr Kisorio stated that he had met Mr Okeyo "like two, three, or four times",[35] which was somewhat inconsistent with his written statement, although perhaps not materially so. When asked whether in his meetings with Mr Okeyo, he had the impression that Mr Okeyo wanted to ask him for money, Mr Kisorio wavered in his responses. The first time the Prosecutor asked him whether it had become clear to him that that "he was trying to see if you would pay him some money", he responded, "Not really but …".[36] A little later the following exchange occurred:

> "Prosecutor: But it did become clear to you at the time that he was trying to see if you would pay him some money.
>
> Kisorio: As you can see the way I describe it he didn't ask me for any money.
>
> Prosecutor: No, but the sense …

[34] Id. at para 12.
[35] For ease of reference, see Transcript, Vol 6, p 9, lines 23 – 24.
[36] For ease of reference, see Transcript, Vol 6 p 14, lines 2 – 4.

Kisorio: No, I didn't pay him. I didn't pay him even a single cent.

Prosecutor: No, but you had the clear sense that he was seeking money from you?

Kisorio: If he had, but I didn't know, but when he asked me how much have you been paid in some races that you ran, have you been – got any money, like how much money you got in with your manager, so I know he wanted to tell me that. I was – I didn't expect him to ask me to pay him because at that time I had like no lump sum money. I had only little money so in any case if he could have asked me I had got no ability to pay him, so …

Prosecutor: But can we just be clear, the sense that you had at the time was that he was indirectly – so not asking you directly but by implication – asking you to pay him money?

Kisorio: I think I can – can I say it in Swahili? …

… On the letter number 12, regarding how I met with Mr Okeyo, I spoke with him and he asked me so many questions. He asked whether I'd been paid or not but I did not feel … when, you know, me and Mr Okeyo have been friends, he was open to me, asking me questions about whether I've received money through other means. I thought he was helping to help me in other ways but he did not ask for any money I also did not pay him and it's because there's respect between me and him and he's my boss, he was my boss and I could not expect that he would ask for any money from me so that I could go free."[37]

91. This exchange illustrates how Mr Kisorio failed to confirm what he had said in his statement that he had "got the clear sense from what he was saying that he was looking for a payment". The Prosecutor continued with this line of

[37] For ease of reference, see Transcript Vol 6, p 17 line 3 to p 18 line 11.

questioning and asked him if he was changing his evidence and Mr Kisorio responded "I think I haven't changed it".[38] The final exchange on this issue between Mr Kisorio and the Prosecutor went as follows:

> "Prosecutor: Mr Kisorio, is it true that during the meetings you had with Mr Okeyo alone it was clear to you that he was trying to see if you would pay him some money?
>
> Kisorio: I think in my statement –
>
> Prosecutor: Would you prefer to answer in Kiswahili?
>
> Kisorio: No, English. In my statement, let me put aside what I have written here. When I met with Mr Okeyo I don't remember what time that we did but I talked with him several times, he explained to me and he told me that even he himself is unhappy about my situation, even me myself I feel that guilt a lot. I feel a lot of guilt, but he encouraged me. As I stated here, I used to respect him so whenever I was in his office I respected him so much but we talk many things. If about the money he ask me, he didn't ask me to pay him but in my statement that I got clear sense from what he was looking for payment, I don't know whether he wanted some cash from me or not, I don't know, but at the end of the day he didn't ask for any payment and I didn't pay him."[39]

92. The Prosecutor argues in her written submissions that Mr Kisorio did not seek to depart from his January 2018 statement, but in the view of the Panel, Mr Kisorio did not unequivocally confirm his statement during his testimony. Instead he appeared uncertain and hesitant and unwilling to say that he had formed the view during his meetings with Mr Okeyo that Mr Okeyo wanted to ask him for money, despite being repeatedly asked by the Prosecutor. The Panel accepts that Mr Kisorio was uncomfortable in testifying against Mr

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[38] For ease of reference, see Transcript Vol 6, p 18 line 17 – page 18, line 2.
[39] For ease of reference, see Transcript Vol 6, p 121, line 11 to p 22 line 7.

Okeyo in his presence. The Panel notes too that, according to the Prosecutor, Mr Okeyo was laughing during Mr Kisorio's testimony. The Panel is not certain of this as none of the members of the Panel observed Mr Okeyo's conduct as we were listening to Mr Kisorio and Mr Okeyo was not in our line of sight.

93. For the sake of completeness, the Panel adds that it is of the view that even if Mr Kisorio had confirmed his statement without hesitation, the Panel observes that nowhere in that statement did he allege that Mr Okeyo had explicitly asked him for money or promised him any reduction in the period of his suspension. To establish a case of extortion beyond a reasonable doubt it would be necessary for the Panel to conclude that the proper inference to be drawn from Mr Okeyo's meetings with Mr Kisorio were that he was implicitly asking for money to reduce the period of suspension that Mr Kisorio faced. Mr Kisorio's statement cannot be said to have established that case and his hesitant and uncertain testimony did not bolster the case made out in his statement.

94. Accordingly, in the view of the Panel, Mr Kisorio's witness statement, without more, is not sufficient to establish that Mr Okeyo sought to extort money from him in return for a reduction in the period of his suspension and the Panel concludes accordingly that this charge against Mr Okeyo has not been proven.

<u>Ms Agatha Jeruto Kimaswai</u>

95. Ms Agatha Jeruto Kimaswai (Ms Jeruto) is a middle distance Kenyan runner who also did not make a statement to Mr Rao during his investigation. On 29 January 2018, the Prosecutor applied to have a written statement made by Ms Jeruto admitted to the record.[40] Ms Jeruto made the statement pursuant to an agreement with WADA and the IAAF that she would provide "substantial assistance" in terms of Rule 40(5)(c) of the IAAF Competition

[40] For ease of reference, see Bundle F2, Tab 1.

Rules 2015. The Substantial Assistance Provisions have been described at para 58 above.

96. Ms Jeruto stated that on 14 April 2015 she underwent an out-of-competition test for prohibited substances at her home in Eldoret. She found out a month later that she had tested positive for a prohibited substance, but she asserted that she did not know why she tested positive and had not knowingly taken a prohibited substance. She does recall going to a doctor on 20 March because she had a gastric ailment and that he gave her two injections, assuring her that they were suitable for her as an athlete.

97. During May 2015, Ms Jeruto received a call from Athletics Kenya asking her to go to meet Mr Mwangi and she travelled to Nairobi to meet him. It was there that she was told that she had tested positive and she was very upset and confused. Mr Mwangi told her to write a statement about what had happened. She went home and called her coach, who – she says – gave her no assistance. She also tried to contact the doctor who had administered the injections to her in March without success. She wrote out a statement and sent it to Athletics Kenya. Late in May 2015 she flew to Norway to meet her fiancé, a Norwegian man, whom she married later in the year. Sadly, he was killed in a helicopter accident in April 2016.

98. Shortly after arriving in Norway in May, Ms Jeruto stated, she received a call from Athletics Kenya informing her that she should attend a hearing of the Medical and Anti-Doping Commission of Athletics Kenya in Nairobi on 4 June, so she returned to Kenya. Present at the hearing were Mr Okeyo, Mr Mwangi and General Tuwei, as well as three doctors, whose names she could not recall. In response to their questioning, she explained what had happened and said that she had not knowingly taken a prohibited substance. During the hearing, Mr Okeyo asked if she had come from Eldoret for the meeting, but she explained that she had come from Norway. Mr Okeyo then asked her whether she had a boyfriend, which she found strange, but she admitted that she had a

Norwegian boyfriend. She was told not to go to Norway as she would be needed to assist the Investigation. She then returned to her home in Eldoret.

99. A little later in June, Mr Mwangi called her, Ms Jeruto stated, and told her that "they" were in Eldoret and that she should be on "stand by" for the investigation, but she heard nothing further at that time. In mid-June 2015, according to Ms Jeruto, she received another call from a man whom she had met, but did not know well. She knew this caller ("the intermediary") because his girlfriend was an athlete. She stated that although the intermediary did not work for Athletics Kenya, he was friendly with Mr Okeyo. The intermediary, she stated, had told her that Mr Okeyo had asked him to tell her that if she paid some money to Mr Okeyo she would receive a reduced sanction for her doping offence. When she asked how much money she would need to pay, the intermediary said KES 5,000,000. She also asked why Mr Okeyo was asking for money, and the intermediary told her it would be shared between Athletics Kenya officials.

100. Ms Jeruto stated that she had discussed the matter with her fiancé, who she suggested, would have been able to pay the money, but that she had decided it was not the right thing to do. A few days later, she went with the intermediary to Nairobi to meet Mr Okeyo. She asserted that she had never had any intention of paying the money, but was curious as to what Mr Okeyo could do. She stated that she alone met with Mr Okeyo in Nairobi near the Nyayo Stadium, which is close to the Athletics Kenya offices. Mr Okeyo, she said, told her that "we will help you" with her positive doping result, but did not bring up the question of money. When she asked him how much money he wanted, he did not reply. He simply repeated that he would help her and added that he had helped many other athletes. Ms Jeruto stated that she was confused as to why she had been asked to go all the way from Eldoret to Nairobi to meet Mr Okeyo when he would not discuss money. She also said that when her meeting with Mr Okeyo ended, she saw that the intermediary then had a conversation with Mr Okeyo, which she did not overhear.

101. On their way back to Eldoret, she said, the intermediary had told her that Mr Okeyo needed KES 5,000,000 to help her and that it would have to be paid in cash. When she queried that and asked why it could not be paid into Mr Okeyo's bank account, the intermediary told her that Mr Okeyo did not want it to be "used against him". She told the intermediary she would not pay the money. Over the next month, the intermediary called her on several occasions to ask her whether her fiancé would pay the money, but each time, she stated, she told him that the money would not be paid, and eventually the intermediary stopped calling her.

102. The next time she heard from Athletics Kenya, according to Ms Jeruto, was in September 2015 when she was called to another meeting. She recalled that she then called Mr Okeyo to find out what was happening as she was still expecting the investigation into the doctor who had given her the injections. They met again at the Nyayo Stadium in Nairobi and Mr Okeyo told her that she would be banned for four years. She recorded that although Mr Okeyo did not mention money, it was clear to her that Mr Okeyo was telling her that she was being given a four-year ban because she had refused to pay the KES 5,000,000. On 22 September 2015, she went to the hearing at the Athletics Kenya offices where Mr Mwangi and a doctor were present. Mr Mwangi told her that she would be banned for four years. Ms Jeruto asked why the investigation into the doctor has not happened and Mr Mwangi told her it was for her to conduct her own investigation. Ms Jeruto stated that she was very angry, and had decided to contact the IAAF. The Panel notes that in her testimony before the Panel, Ms Jeruto confirmed in all material respects the statement that she had made to the Ethics Board in January 2018.

103. In his testimony, Mr Okeyo denied that he had ever met Ms Jeruto at the Nyayo Stadium, denied that he knew the intermediary and also denied that he had ever asked Ms Jeruto for money.[41] He asserted that by 2015, he was no

[41] For ease of reference, see Transcript Vol 7, p 19, lines 2 - 25.

longer responsible for the process of results management, a task that had been taken on Mr Mwangi, and that therefore it was no longer his responsibility to meet with athletes who had tested positive for prohibited substances.

104. Ms Jeruto also testified about her agreement with WADA and the IAAF, explaining to the Panel that she had received a reduction of one year from her period of suspension, so that her suspension was for a period of three years.[42] This agreement was reached in terms of the "Substantial Assistance" provisions of both WADA's Anti-Doping Regulations and the IAAF Competition Regulations. Those provisions are outlined above at para 58, as mentioned at para 95 above.

105. It was submitted by Mr Okeyo's counsel that Ms Jeruto is an unreliable witness because of her agreement with WADA.[43] In the view of the Panel, however, it does not follow that because a witness has been afforded a reduction in their period of suspension in accordance with the "Substantive Assistance" provision in the IAAF Competition Rules, the evidence of that witness is to be treated as unreliable unless on the specific facts of a particular case there is a basis for that conclusion. As the prosecutor submitted, the approach proposed on behalf of Mr Okeyo would threaten the important public interest that the substantial assistance provision seeks to achieve. The rationale for that public interest was clearly set out in relation to a similar provision relating to the sport of alpine skiing by the Court of Arbitration for Sport in its decision *Hans Knauss v FIS* as follows:

> "The motive for this preferential treatment is the recognition that the instruments for combating and eliminating the acts of trafficking, possession or the administration of prohibited substances are extremely limited. This is due primarily to the clandestine nature of these activities and, secondly, the personal relationships which the athlete usually has

[42] For ease of reference, see Transcript, Vol 5, p 21.
[43] For ease of reference, see written submissions on behalf of Mr Okeyo at para 26.

developed to the people and athletes in his immediate proximity. The athlete will generally not want to expose these persons to the risk of a sanction. [The Substantial Assistance provision] is intended to create an incentive for the athlete to provide the information which is urgently required for the fight against doping."[44]

106. In the view of the Panel, the correct approach to the testimony of a witness who has benefited from the substantial assistance provision is for a panel to bear in mind the fact that the witness has benefited from the substantial assistance provision when hearing the evidence and to consider the evidence and assess its credibility on the basis of that fact as well as all the other facts before the Panel. If, on a careful consideration of all the circumstances, the Panel concludes that the witness is to be believed, the fact that the witness has benefited from the substantial assistance provision should not preclude a panel from believing the witness.

107. It was also submitted on behalf of Mr Okeyo that the Substantial Assistance provision had been wrongly applied in Ms Jeruto's case.[45] The submission was that because Ms Jeruto's statement included hearsay evidence she did not qualify for a reduction in her period of suspension under the Substantial Assistance rule. The Panel observes that the question whether the Substantial Assistance provision has been correctly applied in this case is not an issue before it, nor is it one that falls within its jurisdiction. The Panel must assess Ms Jeruto's credibility in the light of the fact that she has benefited from the Substantial Assistance rule, but it is not for the Panel to consider whether the rule was properly applied. This submission on behalf of Mr Okeyo needs no further consideration.

108. The Panel now turns to assess the credibility of Ms Jeruto. She struck the

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[44] CAS 2005/A/847 dated 20 July 2005 at para 25, the decision is available at: http://jurisprudence.tas-cas.org/Shared%20Documents/847.pdf

[45] For ease of reference, see written submissions on behalf of Mr Okeyo at para 38ff.

Panel as a truthful witness. Her oral testimony was consistent with her written statement, and she answered questions both in chief and under cross-examination clearly and without hesitation. She testified that she had taken some time to agree to testify because she was worried about her security. "As a woman, maybe in Kenya", she said, "you don't really have the (inaudible) to come out and to speak what has happened to you".[46]

109. Truthful as Ms Jeruto may have been, there is one difficulty with her account, and that is that on her own version Mr Okeyo never expressly asked her for money. She told the Panel that all the requests for money were made via the intermediary and not by Mr Okeyo himself. The intermediary was not called to testify, and accordingly the Panel has not had the opportunity to hear his evidence. Mr Okeyo denied knowing him, which presumably accounts for why he did not call him to bolster his defence.

110. This Panel is not bound by the rules of evidence that apply in many common-law jurisdictions, in which hearsay evidence is generally inadmissible. Instead, Procedural Rule 11(1) provides that the Ethics Board "is not bound by rules governing the admissibility of evidence. Facts relating to a violation of the Code may be established by any means deemed by the "Panel" to be reliable." There was no reason, therefore, for the Panel to prevent Ms Jeruto from providing hearsay evidence in her testimony, but the question that the Panel now must determine is what weight should be attached to that evidence.

111. The Panel notes that on Ms Jeruto's version the only person who actually heard Mr Okeyo make a demand for payment was the intermediary. The Panel has not heard the evidence of the intermediary himself. Where such evidence is tendered only by way of hearsay, the possibility to hear and rebut such evidence is compromised. In the view of the Panel, it is for this reason that Ms Jeruto's account of what she heard the intermediary say could not be given

[46] For ease of reference, see Transcript, Vol 5, p. 20.

decisive weight. Accordingly, the Panel concludes that, in the absence of any evidence that directly confirms Mr Okeyo's demand of extortion, it cannot find that it has been established beyond a reasonable doubt that Mr Okeyo sought to extort money from Ms Jeruto in return for a promised reduction in her period of suspension.

Conclusion on case against Mr Okeyo

112. For the reasons given in the preceding paragraphs, the Panel has found that none of the allegations of extortion made against Mr Okeyo have been proved beyond a reasonable doubt. The Panel records that in the case of both Mr Kipchumba and Ms Jeruto it considers there to be credible evidence to suggest that extortion may have taken place, even though ultimately the Panel has concluded that that evidence does not meet the standard of proof required in terms of the rules of the Ethics Board. The Panel considers the evidence to raise a matter of sufficient concern to warrant the attention of both Athletics Kenya and the IAAF and urges them to take steps to ensure that appropriate procedures are in place to prevent extortion by officials and others involved in the processes that enforce the anti-doping rules.

The Case against Mr Mwangi: Ms Sakari and Ms Koki Manunga

113. In the original notification of charge, Mr Mwangi was charged with a breach of the IAAF Ethics Code in relation to allegations made by four athletes, Ms Joy Sakari, Ms Francesca Koki Manunga, Ms Peris Jepkorir and Mr Wilson Erupe. However, as mentioned above, the Prosecutor did not lead Ms Pepkorir and Mr Erupe as witnesses, and therefore the only remaining allegations against them were those made by Ms Sakari and Ms Koki Manunga. On the record before the Panel, there were four written statements made by Ms Sakari, three of them were made during 2016 to the investigation conducted by Mr Sharad Rao,[47] and one made to the IAAF Ethics Board on 23 January 2018.[48]

[47] For ease of reference, see Bundle F, Tabs 14, 15 and 16.
[48] For ease of reference, see Bundle F2, Tab 5.

There were three statements made by Ms Koki Manunga, two made to the Investigation in 2016,[49] and one made to the IAAF Ethics Board on 17 January 2018.[50]

114. At the commencement of the hearings relating to the allegations made by Ms Sakari and Ms Koki Manunga, the Prosecutor arranged for a video of the Associated Press to be shown to all present. The video clip is relatively short and shows Ms Sakari and Ms Koki Manunga in conversation. A verbatim transcript of the interview was also included in the record. It is common cause that it was the public broadcasting of this video clip that led the Chairperson of the Ethics Board to initiate an investigation into the allegations made in it.

115. In the video clip, Ms Koki Manunga states that "we went, and asked him, and he told us we could get something, he told us 2.5, and I told him that I never, touched that money in my life."[51] Once the video clip had been shown, Ms Koki Manunga testified followed by Ms Sakari. As mentioned at para 44 above, the recording equipment failed when Ms Koki Manunga was testifying and in preparing this decision, the Panel is working from the contemporaneous notes taken by the Chair of the Panel, which have been made available to the parties.

116. It is common cause between the parties that Ms Sakari and Ms Koki Manunga are both Kenyan athletes who formed part of the Kenyan team at the IAAF World Championships in Beijing in August 2015. While there, they both tested positive for prohibited substances, and were sent home. The athletes appeared before the Athletics Kenya Medical and Anti-Doping Commission on two occasions (in late September and early November 2015) in connection with their breach of the anti-doping regulations. In November, the Commission imposed four-year bans on both of them.

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[49] For ease of reference, see Bundle F, Tabs 17 and 18.
[50] For ease of reference, see Bundle F2, Tab 4.
[51] For ease of reference, see Bundle F1, Tab 19.

117. There are disputes of fact between Mr Mwangi and Ms Sakari and Ms Koki Manunga as to the events that took place in Beijing after they had both tested positive. The Panel notes however that neither Ms Sakari nor Ms Koki Manunga stated that Mr Mwangi told them in Beijing that if they gave him money he would be able to reduce the periods of suspension that would follow as a result of their positive tests. In the view of the Panel, the disputes of fact between them relating to the events in Beijing have no material relevance to the charge of extortion against Mr Mwangi, and there is no need to outline them in this decision.

118. In their testimony and in their various statements, Ms Sakari and Ms Koki Manunga stated that on 16 October 2015 they went to the offices of Athletics Kenya to collect prize monies owing to them as a result of their having been members of a successful relay team that had competed in the Bahamas World Relays Championships earlier in the year. They stated that on that morning they asked to see Mr Mwangi and that they were shown into his office where they met him alone. Ms Koki Manunga testified that they asked Mr Mwangi whether they would be given their share of a Safaricom bonus that had been paid to members of the Kenya team in Beijing because Kenya had ended the championships at the top of the medal table. Mr Mwangi told them that they would not be entitled to the bonus because they had been sent home before the Championships ended because they had tested positive for prohibited substances.

120. In her January 2018 statement, Ms Koki Manunga stated that they then asked Mr Mwangi about the progress in relation to their doping case. She stated that Mr Mwangi told them that if they did not want the case to go ahead, then they "could give Mr Mwangi some money and we might be given two months or six months or the case might even be finished and we could return to training".[52] When they asked Mr Mwangi how much money they would

[52] Ms Koki Manunga's statement to IAAF Ethics Board on 17 January 2018. For ease of reference, see Bundle F2, Tab 4, para 15.

need to give him, he said KES 2,500,000 each, she said. They both stated in their statements that they were shocked at the amount of money as they did not have that much money. In her January 2018 statement, Ms Sakari said that when they asked about the doping case, Mr Mwangi told them that it was very serious and they might get four years. When they queried the period, "he said that he could reduce our bans or even make them go away if we paid him KES 2,500,000 each."[53]

121. There were small discrepancies between the accounts given by Ms Sakari and Ms Koki Manunga in their various statements and their oral testimony as to what happened in Mr Mwangi's office on 16 October 2015 but in the view of the Panel these discrepancies were not material.

122. In his testimony, Mr Mwangi denied that he had met Ms Sakari and Ms Koki Manunga on 16 October 2015 in his office, and accordingly also denied that he had ever asked them for money to reduce the period of their suspension. He testified that he had arrived back in Nairobi late the previous evening and had a busy day on 16 October attending scheduled meetings.

123. He led three witnesses to confirm that he did not meet Ms Sakari and Ms Koki Manunga on that day, Ms Charlotte Kurgoy, Executive Assistant to Mr Mwangi,[54] Ms Viola Chepchumba, an administrative assistant at Athletics Kenya[55] and Ms Karen Gachahi, who works at the front desk at Athletics Kenya.[56]

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[53] Ms Sakari's statement to IAAF Ethics Board on 23 January 2108. For ease of reference, see Bundle F2, Tab5, para 12.

[54] Ms Kurgoy made a statement on 14 March 2016 that was annexed to Mr Mwangi's statement to the Sharad Rao Investigation dated 7 October 2016. For ease of reference, see Bundle C, Tab 21(d), annexure 10 (pp 71 - 72).

[55] Ms Chepchumba also made a statement on 14 March 2016 that was annexed to Mr Mwangi's statement to the Sharad Rao Investigation dated 7 October 2016. For ease of reference, see Bundle C, Tab 21(d), annexure 10 (p 94).

[56] Ms Gachahi also made a statement on 14 March 2016 that was annexed to Mr Mwangi's statement to the Sharad Rao Investigation dated 7 October 2016. For ease of reference, see Bundle C, Tab 21(d), annexure 10 (p 107).

124. A fourth witness, Mr Emmanuel Rerimoi, the accountant at Athletics Kenya, was, by agreement between the parties, questioned first by the Panel, and then by the Prosecutor and counsel for Mr Mwangi.[57] Mr Rerimoi confirmed that he had given the US Dollar cheques that constituted their prize money for the Bahamas Relay competition to Ms Sakari and Mr Koki Manunga. He also confirmed that he gave them letters to enable them to open dollar bank accounts.

125. The Panel notes that in relation to key question – whether the athletes met Mr Mwangi on 16 October 2015 and whether he asked them for money then – the versions of Ms Sakari and Ms Koki Manunga, on the one hand, and Mr Mwangi, on the other are mutually contradictory. Either Ms Sakari and Ms Koki Manunga are not telling the truth, or Mr Mwangi is not.

126. The Prosecutor argued that the Panel should not believe Mr Mwangi and submitted that he had not established his assertion that he *could not* have met the two athletes on the morning of 16 October. To establish that he could not have met Ms Sakari and Ms Koki Manunga, three witnesses were led on behalf of Mr Mwangi: his executive secretary, Ms Kurgoy; the front office receptionist, Ms Gachahi; and an administrative assistant, Ms Chepchumba. Ms Kurgoy and Ms Gachahi, in particular, testified that Ms Sakari and Ms Koki Manunga did not meet Mr Mwangi on that day.

127. In her written submissions, the Prosecutor argues that their evidence does not support Mr Mwangi's assertion that he could not have met Ms Sakari and Ms Koki Manunga on 16 October. She argues that their evidence was overstated and inconsistent. Moreover, in her submission, their evidence should be viewed as a concerted attempt by employees at Athletics Kenya to

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[57] Mr Rerimoi also made a statement on 14 March 2016 that was annexed to Mr Mwangi's statement to the Sharad Rao Investigation dated 7 October 2016. For ease of reference, see Bundle C, Tab 21(d), annexure 10 (p 79). On the record before the Panel there is also a note of interview with Mr Rerimoi also with IAAF Ethics Board. For ease of reference, see Bundle F2, Tab 51.

protect Mr Mwangi.

128. The Panel finds that there were difficulties with the evidence of these three witnesses. Ms Kurgoy sought to suggest in her statement that Mr Mwangi was fully committed with meetings on 16 October 2015 and could therefore not have met Ms Sakari and Ms Koki Manunga. She tendered an excerpt from Mr Mwangi's electronic diary to support her testimony. However, it became apparent that there were significant discrepancies between the times that she said the meetings took place, and the dates recorded in the diary. Moreover, it appeared that one of the diary entries for 16 October 2015 had been entered in the diary some four months later, on 29 February 2016. She could not explain this.[58]

129. The Panel concludes that the excerpt from Mr Mwangi's electronic diary is not a reliable basis for determining Mr Mwangi's meetings on 16 October 2015 and that Ms Kurgoy's evidence did not reliably establish Mr Mwangi's engagements on 16 October. In addition, the Panel finds that the fact that an entry was made in the diary for 16 October 2015 some four months later in February 2016, once the Investigation had been commenced, to suggest that there was indeed an attempt to bolster Mr Mwangi's defence that he *could not* have met Ms Sakari and Ms Koki Manunga on 16 October 2015. We return to this below.

130. In her statement made in March 2016, Ms Gachahi stated that Ms Sakari and Ms Koki Manunga had arrived at the Athletics Kenya offices at about 11.15am and left at 12.30pm.[59] When asked in cross examination how she could remember those precise times, given that Athletics Kenya has many visitors every day and no documentary record is kept of arrival and departure times, she said she no longer had any independent recollection of their arrival and departure time, but asserted that when she had made the statement, she did

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[58] For ease of reference, see Transcript, Vol 7, pp 258 – 260.

[59] For ease of reference, see her statement Bundle C, Tab 21(d), annexure 10 (p 107).

have such a recollection.[60] She could not provide any explanation as to how she could have had such a recollection in March 2016 when she made the statement, some five months after the events in question.[61] Having heard Ms Gachahi's testimony, the Panel is not convinced that she had an independent and accurate recollection of when Mr Sakari and Ms Koki Manunga arrived and left Athletics Kenya on 16 October 2015 and concludes that her assertion to the contrary cannot be believed.

131. Ms Chepchumba stated that she saw Ms Sakari on the morning of 16 October 2015 and reminded her that she should collect a trophy that she had won. She stated that she saw Ms Sakari at about 11.30 and that Ms Sakari came to collect the trophy at about 12.30pm.[62] Like Ms Gachahi, she could not explain how she remembered these times, given that her statement was made five months after the relevant events and she could produce no documentary evidence to confirm the precise times.[63] Under cross-examination, she wavered as to the precise time that she saw Ms Sakari. She did produce a trophy register that confirmed that Ms Sakari had collected a trophy that day, but that register did not contain a record of the time of collection.[64] Again having heard her testimony, the Panel was not convinced that Ms Chepchumba had a reliable recollection of the times that she saw Ms Sakari on 16 October 2015.

132. On the question of the collection of the trophy, the Panel notes that neither Ms Sakari nor Ms Koki Manunga had any recollection of collecting a trophy on 16 October 2015[65] even though it appears on the record before the Panel that the trophy was signed for and collected by Ms Sakari on that day. The Panel finds it surprising that neither Ms Sakari nor Ms Koki Manunga recall collecting the trophy, which presumably Ms Sakari would have carried

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[60] For ease of reference, see Transcript, Vol 8, p 16, line 11.
[61] For ease of reference, see Transcript, Vol 8, pp 16 – 17.
[62] For ease of reference, see Bundle C, Tab 21(d), annexure 10 (p 94).
[63] For ease of reference, see Transcript, Vol 7, pp 297 – 298.
[64] For ease of reference, see Bundle C, Tab 21(d), annexure 10 (p 106).
[65] For ease of reference, see Chair's transcribed notes of Ms Koki Manunga's evidence, at p 13, and for Ms Sakari's testimony, see Transcript, Vol 4, p 59.

with her. They both testified that they had been together all day. Given that there appears to be no reason to doubt the documentary record of Ms Sakari's having collected the trophy on that day, it leaves the Panel with some doubt as to how clearly and independently Ms Sakari and Ms Koki Manunga recall the events of 16 October 2016.

133. The Panel concludes that the witnesses led by Mr Mwangi to establish that Ms Sakari and Ms Koki Manunga could not have met with him at the Athletics Kenya offices on 16 October 2015 do not establish that he indeed could not have met them on that day.

134. The Prosecutor also suggests that the Panel should disbelieve Mr Mwangi on the basis that there is evidence on the record that there was an attempt to create a documentary basis to bolster Mr Mwangi's defence. The first documentary record in this regard is the antedated entry of a meeting into Mr Mwangi's electronic diary of 16 October 2015, some four months later, in February 2016 that surfaced during Ms Kurgoy's testimony discussed above at para 129. The Panel concludes that this antedated entry may well have been entered in order to bolster Mr Mwangi's assertion that he had a full diary that day and could not have met with Ms Sakari and Ms Koki Manunga. We return to assess this conclusion below.

134. The second document on the record that the Prosecutor submits supports a suggestion that there was an attempt to construct a documentary record after the event is a document entitled "Decision." This document purported to be the reasons for the decision given by the Medical and Anti-Doping Commission in the case of Ms Sakari and Ms Koki Manunga. The document was furnished as part of the package of documents provided by Mr Mwangi to Mr Rao's Investigation.[66]

135. There are three signatures at the end of the document that purport to be

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[66] For ease of reference, see Bundle C, Tab 21(d), Annexure 6 (pp 44 - 61).

the signatures of Mr Okeyo, Mr Kibet and Ms Shiraku. Doubt was cast on the authenticity of the document when Mr Okeyo in his testimony denied that the signature following his name was his signature.[67] Further doubt was cast on the authenticity of the document, given that the three purported signatories of the document do not accord with Mr Mwangi's own statement in his written defence as to who heard Ms Sakari and Ms Koki Manunga's doping case. He stated that Dr Bargoria, General Tuwei, Ms Chiruku and Mr Kibet had been the members of the Commission.

136. The Panel notes in passing that it was put to Mr Mwangi that this aspect of his statement in defence conformed neither with the minutes of the meeting of 28 September 2015 which suggested that General Tuwei and Mr Kibet were not present, nor with the names that appear at the end of the purported "Decision". He did not provide a clear explanation for these inconsistencies.[68]

137. Yet further doubts were raised regarding the authenticity of the "Decision" by the fact that it does not appear on the record to have been sent either to the IAAF[69] or to the athletes.[70] Finally the Panel also notes that no similar "Decisions" were produced in relation to the other doping cases under review in these proceedings. All of these factors suggest to the Panel that the "Decision" was not an authentic document, although why it should have been manufactured or by whom is less clear.

138. The Prosecutor put to Mr Mwangi in cross-examination that he must have manufactured the "Decision" in order to bolster his defence, but Mr Mwangi denied that he had done so.[71] The Prosecutor made the same argument in her written submissions. In considering this argument, the Panel notes that it is not clear – even assuming Mr Mwangi had constructed the "Decision" – how

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[67] For ease of reference, see Transcript, Volume 7, pp 170 – 172.
[68] For ease of reference, see Transcript at Vol 8, pp 157 – 159.
[69] For ease of reference see Mr Mwangi's letter to the IAAF concerning the Sakari/Koki Manunga recommendations, Bundle F2, Tab 8.
[70] For ease of reference, see the emails sent to the two athletes, Bundle F2, Tab 8.
[71] For ease of reference, see Transcript, Vol 8, p 201 lines 6 - 12.

it would have materially bolstered his defence. In any event the Panel cannot conclude on the record before it that Mr Mwangi did draft this document. It remains unclear to the Panel who did draft the document and for what reason.

139. In sum, the Panel accepts that there was an attempt to bolster Mr Mwangi's defence at least in relation to his electronic diary but the Panel notes that it cannot decide who was responsible for this attempt. Was it Ms Kurgoy or Mr Mwangi himself? The Panel cannot be sure. Before turning to the consequence of this conclusion, the Panel considers one further argument made by the Prosecutor.

140. The Prosecutor argues that the three witnesses led on behalf of Mr Mwangi demonstrated a concerted, but unsuccessful, attempt to provide him with an alibi for 16 October 2015. She suggests that if the Panel accepts this argument it should view Mr Mwangi's own evidence with circumspection. However, the Panel is not sure that the record demonstrates that there was a concerted attempt by Ms Kurgoy, Ms Chepchumba and Ms Gachahi to provide Mr Mwangi with an alibi.

141. Even were the Panel to have concluded that the three witnesses had indeed conspired to seek to give Mr Mwangi an alibi, the question for the Panel would still be whether the existence of such a plan would be probative of the key factual issue before the Panel: whether Mr Mwangi met with Ms Sakari and Ms Koki Manunga on 16 October 2015 and asked them for money in return for pledging to ensure that they received reduced periods of suspension. This question arises too in relation to the Panel's conclusion that there was an attempt to create a documentary basis for Mr Mwangi's defence and it is to this question we now turn.

142. The Panel is not sure that the only reasonable inference that can be drawn from the fact that there was an attempt by someone to provide support for Mr Mwangi's defence by antedating an entry in his diary is that it was done to conceal that Mr Mwangi had in fact met with Ms Sakari and Ms Koki Manunga

on 16 October and asked them for money in return for undertaking to reduce their periods of suspension. In the view of the Panel, another reasonable inference from this conduct would be that an attempt was made to bolster his defence simply because whoever antedated the entry into his electronic diary feared that his truthful denial of Ms Sakari and Ms Koki Manunga's allegations would not be believed. The Panel notes that a conclusion by the Panel that the three Athletics Kenya witnesses had conspired together to testify to provide Mr Mwangi with an alibi would have been open to a similarly non-incriminatory inference.

143. The Panel now considers its assessment of Mr Mwangi's own testimony before it. Mr Mwangi outlined his career history. He told the Panel that he joined Athletics Kenya in August 2013 with a background not as a competitive athlete but as a specialist sports administrator.[72] Prior to joining Athletics Kenya, he worked as a sports administrator at Strathmore University for about ten years where he asserted that he had developed "one of the best" university sports programmes in Kenya.[73] He told the Panel that he considered himself to be a professional in sports management.[74] He also described in some detail the measures that had been initiated after he joined Athletics Kenya to address the problem of doping amongst athletes.[75]

144. Mr Mwangi told the Panel that when he received notice of the investigation against him he was shocked given his background as a professional sports administrator.[76] He described how he had co-operated with the investigation undertaken by Mr Sharad Rao.[77] He told the Panel that the consequences of these disciplinary proceedings have been grave for him, as his "career is now on the line" and that he had not been employed for two years since the

[72] For ease of reference, see Transcript at Vol 8, p 28, line 22.
[73] For ease of reference, see Transcript at Vol 8, p 29, line 4.
[74] For ease of reference, see Transcript at Vol 8, p 31, line 8.
[75] For ease of reference, see Transcript at Vol 8, pp 35 – 39.
[76] For ease of reference, see Transcript at Vol 8, p 33, line 18.
[77] For ease of reference, see Transcript at Vol 8, p 57, line 5ff.

disciplinary proceedings commenced.[78]

145. The Panel formed a positive impression of Mr Mwangi as a witness. There were some inconsistencies in his testimony and at times he hesitated, but the overall impression he gave the Panel was that he was telling the truth.

146. The Panel cannot conclude on the record before it that the version presented by Ms Sakari and Ms Koki Manunga was untrue nor can it conclude that Mr Mwangi was lying when he denied their allegations. The Panel is thus left in the uncomfortable position of having heard contradictory evidence from witnesses that, in the main, it has found to be credible. It is precisely in such circumstances that the burden of proof determines the result of a case. In this case, the Prosecution bears the burden of proof, and the Panel accordingly concludes that the case against Mr Mwangi has not been made out.

<u>Conclusion on charges against Mr Mwangi</u>

147. For the reasons given in the preceding paragraphs, the Panel has found that the allegations of extortion made against Mr Mwangi have not been proved beyond a reasonable doubt.

148. In the light of its conclusion that no breach of the Ethics Code by Mr Okeyo or Mr Mwangi has been established in these proceedings, no discussion of sanction or costs arises.

<u>Concluding remarks</u>

149. Although the charges have not been proven in this case against either Defendant, the Panel is perturbed by some of the evidence led in the case. It affirms that it has found that the case against the Defendants has not been established beyond a reasonable doubt, but it considers that the facts on the record before it give rise to concerns that it considers both the IAAF and its

[78] For ease of reference, see Transcript at Vol 8, p 62, line 5 -6

member federations should consider and address.

150. The Panel's concerns arise from two issues that appear from the record before it as well as from the experience of two members of the Panel in sports administration over many years. The first is that given the power and authority of national athletics officials over athletes, there may be a risk that unscrupulous officials will seek to take improper advantage of athletes. The second is that should this happen, it is difficult for athletes to seek to vindicate their rights because often athletes are persons of limited or moderate means and often they are considerably younger and less experienced than sports administrators.

151. These structural factors within sport should, in the view of the Panel, be borne in mind in the design of sports administration systems. Accordingly, where there is scope for the attempted abuse of athletes by officials, athletes' interaction with relevant officials should be regulated in a manner that reduces the risk of abuse. For example, sports administrators should ensure that transparent and safe systems are in place for athletes to lodge complaints about improper behaviour by officials and should take steps to inform athletes about how to use complaints procedures.

152. In the view of the Panel, the development of policies and practices to prevent the abuse of athletes, including well-publicised whistle-blower procedures within the sport, should be an urgent priority for the IAAF and its member federations, who should also take steps to monitor and assess the effectiveness of such policies and procedures.

Right of Appeal

153. The parties have 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 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-procedural-

rules.html).

Signed:

Catherine O'Regan

Kevan Gosper

Annabel Pennefather

Date: 6 September 2018

ANNEXURE: Ruling on Preliminary Objections 29 January 2018

Preliminary Objection 1

1. Objection to the manner in which the Investigator conducted the investigation.
    1.1. On the basis that he obtained assistance from an individual called Mr Ndegwa;
    1.2. In relation to a range of issues raised by Mr Mwangi in his Amended Statement of Defence.

    Objection dismissed.

Preliminary Objection 2

2. Objection in relation to the procedure adopted following finalisation of the Investigation Report and in particular that new evidence and an expert report were introduced, on the basis that no further evidence can be gathered and no further witnesses identified after the finalisation of the Investigation Report. Objection dismissed.

Preliminary Objection 3

Not relevant to these proceedings

Preliminary Objection 4

3. Objection in relation to the role of the Chairman of the Ethics Board in reviewing the Investigator's Report in this matter. Objection Dismissed.

Preliminary Objection 5

Not relevant to these proceedings

Preliminary Objection 6

Not relevant to these proceedings

Preliminary Objection 7

Not relevant to these proceedings

Preliminary Objection 8

4. Objection in relation to the role of the Chairperson of the Board in subsequent proceedings and particularly allegation that Chairperson was involved in determining hearing dates and in listing this matter for hearing and in the amendment of charges subsequent to the original Notification of Charge. Objection Dismissed.

Preliminary Objection 9

5. Objection relating to the fact that documents were presented to the parties without affording them an adequate time to prepare. This was in relation to the following:
   - 5.1. Statements that had not been included in the record beforehand, that were circulated yesterday in relation to two witnesses: Ms Agatha Jeruto and Mr Matthew Kisorio. The party who is affected by the statements objected to their inclusion. Decision reserved until Thursday morning (1 February 2018). I am minded to admit the statements on the basis that any party who considered that they would need further time or would need to lead further evidence as a result of those statements would be entitled to do so.
   - 5.2. Timesheet relating to charge against Mr Mwangi. Decision reserved until Thursday morning (1 February 2018).
   - 5.3. Three witness statements from witnesses who had previously provided statements. Mr Kipchumba, Ms Sakari and Ms Manunga. Statements Admitted.
   - 5.4. …. **Not relevant to these proceedings**

Preliminary Objection 10

6. Objection that the complaint made in relation to the second charge about the extortion of athletes was made in the Press and therefore not by a competent person. Objection Dismissed.

Preliminary Objection 11

Objection relating to issue raised on behalf of Mr Mwangi, who asserted the right to cross examine witnesses who had not been called. Objection Dismissed.