CAS 2018/A/5928 David Siwa Okeyo v. IAAF Ethics Board

ARBITRAL AWARD

delivered by the

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr David W. **Rivkin**, Attorney, New York, USA

Arbitrators: Mr Mark Andrew **Hovell**, Solicitor, Manchester, England
Mr Richard **Akpokavie**, Barrister, Tema, Ghana

Ad Hoc Clerk: Mr Patrick **Taylor**, Solicitor, London, England

in an arbitration between:

David Siwa Okeyo, Kenya
Represented by Messrs James Ochieng Oduol and Justus Obuya of Tripleoklaw, Nairobi, Kenya

Appellant

and

The Ethics Board of the International Association of Athletics Federations, Principality of Monaco
Represented by Ms. Kate Gallafent QC and Mr Tom Coates of Blackstone Chambers, London, England, and Messrs Julian Diaz-Rainey and Andrew Mitchell of Pinsent Masons LLP, Manchester, England

Respondent

I. PARTIES

1. Mr David Siwa Okeyo ("Mr Okeyo" or the "Appellant"), is a Kenyan national who served as Secretary General and Vice-President of Athletics Kenya ("AK").

2. The Ethics Board of the International Association of Athletics Federations (the "Ethics Board" or the "Respondent"), is an independent judicial body established under Article 5.7 of the IAAF Constitution to adjudicate whether violations of the IAAF Code of Ethics in its different iterations (the "IAAF Code(s)") have occurred and to impose sanctions for breaches of the IAAF Codes applicable from time to time, where appropriate. The International Association of Athletics Federations (the "IAAF" or the "Federation") governs the sport of athletics throughout the world. The IAAF has its seat in the Principality of Monaco.

II. THE APPEAL

3. The appeal is brought by Mr Okeyo against Decision 10/2018 of an adjudicative IAAF Panel of the Ethics Board comprised of Ms Catherine M E O'Regan (Chairperson), Mr Kevan Gosper, and Ms Annabel Pennefather (the "IAAF Panel") dated 30 August 2018 (the "Appealed Decision"). By the Appealed Decision, the IAAF Panel found *inter alia* that Mr Okeyo breached provisions of the IAAF Code applicable to him by improperly diverting payments received by an athletics governing body for his own personal use. Through the Appealed Decision the IAAF Panel imposed the following sanctions and costs on Mr Okeyo:

   a. expulsion from his offices as a member of the IAAF Council;

   b. a lifetime ban from taking or holding any office in the sport of athletics or taking part in any athletics-related activity;

   c. a fine of USD 50,000 to be paid within 90 days of the date of the Appealed Decision; and

   d. liability to reimburse the IAAF costs of USD 100,000 within 90 days of the date of the Appealed Decision.

III. FACTUAL BACKGROUND

4. The following is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While this CAS Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence that it considers necessary to explain its reasoning.

A. Genesis of Investigation and Proceedings against Mr Okeyo and Mr Kinyua

5. The Appealed Decision concerns the alleged diversion of AK funds by two of AK's senior officials for their direct or indirect personal benefit in breach of the IAAF Code in force at the time of the alleged offences. The funds in question were received by AK from one of its major sponsors, Nike. The persons who were the subject of the Appealed Decision were Mr Okeyo, a former Secretary-General and Vice President of AK and member of the IAAF Council, and a Mr Joseph I Kinyua ("Mr Kinyua"), a former treasurer of AK.

6. On 16 March 2015, a member of the IAAF Medical and Anti-Doping Department wrote to the IAAF Ethics Commission (as it was then called), stating that it had information about accusations levelled at two members of a national federation of the IAAF that involved "*the subversion of sponsorship monies*". The two officials identified in the initial report were Mr Isaiah Kiplagat, the former President of AK, and Mr Okeyo.

7. On 29 November 2015, following a preliminary investigation, the Chairperson of the Ethics Board informed Mr Kiplagat, Mr Okeyo and a third individual, Mr Kinyua, that there was a *prima facie* case against them that they had breached the IAAF Code in force at the time of the alleged offences, and that the matter therefore warranted investigation. Mr Sharad Rao (a former director of public prosecutions in Kenya) was appointed to investigate the matter further. The three men were suspended from any office they held in the IAAF and/or AK during the pendency of the investigation. The period of suspension was renewed five times until the Appealed Decision was eventually handed down in August 2018, more than three years after the original allegations were made.

8. Mr Kiplagat died in August 2016, and all disciplinary proceedings against him were accordingly terminated. The investigation and proceedings before the Ethics Board continued, therefore, only as against Mr Okeyo and Mr Kinyua.

9. Mr Rao's investigations continued through 2016, culminating in the presentation of a report to the Chairperson of the Ethics Board.

10. Mr Rao concluded that both Mr Okeyo and Mr Kinyua should be charged with breaches of the IAAF Code. Adjudicatory proceedings were then commenced and, on 28 February 2017, Mr Okeyo and Mr Kinyua were informed that they were being charged in terms of Rule 13(4) of the Ethics Board Procedural Rules with breaches of the IAAF Codes in force at the time of the alleged offences. Both Mr Okeyo and Mr Kinyua denied the charges and lodged statements of defence.

11. The Ethics Board instructed an expert, Mr Barry Dean, to provide an expert forensic accounting report. Mr Dean provided an expert report and a brief addendum to his report. These were provided to Mr Okeyo and Mr Kinyua, who both contested the reports.

12. A hearing took place before the IAAF Panel in Nairobi, Kenya, between 29 January 2018 and 2 February 2018, and the Appealed Decision was issued on 30 August 2018 finding against Mr Okeyo but releasing Mr Kinyua from sanction on the basis that he

was not subject to the provisions of the IAAF Codes in force at the relevant times. The details of the Appealed Decision are further considered at paragraphs 33 to 40 below.

B. Factual Background to the Investigation

13. The Appealed Decision sets out the background to the disciplinary proceedings. Unless otherwise stated, the facts summarized below have not been contested by the Parties, or by Mr Kinyua.

i. The Honorariums, the Commitment Fee and the Service Fees

14. Nike has been the official footwear and apparel sponsor of AK since the 1990s.

15. On 27 August 2003, Nike and AK entered into a written sponsorship and license agreement (the "2003 Agreement"). Under the 2003 Agreement, AK agreed that Nike would be its exclusive supplier of athletics footwear, apparel and necessary products. In return, Nike agreed to pay AK annual compensation. In addition, Nike supplied Nike products up to an agreed value for use by athletes, provided an annual travel allowance for AK representatives to meet with Nike executives, as well as an annual transport allowance for transportation of athletes and agreed to pay performance bonuses for achievements by Kenyan athletes in certain international competitions. Mr Kiplagat and Mr Okeyo signed the 2003 Agreement on behalf of AK.

16. On 3 November 2010, Nike and AK agreed to an amendment to the 2003 Agreement (the "2010 Amendment"). The 2010 Amendment extended the terms of the 2003 Agreement until 2020 and altered Nike's financial obligations under the contract. The annual instalments were increased. In addition, Nike agreed to continue providing Nike products to AK and to provide travel and transport allowances. However, the system of performance bonuses was terminated and replaced by a one-off commitment fee of USD 500,000. Nike also agreed to pay AK an annual service fee of USD 100,000 for "*paying the costs and expenses of performing the following services necessary for Nike to receive the full value of the rights and benefits granted to Nike under this agreement...*". The relevant services that were listed included scouting for and selecting athletes, organising local, regional and international athletics meetings, distributing Nike products to athletes and coordinating with the national Olympic Committee on track and field administration matters. The 2010 Amendment was signed on behalf of AK by Mr Kiplagat, Mr Okeyo and Mr Kinyua.

17. Before the IAAF Panel, it was alleged by the IAAF prosecutor, Ms Kate Gallafent QC (the "Prosecutor"), that in each year between 2004 and 2010 Nike paid sums of money to AK that it referred to as "honorariums" and that these sums were paid out in cash to Mr Kiplagat, Mr Kinyua and Mr Okeyo. It was also alleged that those sums belonged to AK and were diverted by the three men for their own direct or indirect personal benefit.

18. Nike, in correspondence put before the IAAF Panel, admitted that it paid honorariums to AK. Nike was concerned to make sure that the character of the honorariums was not misunderstood, and it was therefore keen to make sure that proper records of the

payments were kept. Nike thus described the honorariums in writing in a letter as follows: "*The Honorarium is an annual payment that Nike makes directly to the Federation in order to ensure that certain Federation members will provide, and will have adequate funding for, certain activities that Nike considers critical to maximizing* [its] *investment.* [...] *Furthermore, it is Nike's understanding that these payments are made with the full knowledge of the Federation, and how the Federation chooses to distribute these monies amongst Federation members is at their sole discretion.*" (See letter of 25 September 2003 from Nike to Mr Kiplagat.) In the cover email sent with the letter to Mr Kiplagat, Mr Mark Mastalir of Nike stated that the letter "*will by no means affect our agreement with you. We just need to have the document for our file to protect Nike.*" (See email of 26 September 2003 from Nike to Mr Kiplagat.)

19. The IAAF Panel noted five points based on the written correspondence between Nike and AK referred to immediately above.

a. First, that the correspondence suggested that Nike had already established a practice of paying honorariums to officials, and that the payment of honorariums predated the 2003 Agreement. This was said to have been confirmed by the fact that both Mr Kinyua and Mr Okeyo admitted that they received an honorarium directly into their own bank accounts from Nike in 2003. The IAAF Panel noted, however, that the Nike letter does not identify to whom honorariums were paid or in what amount.

b. Second, that the established practice of the payment of honorariums was based on an agreement between Nike and existing officials, including at least Mr Kiplagat, who received the honorariums. The email does not disclose the terms of that agreement but it does state that the terms of that agreement will not be varied by the contents of the letter attached to the email. The IAAF Panel thus concluded that the email implies that the actual agreement is different to the agreement stipulated in the draft letter.

c. Third, that – as the email states – Nike wrote the letter "*to protect Nike in case something happens in the future*". The email thus suggests that Nike was anxious as to how its payment of honorariums might be construed in the future and that the letter was written to "*protect*" Nike. The IAAF Panel therefore concluded that the email suggested that Nike was of the view that should the payment of honorariums to officials of AK become public knowledge it might be harmful to Nike. Yet the email was also deemed to make clear that the actual arrangement between Nike and the officials would not be varied by the contents of the letter.

d. Fourth, as stated by the letter, it had been Nike's "*understanding*" that the honorariums were paid with the full knowledge of AK and that it was for AK to determine how to distribute the honorariums "*amongst its members*".

e. And the fifth and final point noted was that although there was no concrete evidence that the correspondence was actually sent, the purposes for the payment of the honorarium asserted in the draft letter match the purposes identified by Nike in its correspondence with the Prosecutor in November 2017 and January 2018. The IAAF Panel thus concluded that the similarity in terms between the draft letter and the recent Nike correspondence suggests that the draft letter was indeed sent.

20. The IAAF Panel observed that a second admission of Nike's payment of honorariums emerged from an email sent by one of its senior executives to Mr Kiplagat on 19 June 2008, and that such email also revealed Nike's discomfort with the payments. The email was a response to an email from Mr Kiplagat in which he expressed his disappointment that the honorarium amount had not been increased to USD 85,000 from USD 72,000 despite an alleged agreement with Nike to increase the honorarium payment. The Nike executive states in his email:

"*It is very hard to change the honorarium amount. Very sensitive issue here at Nike. It has been from the very first day we paid the first payment in regards to the honorarium. Please understand the only honorarium we pay is to Athletics Kenya* [and one other organisation]. *A few people at Nike got in a lot of trouble several yrs* [sic.] *ago when we first agreed to the honorarium and made our first payment.*"

21. In a letter to the Prosecutor dated 17 November 2017, Nike admitted that it made honorarium payments from 2002 to 2010 to AK officials. It identified the purpose of the honorariums to be the same as that set out in the draft letter discussed above at paragraph 18. In the same letter, Nike admitted that the honorarium payments in 2003 were made to the individual bank accounts of Mr Kiplagat, Mr Okeyo and Mr Kinyua.

ii. The Clearance Account

22. As mentioned above and in the Appealed Decision, Mr Barry Dean, a forensic accountant, prepared an expert report at the request of the Prosecutor in which he analysed the books of account kept by AK in the period between 2003 and 2015. Mr Dean was the main witness for the prosecution at the Ethics Board hearing.

23. In his report, and again in his evidence before the IAAF Panel, Mr Dean explained that, between 2003 and 2012, AK had made use of an accounting device called a "Clearance Account". Mr Dean also explained this directly to the CAS Panel at the appeal hearing. According to Mr Dean, his analysis of AK's books disclosed that in almost all circumstances, receipts into the Clearance Account were mirrored by withdrawals from the Clearance Account. Receipts to and withdrawals from the Clearance Account were reflected in the ordinary cashbook but —and the IAAF Panel considered this to be of particular importance— twinned payments to and from the Clearance Account were not then reflected in the annual audited financial accounts of AK. The only time that receipts into the Clearance Account were reflected in the audited statements was when a receipt had been received that had not yet been twinned with a withdrawal.

24. Mr Kinyua, who as Treasurer of AK was responsible for the management of the financial accounts of AK, admitted to the IAAF Panel his use of the Clearance Account. He also admitted that moneys received into the Clearance Account were ordinarily followed by withdrawals and that in such circumstances neither the receipt nor the withdrawal would have been included in the annual financial statements of AK.

25. Mr Kinyua defended this system as a legitimate accounting mechanism and pointed the IAAF Panel to the fact that AK's auditors had not qualified their approval of the accounts as a result of the Clearance Account, nor had they advised against the use of the Clearance Account. Mr Kinyua, however, did acknowledge during his testimony

to the IAAF Panel that the Clearance Account system had been abandoned by AK since his departure because, he thought, they had been advised to do so by its new auditors.

26. Mr Dean informed the IAAF Panel and this CAS Panel that use of a clearance account could be a legitimate accounting device in certain limited circumstances. He described those circumstances as arising when money is received on behalf of a third party and paid out to that third party. He expressed the view that it would have been acceptable for AK to use the Clearance Account in such circumstances, but he submitted that the Clearance Account had been employed in a different and unacceptable manner. In particular, he pointed to the fact that the Clearance Account had been used on a series of occasions to record amounts of money paid by Nike pursuant to the contract between it and AK, and those amounts of money were accordingly due and payable to AK, and not to third parties.

27. It was common cause between the Parties before the IAAF Panel that the effect of using the Clearance Account in this manner was that receipts and withdrawals posted to the Clearance Account did not appear in AK's annual audited financial statements.

iii. The Payments

28. Mr Dean identified sixteen payments made by Nike to AK between December 2004 and December 2012 that were posted to the Clearance Account, but not to the annual audited financial accounts. In total, these sixteen payments amounted to US$ 1,225,806. That was money paid to the account of AK, but never disclosed in AK's audited financial statements. The IAAF Panel determined that Mr Okeyo and Mr Kinyua did not dispute this.

29. Mr Dean testified to the IAAF Panel and this CAS Panel that, in most cases, funds paid into AK's bank account that were posted to the Clearance Account were linked to a corresponding cash withdrawal in an identical or near-identical amount from that bank account either shortly before or shortly after the deposit. It was accepted by all Parties before the IAAF Panel that these withdrawals were never reflected in AK's annual audited financial statements.

30. Further light is shed on these receipts and withdrawals by two letters sent to the Prosecutor by Nike dated 8 January and 16 January 2018. Those letters were in response to a letter to Nike from the Prosecutor in which she furnished Nike with a copy of Mr Dean's report to the IAAF Panel and asked Nike to address certain questions arising from the report. Both the letters from Nike were placed before the IAAF Panel by Mr Dean in an addendum to his initial report.

31. In the Appealed Decision, the IAAF Panel analysed the sixteen payments ("Payments A-P"), and four additional payments, that were the subject of Mr Dean's report to the IAAF Panel (the "Four Additional Payments"). Evidence on each of the payments was put before the IAAF Panel by the Parties. The IAAF Panel concluded as follows in respect of those payments:

    a. Payments A, C, D, F amounted to honorarium payments from Nike to AK.

b. Payments M, N, P were the service fees which Nike agreed to pay in place of the honorariums by the 2010 amendment to the Nike agreement.

c. Payment E also represented a sum from Nike which was diverted by Mr Kinyua for the benefit of AK officials.

d. With respect to Payments K and L, the IAAF Panel found that an initial withdrawal of USD 200,000 was diverted for the indirect benefit of Mr Okeyo and Mr Kinyua. Payments K and L amounted to USD 500,000 in total. Of this total, USD 200,000 was withdrawn to be paid to a Chinese company, Li-Ning (China) Sports Goods Ltd ("Li-Ning"), which had previously paid USD 200,000 to Mr Okeyo, Mr Kiplagat and Mr Kinyua as a kind of honorarium or "*signing on fee*" in respect of a new sponsorship deal. This sponsorship deal eventually came to nothing when AK and Nike renegotiated the terms of the Nike 2003 Agreement through the 2010 Amendment. As part of the 2010 Amendment, Nike paid USD 200,000 which was used to reimburse the signing-on fee to Li-Ning. The IAAF Panel was not, however, satisfied that the further withdrawals which were said to be associated with Payments K and L had been diverted by the Defendants (see paragraphs 105—205 of the Appealed Decision).

e. The IAAF Panel was not comfortably satisfied that Payments B, G, H, I, J and O had been diverted by Mr Okeyo and Mr Kinyua. In particular, the IAAF Panel had regard to issues such as: the receipt of the relevant payment occurring after the associated withdrawal (or having no clearly corresponding withdrawal); and the account of the relevant payments given by Nike, which in some cases did not state that they amounted to honorariums or services fees.

f. The IAAF Panel determined that Nike had made four further payments to Mr Okeyo, Mr Kinyua, and Mr Kiplagat in 2004, 2006 and 2007 which had not even been recorded in AK's cashbooks, and that these amounted to honorarium payments.

32. Having considered the payments, the IAAF Panel then considered four questions:

a. Had it been established that Mr Okeyo and Mr Kinyua had received the honorarium payments;

b. If so, were such payments received by them for their own direct or indirect benefit;

c. If so, did receiving such payments constitute a "*diversion of Athletics Kenya's funds*"; and

d. Did such conduct constitute a breach of the IAAF Codes binding upon Mr Okeyo and Mr Kinyua at the time of the alleged offences such that those individuals and their actions fell within the jurisdiction of the IAAF Panel.

C. Conclusions of the Appealed Decision

33. On 30 August 2018, the IAAF Panel issued the Appealed Decision which concluded as follows:

a. Mr Okeyo, Mr Kiplagat and Mr Kinyua did receive honorarium payments from Nike in the period throughout 2004 – 2010 and service fee payments for 2011 – 2013. The IAAF Panel did not exclude the possibility that some small portion of those payments may also have been paid to other officials of AK, and it made no finding as to whether Mr Okeyo, Mr Kiplagat and Mr Kinyua received those payments in equal or unequal shares.

b. Although the IAAF Panel accepted that Kenya is a "cash economy", it was noted that the cost of running events in Kenya was "*considerably less than the amounts drawn in relation to the honorarium and service fees*" (see paragraph 162 of the Appealed Decision). The IAAF Panel also found that the travel and accommodation costs of Mr Okeyo, Mr Kiplagat and Mr Kinyua were covered separately by AK, as were their phone bills. The IAAF Panel concluded that the men "*failed to provide any detail as to how they spent the funds*". Accordingly, the IAAF Panel determined that it was "*comfortably satisfied that at least some of the money received by Mr Okeyo and Mr Kinyua as honorariums and service fees were used by them for their own personal benefit*".

c. Mr Okeyo, Mr Kiplagat and Mr Kinyua never disclosed the honorariums and service fee payments to the Annual General Meeting of AK and none was included in the annual financial statements between 2004 and 2013. In the view of the IAAF Panel, "*this failure by the three senior officials to disclose to the membership of Athletics Kenya the fact that Nike was paying honorariums and service fees to Athletics Kenya, as well as the quantum of those payments, and the beneficiaries who received them, was a material dereliction of their duty of good faith towards the membership of the organisation. It was also directly in conflict with the express intentions of the donor, Nike, as set out in its letter of September 2003.*" Accordingly, the IAAF Panel concluded that it was "*comfortably satisfied that the Defendants diverted funds for Athletics Kenya for their own direct or indirect personal benefit, as charged.*" (See paragraphs 171-172 of the Appealed Decision.)

d. As the events at issue all took place before the 2014, 2015 and current IAAF Codes of Ethics came into operation, the IAAF Panel only considered the application of the 2003 and 2012 IAAF Codes to Mr Okeyo and Mr Kinyua. The Appealed Decision concluded that Mr Okeyo was bound by the 2003 and 2012 IAAF Codes on account of having been a member of IAAF committees at the time of the alleged breaches of those Codes. However, the IAAF Panel considered that the position of Mr Kinyua was different. Mr Kinyua was never a member of an IAAF Committee or "*otherwise in a position of trust within the IAAF as contemplated by the 2003 IAAF Code*". Mr Kinyua was therefore deemed only to be a "Participant" as defined in the 2012 IAAF Code, but the IAAF Panel determined that "*the Application clause of the 2012 Code provides that the Code applies to "Participants" only to a limited extent*".

34. In the light of the conclusions set out above, the IAAF Panel applied the provisions of the 2003 and 2012 IAAF Codes to Mr Okeyo and considered his actions in the light of the obligations placed upon him by those IAAF Codes.

35. First, Article C(7) of the 2003 IAAF Code stipulates, in part, that "*all persons subject to this Code must not act in a manner likely to tarnish the reputation of the IAAF, or Athletics generally, nor act in a manner likely to bring the sport into disrepute.*" The IAAF Panel concluded that "*Mr Okeyo's conduct in failing as Secretary General of Athletics Kenya to disclose to the membership of Athletics Kenya the fact of the substantial honorarium and service fee payments made by Nike to Athletics Kenya in the period 2004 — 2012 and to account for these payments, constituted conduct likely to bring the sport of athletics into disrepute. The IAAF Panel is also of the view that his conduct in receiving honorariums and service fee payments throughout the period without disclosing the fact of the receipt of such payments was similarly conduct that was likely to bring the sport into disrepute. In particular, the IAAF Panel notes that the diversion of funds of Athletics Kenya by Mr Okeyo is closely linked to the sport of athletics, and would be perceived to reflect negatively on the sport, and the administration of the sport, if the fact of the diversion of the funds became known.*" (See paragraph 177 of the Appealed Decision.)

36. In respect of Article H(17) of the 2003 IAAF Code (which provides that "*it is the duty of all persons under this Code to see to it that IAAF Rules and the present Code are applied*") the IAAF Panel was "*not persuaded*" that it added anything further to its analysis in respect of Article C(7).

37. Turning then to the 2012 IAAF Code, Mr Okeyo and Mr Kinyua were charged with a breach of Article C(6), which provides as follows: "*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.*" The IAAF Panel noted that such provision is one of the few provisions in the 2012 IAAF Code that imposes obligations both upon IAAF Officials and Participants. The terms of Article C(6) prohibit corrupt practices in relation to the sport of athletics, including improperly affecting the results of events and competitions. The IAAF Panel concluded that the terms of that provision suggest that it is primarily concerned with prohibiting corrupt practices that relate to competitions and events and that the term "*corrupt practices*" in the provision does not have a more general meaning. For that reason, the IAAF Panel concluded that neither Mr Okeyo nor Mr Kinyua committed a breach of that provision.

38. The only other provision of the 2012 IAAF Code that Mr Okeyo and Mr Kinyua were accused of breaching and, therefore, the only additional one that could be considered by the IAAF Panel was Article H(18). The IAAF Panel observed that Article H(18) is in similar terms to Article H(17) of the 2003 IAAF Code and provides that it is "*the duty of all persons under this Code to see to it that IAAF Rules and this Code of Ethics are applied.*" The IAAF Panel then concluded as follows: "*It might be argued that the effect of Article H(18) is, that if it is established that a person is found to have breached a provision of the Code, despite not have been charged with a breach of that provision, that the person will nevertheless have been shown to be in breach of Article H(18) because he or she has not observed the duty to "see to it" that the Code is applied. In the view of the Panel, such an argument should not succeed. Those charged with a breach of the Code are entitled to know which substantive provision they are alleged*

to have breached so that they can mount a meaningful defence to the charge." On this basis the IAAF Panel dismissed the charge that Mr Okeyo or Mr Kinyua breached Article H(18) of the 2012 IAAF Code.

39. Based on these findings the IAAF Panel ruled that:

a. Mr Okeyo was in breach of his obligation under Article C(7) of the 2003 IAAF Code only.

b. As for Mr Kinyua, although he was found to have engaged in similar conduct, "*because he was not bound by the 2003 Code of Ethics he cannot be found to have been in breach of that Code.*"

c. Similarly, neither Mr Kinyua nor Mr Okeyo was found to have been in breach of the two provisions of the 2012 IAAF Code with which they were charged.

40. In the light of the finding that Mr Okeyo had been guilty of a breach of the 2003 IAAF Code, the IAAF Panel ordered that Mr Okeyo bear the following sanctions and costs:

a. expulsion from his offices as a member of the IAAF Council;

b. a lifetime ban from taking or holding any office in the sport or taking part in any athletics related activity;

c. a fine of USD 50,000 to be paid within 90 days of the date of the Appealed Decision; and

d. liability to reimburse the IAAF costs of USD 100,000 within 90 days of the date of the Appealed Decision.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

41. The Appellant filed his Statement of Appeal with the CAS on 20 September 2018 in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code"). The Appellant appointed Mr Richard Akpokavie as arbitrator.

42. On 27 September 2018, the Appellant informed the CAS Court Office that, pursuant to Article R51, par. 1, of the CAS Code his Statement of Appeal had to be considered also as his Appeal Brief.

43. On 28 September 2018, the Appellant submitted a witness statement from himself in support of his appeal.

44. On 5 October 2018, the Ethics Board confirmed that on 19 September 2018, it had submitted its own Appeal against the Appealed Decision insofar as it related to Mr Kinyua who had been found by that same decision not to have breached any IAAF Code. Noting that the Appeals were "*so closely linked*", the Ethics Board confirmed its wish to "*manage*" both appeals "*together*".

45. Later on 5 October 2018, the CAS Court Office informed the Parties that the IAAF had initiated an appeal against Mr Kinyua with respect to the same Appealed Decision, that an appeal procedure was pending under reference *CAS 2018/A/5917 IAAF v Joseph I Kinyua*, and inviting the Parties in this appeal to "*inform the CAS Court Office, within **three (3) days** from receipt of this letter, whether they agree to consolidate the present procedure with the procedure CAS 2018/A/5917 IAAF v Joseph I Kinyua*" pursuant to Article R52 of the CAS Code.

46. On 8 October 2018, the Respondent confirmed its agreement to consolidation of the present procedure with procedure *CAS 2018/A/5917 IAAF v Joseph I Kinyua*. The Appellant did not inform the CAS Court Office of his position on the consolidation of the procedures.

47. On 10 October 2018, the Respondent nominated Mr Massimo Coccia as arbitrator. However, on 5 November 2018, the CAS Court Office informed the Parties that Mr Massimo Coccia did not accept his nomination. Respondent was therefore invited to nominate another arbitrator.

48. On 1 November 2018, the CAS Court Office confirmed that the President of the Appeals Arbitration Division of the CAS "*decided not to consolidate the proceedings CAS 2018/A/5917 and CAS 2018/A/5928*", but invited the Parties to confirm whether they would agree to submit both procedures to the same panel of CAS arbitrators pursuant to Article R50 of the CAS Code.

49. On 15 November 2018, the Respondent nominated Mr Mark Andrew Hovell as arbitrator, confirmed that it was also nominating Mr Hovell as arbitrator in procedure *CAS 2018/A/5917 IAAF v Joseph I Kinyua*, and further confirmed that it would accept to submit both procedures CAS 2018/A/5917 and CAS 2018/A/5928 to the same panel of CAS arbitrators pursuant to Article R50 of the CAS Code.

50. On 16 November 2018, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

51. On 19 November 2018, in the absence of any response from the Appellant on whether it would consent to submit both procedures CAS 2018/A/5917 and CAS 2018/A/5928 to the same panel of CAS arbitrators, the President of the Appeals Arbitration Division of the CAS "*decided to refer the referenced procedure to the same panel as in the procedure CAS 2018/A/5917*".

52. On 21 November 2018, after the order of the CAS referring both procedures to the same panel of CAS arbitrators, Mr Okeyo confirmed his agreement to this decision. By the same letter, Mr Okeyo confirmed his wish to have an oral hearing of the appeal before the CAS Panel. On 26 November 2018, the Respondent also confirmed its wish to have an oral hearing in the present procedure.

53. On 9 January 2019, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division and in accordance with Article R54 of the CAS Code, constituted the CAS Panel as follows:

President: Mr David W. Rivkin, Lawyer in New York, USA

Arbitrators: Mr Richard Akpokavie, Barrister in Tema, Ghana
Mr Mark Andrew Hovell, Solicitor in Manchester, England

54. On 7 February 2019, the CAS Court Office informed the parties in both cases that the CAS Panel had decided to hold a hearing in both of them. On 5 March 2019, the CAS Court Office informed the Parties that the hearings would be held on 15 May 2019 in Lausanne.

55. On 18 February 2019, Mr Okeyo's counsel informed the CAS Panel that he would rely on the transcripts of the hearing before the IAAF Panel and that he would not attend the hearing, though he would be represented by counsel there. On 20 February 2019, the Respondent stated that it would call Mr Barry Dean as an expert witness at the hearing.

56. On 26 April 2019, the CAS Court Office confirmed the appointment of Mr Patrick Taylor, Solicitor in London, England, as *ad hoc* clerk in this procedure.

57. On 2 May 2019, the CAS Panel requested that Mr Okeyo inform it by 7 May 2019 "*whether he contends that the AK Board at any time ratified decisions relating to honoraria, signing bonuses or Nike payments, and if so, to point to where in the record or in the supplemented minutes provided by IAAF such ratification occurs.*" The CAS Panel also confirmed that it would decide on the admissibility of the further minutes of the AK Board (submitted late by Mr Okeyo) after receiving Mr Okeyo's response to the CAS Panel's request for clarification. However, on 9 May 2019, the CAS Court Office confirmed that Mr Okeyo had failed to provide the confirmation sought by the deadline.

58. On 7 May 2019, the CAS Court Office sent for the Parties' attention the Order of Procedure. On 8 May 2019, the Appellant and the Respondent signed and returned the order of procedure to CAS Court Office.

59. On 15 May 2019, a hearing was held at the CAS headquarters in Lausanne, Switzerland. The CAS Panel was assisted by Mr Daniele Boccucci, Counsel at the CAS, and joined by the following:

For the Appellant: (both in person)

Mr James Ochieng Oduol
Mr Justus Obuya

For the Respondent: (all in person)

Ms Kate Gallafent QC (Blackstone Chambers)
Mr Vijay Parbat (legal counsel at the IAAF)
Mr Julian Diaz-Rainey (Pinsent Masons)
Mr Andrew Mitchell (Pinsent Masons)
Mr Alexander Richardson (Pinsent Masons)
Mr Tom Coates (Blackstone Chambers)
Mr Barry Dean (expert witness)

60. At the conclusion of the hearing, the Parties confirmed that their rights to be treated equally and to be heard were fully respected. No further comments or objections were raised at the hearing.

61. On 22 May 2019, the CAS issued the operative part of the Award, as stated in the final page hereof, with the "*full award, with grounds*" to be issued subsequently.

V. SUBMISSIONS OF THE PARTIES

A. Overview

a. The Appellant

62. The Appellant grounded his appeal on 21 separate grounds of appeal set out as follows in his written submission:

1. The IAAF Panel having found as fact and a matter of law at paragraph 26 of the Appealed Decision that from a clear reading of the provisions of Procedural Rules No. 13(10) and (11), the Chairman ought not to have appointed himself as a reviewing member of the Investigation Report and that he erred in this case, and proceeded to justify the error for the reason that the Appellant was not materially prejudiced by the Chairman's mistake.

2. The review having been undertaken in blatant violation of the Procedural Rules No. 13(10) and (11) by the wrong person, the subsequent proceedings were vitiated by the lack of fairness and independence and are null due to non-compliance with the mandatory provisions of the Procedural Rules.

3. There were no valid proceedings in this case since the Chairman of the Ethics Board, having formed an opinion that the Appellant had a case to answer, went ahead to personally review the Investigator's Report and recommend a case to answer contrary to rule No.13 (10). It is noteworthy, that the bulk of Mr. Sharad Rao's report was later abandoned by the prosecution thereby raising questions as to how exactly the Chairman arrived at the conclusion that the Appellant had a case to answer.

4. The IAAF Panel erred in failing to take into account and failing to appreciate the impact of violation of the various procedural rules and timelines in the entire process that are aimed at guaranteeing fair hearing.

5. The IAAF Panel erred in failing to take into account the impact of the prolonged suspension of the rights of the Appellant and the principles of fair hearing. The Appellant's suspension was extended five times over a period of three years and a hearing was only scheduled after several letters and protests from the Appellant.

6. The IAAF Panel applied a wrong standard of proof in this case since the alleged offences are of the most serious nature and the standard of proof ought to have been "beyond reasonable doubt" considering that the Appellant is accused of

misappropriating approximately USD 1,409,096 and further that corruption offences are criminal in nature and should be proven beyond reasonable doubt. The IAAF Panel ignored the previous decision in the case of *Balachnichev, Melnickov, Dollé, and Massata Diack*, which clearly demarcates the criteria for dealing with the standard of proof.

7. Due to the lowered standard of proof, the IAAF Panel having rightly found at paragraph 162 of its Appealed Decision that Kenya is mainly a cash economy, fell into error by attributing the cash withdrawals in the name of the Appellant to probable diversion of funds without specific proof of diversion of the funds to his personal use.

8. The IAAF Panel while appreciating that Kenya is mainly a cash economy, failed to appreciate the local operational circumstances of AK and to uphold the same in favour of the Appellant.

9. The IAAF Panel erred at paragraph 177 of its Appealed Decision in finding the Appellant guilty of non-disclosure of the honorarium payments received from Nike in the financial statements despite the fact that he was not in charge of accounting and record keeping at AK.

10. The IAAF Panel rightly found that the Appellant was a member of the IAAF cross-country and road running committee between the years 1991-2011 and cross-country committee between the years 2011-2015 and therefore a member of the "IAAF Family". However, the IAAF Panel failed to appreciate that none of the allegations against the Appellant relates to his roles in the respective committees and they are therefore outside the jurisdiction of the IAAF Panel.

11. The IAAF Panel erred in failing to take into account the input of the Executive Board created under the Athletics Kenya Constitution in the running of the Federation. The IAAF Panel equally failed to question the intention of the prosecution in failing to produce minutes of the Executive Board meetings in which most of the transactions in question were deliberated and duly approved.

12. The IAAF Panel went ahead to discredit the Appellant's evidence on the use of the funds from Nike for the reason that he did not produce the minutes or the supporting documents despite the fact that the Appellant did not have access to AK's offices owing to his suspension.

13. The IAAF Panel failed to question the selective production of evidence by the prosecution despite protests from the Appellant that minutes were selectively produced in the proceedings with crucial minutes especially of the Executive Board conveniently missing.

14. The IAAF Panel misinterpreted the intended use of the honorarium payments as stipulated in the various letters from Nike addressed to Mr Isaiah Kiplagat.

15. The IAAF Panel failed to appreciate the role of the Auditors who were appointed by members in the Annual General meetings. All the accounts for AK were availed

to the Auditors, Mwashimba and Associates and Hudson and Associates who passed the accounts as a true and correct representation of the affairs of AK.

16. The IAAF Panel failed to appreciate the role played by Mr Julius Ndegwa in the proceedings especially due to the fact that crucial minutes of meetings were found to be missing from AK's offices yet evidence was adduced to show that Mr Ndegwa led a group of demonstrators who stormed into AK's offices, vandalized and stole property from the premises in a bid to oust the Appellant and Mr. Kiplagat. It was the Appellant's uncontroverted position that the invaders targeted specific documents from the office. Mr Ndegwa was then used by the prosecution in procuring and coaching of witnesses as was admitted by Mr Ronald Kipehumba. In fact, he was the prosecution's consultant and chief strategist in this case.

17. Mr Julius Ndegwa was integral to the investigations and procurement of witnesses. The case as made up was a convenient set up orchestrated by Mr Julius Ndegwa who had openly displayed his dislike for the Appellant previously. He therefore ensured that all the exculpatory evidence including minutes of meetings, payment vouchers and schedules were conveniently missing. The IAAF Panel erred in finding that since Mr Julius Ndegwa was never called as a witness in the proceedings, his evidence was not relied on and therefore no prejudice occurred.

18. The IAAF Panel further erred in failing to consider the weighty evidence given by Elias Kiptum Maingi who confessed to have worked with Mr Julius Ndegwa in the scheme to malign the Appellant's name to have him hounded out of office. Mr Maingi produced evidence of money transfers to him which were essentially inducements to participate in the scheme but the IAAF Panel did not find them of value in the proceedings.

19. The sanctions meted out by the IAAF Panel do not match the alleged offense at all. The sanctions are extremely punitive and clearly show the bias and a pre-determined outcome especially since the prosecution never gave any proof of actual misappropriation of funds by the Appellant.

20. There was inherent bias exhibited against the Appellant by the Investigator, the Chairman of the Ethics Board and the IAAF Panel who had all made up their minds as to the guilt of the Appellant thereby negating any possibility of objectivity and fairness in the case.

21. The evaluation of the evidence by the IAAF Panel was slanted and shows a complete misunderstanding of the evidence and the Law leading to a conclusion which no reasonable panel could have reached.

63. In his Statement of Appeal, on the basis of the grounds **1 to 21** set out above, as supplemented only by his oral arguments at the hearing (the details of which are considered below at paragraphs 69, 71, 73, 76 and 78) the Appellant sought the following requests for relief:

a. That the Appealed Decision on the charge relating to Mr Okeyo be set aside in its entirety.

b. That the costs of the Appeal be borne by the Respondent.

64. At the hearing, Mr Okeyo's representatives confirmed that Mr Okeyo had not adduced any new evidence for this appeal, and instead that he relied only on the evidence submitted to the IAAF Panel below and the further cross-examination of Mr Dean that took place before the CAS Panel.

65. The grounds of appeal argued by the Appellant at the hearing were divided into six categories: (i) jurisdictional objections (ground 10); (ii) breaches of procedural rules (grounds 1- 3); (iii) an incorrect decision by the IAAF Panel on the applicable standard of proof (ground 6); (iv) failure to prove any breaches (grounds 7-9, 14 and 15); (v) breach of the Appellant's right to be treated fairly (grounds 4 and 5); and (vi) the application of overly severe sanctions (ground 19). Although not all grounds of appeal were argued at the hearing, the Appellant confirmed that all grounds of appeal were maintained.

b. The Respondent

66. The Respondent summarises its submissions at a high level as follows:

a. Mr Okeyo's grounds (1) to (17) simply repeat arguments that were made, unsuccessfully, to the IAAF Panel;

b. Mr Okeyo's ground (18) refers to evidence that was adduced only in relation to a separate charge of seeking to extort monies from athletes that was heard at a separate hearing between 28 and 30 May 2018, after all the evidence in relation to the first hearing has been heard and closing submissions made on the charge of diversion of funds.

c. Mr Okeyo's grounds (19) to (21) add nothing to the previous grounds.

67. The Respondent also went on to provide in its Answer and at the hearing detailed reasons why each of Mr Okeyo's grounds of appeal should fail. Those detailed reasons are set out below at paragraphs 70, 72, 74, 77, 79 and 80. On the basis of the those arguments, the Respondent requests that this CAS Panel:

a. "*Dismiss the Appeal;*

b. Find the Charges proven against Mr Okeyo in their entirety, or alternatively uphold the Appealed Decision;

c. Uphold the sanction and costs order imposed by the IAAF Panel; and

d. *Order Mr Okeyo to pay the IAAF's costs of this appeal.*"

68. The Parties detailed positions on the grounds of appeal are summarized below.

B. Parties' Submissions on the Individual Grounds of Appeal

a. Jurisdiction:

69. In respect of his jurisdictional objection (ground 10), Mr Okeyo argued as follows:

a. First, that the CAS has no jurisdiction to police the performance of a contract between "private" parties – here Nike and AK – in circumstances where none of the parties to that contract is alleging a breach of the contract. The Appellant relied on the facts that: the investigation by the Kenyan authorities had not reached any conclusion; there is and was no investigation being carried out by Nike; and neither Nike nor AK asserted that the funds paid to AK were not applied to the purpose agreed in the contract. The Appellant argued that the CAS must wait until there is a ruling from a proper investigatory authority before it can have jurisdiction to decide on whether funds paid by Nike to AK were not used for the purpose agreed under the contract. The Appellant stated that asserting jurisdiction now would set an extraordinary precedent, whereby the CAS decides on the proper application of "private" contracts in the absence of a complaint by any party to the contracts.

b. Second, the Appellant argued that the language of Article C(7) of the 2003 IAAF Code applied only where Mr Okeyo was "*fulfilling* [his] *roles for, or on behalf of the IAAF*" and that because he was not acting in his capacity as a IAAF Official when implementing the contracts with Nike on behalf of AK, his actions in that respect were not within the scope of Article C(7) of the 2003 IAAF Code.

70. The Respondent's arguments on jurisdiction were the following (see Answer paragraphs 71-73):

a. For the IAAF Panel to have jurisdiction, the Respondent needed to establish that Mr Okeyo was both a person subject to the jurisdiction of the Ethics Board (personal jurisdiction) and that he had engaged in conduct prohibited by the IAAF Code (subject-matter jurisdiction).

b. As regards personal jurisdiction, the Respondent conceded that the scope of the 2003 IAAF Code was more limited than under the 2012 IAAF Code. However, both applied to Mr Okeyo as he was a member of the IAAF cross country and road running committees from 1991 to 2011 and a member of the cross country committee from 2011 to 2015. IAAF Committee members are persons "*acting in positions of trust within the IAAF*" as defined in the 2003 IAAF Code, and they are therefore subject to the provisions of the 2003 IAAF Code. And IAAF Committee members are defined as "*IAAF Officials*" under the 2012 IAAF Code.

c. As regards subject-matter jurisdiction, the Respondent rejected the Appellant's argument that, as none of the allegations related to his roles in the respective committees, the allegations fell outside the jurisdiction of the Ethics Board. The Respondent submitted that the IAAF Panel rightly held in paragraph 50 of the Appealed Decision that Articles C(7) of the 2003 IAAF Code and C(8) of the 2012 IAAF Code have a "*wider reach*" than simply the conduct of relevant persons acting in their official IAAF capacity, as it was "*the clear intention to protect the reputation of athletics in general*" (paragraph 72 of the Answer). The Respondent relied

expressly on the finding of the IAAF Panel in paragraph 178 of the Appealed Decision, and submited that the IAAF Panel's decision is consistent with the CAS's interpretation of similar provisions in other sporting codes of ethics, for example the ISU Code of Conduct (paragraph 73 of the Answer). The Respondent relied specifically on the 29 September 2016 decision of the CAS in *CAS 2016/A/4558 Mitchell Whitmore v International Skating Union (ISU)*, at paragraphs 49-64, where the CAS held that an incident of a speed skater fighting out of competition was capable of bringing the sport into disrepute.

b. Procedural breaches and the right to be treated fairly:

71. Regarding breaches by the Ethics Board of procedural rules (grounds 1-3) and the right to be treated fairly (grounds 4-5), the Appellant argued as follows:

a. He was only facing these proceedings because the Chairman wrongly appointed himself as a reviewing member of the Investigation Report, and because, while suspended, the Appellant had no access to the evidence that he required properly to defend himself.

b. Arbitrariness cannot be permitted, and if the IAAF Panel can simply ignore procedural rules, then the rules are meaningless. The Appellant submitted that the CAS should not allow itself to be used to sanitise the IAAF Panel's breaches of procedural rules.

c. As regards delay, it is not just a question whether the Appellant suffered prejudice.

72. The Respondent's arguments on grounds 1-5 were the following (see Answer paragraphs 30-50):

a. Grounds 1-3 are without any merit (no breaches of Ethics Board Procedural Rules 13(10) or 13(11), and no unfairness – see Answer paragraphs 32-40). Even if they had merit, they cannot succeed because "*any unfairness resulting from a procedural defect in the proceedings before the Panel is cured by this appeal because it amounts to a de novo consideration of the Case*" (see Answer paragraph 31 and the decision in *CAS 98/211 De Bruin v FINA* at paragraph 8). The Respondent also relied upon the 21 September 2017 decision in *CAS 2017/A/5155 Necmettin Erbakan Akyuz v IWUF*, at paragraph 45, where even denial of a hearing was not a valid ground for appeal given the *de novo* nature of the appeal process.

b. As regards the grounds going to fairness (grounds 4-5):

i. As with grounds 1-3, these grounds cannot succeed because of the *de novo* nature of the appeal proceedings, and there was no unfairness or breach of procedural rules (see Answer paragraphs 41-44).

ii. As regards any unfairness arising from the prolonged suspension of Mr Okeyo and delay in the investigation and outcome (ground 5), the Respondent also submitted that: the Ethics Board "*acted with appropriate expedition in a complex matter*"; Mr Okeyo contributed to the delay (Answer paragraph 46); the suspension was justified (Answer paragraph 47); the

suspension did not disadvantage Mr Okeyo (Answer paragraph 48); the length of time was not a cause of unfairness (Answer paragraph 49); and by analogy with the ECHR case law, the threshold for proving a breach of the reasonable time requirement is a high one that is not met in this case (Answer paragraph 50). At the hearing, the Respondent added that the delay was also caused by AK's limited cooperation in providing documents for the investigation.

c. Standard of Proof:

73. Regarding the application of an incorrect standard of proof (ground 6), the Appellant argued as follows:

a. The standard of proof must relate to the severity of the charge, and in this case that requires the application of a "beyond reasonable doubt" standard of proof. The Appellant relied upon *IAAF Ethics Commission Decision 02/2016 VB, AM, GD and PMD*.

b. Accordingly, the Appellant argued that in order to accept the charges, the CAS Panel needs cogent evidence of conversion of funds, and that we cannot decide the case on the basis of probability.

74. The Respondent submitted as follows on the standard of proof (see Answer paragraphs 51-56):

a. In applying a standard of "comfortable satisfaction", the IAAF Panel applied the correct standard of proof. The Respondent rejected the Appellant's argument that because the charges are essentially criminal in nature the IAAF Panel should have applied the higher standard of "beyond reasonable doubt".

b. The alleged acts against Mr Okeyo are serious, but they are not at the "*very highest end of the scale of seriousness*", which would include offences such as blackmail, systematic state-sponsored doping, or serious sexual misconduct (paragraph 53 of the Answer). For this reason, the application of the higher standard of proof in *IAAF Ethics Commission Decision 02/2016 VB, AM, GD and PMD* does not call for the application of the same standard of proof in this case.

c. It is significant that Mr Okeyo's co-defendant, Mr Kinyua, positively asserted that the standard of "comfortable satisfaction" should be applied.

d. Applying the standard of "comfortable satisfaction" is consistent with the CAS's jurisprudence in corruption cases, which supports the view that the standard is appropriate given the difficulty inherent in uncovering evidence of corruption and the importance of fighting corruption in sport.

e. There have been lifetime bans handed down on the basis of cases applying the "comfortable satisfaction" standard, such that the severity of the sanction does not indicate that the wrong standard of proof has been applied.

d. The evidence did not support the IAAF Panel's findings

75. Grounds 7-9, 14 and 15 are related to the Appellant's arguments on the standard of proof and the evidence relied upon by the IAAF Panel.

76. The Appellant thus argued that:

a. Due to the lowered standard of proof, the IAAF Panel erred in attributing the cash withdrawals in the name of the Appellant to probable diversion of funds without specific proof of diversion of the funds to his personal use (ground 7). Such express evidence was said to be necessary given that Kenya is a cash economy where withdrawal and use of large amounts of cash is normal.

b. Accordingly, the IAAF Panel failed to appreciate the local operational circumstances of AK and to uphold the same in favour of the Appellant (ground 8).

c. And the IAAF Panel erred at Paragraph 177 of its Appealed Decision in finding the Appellant guilty of non-disclosure of the honorarium payments received from Nike in the financial statements despite the fact that Mr Okeyo was not in charge of accounting and record keeping at AK (ground 9). Mr Okeyo was not a trained accountant.

d. The IAAF Panel could not look to other cases for guidance on whether the actions and omissions of the Appellant breached the relevant provisions of the IAAF Code, because this case is "*unique*". It is therefore necessary in this case to consider the nature of Kenya's "cash economy" and to carry out a full investigation and audit into what happened to the money paid out. As that had not been done, the standard of proof in this case was not met. It was Mr Okeyo's position that the cash withdrawn was used to pay athletes and expenses at weekend athletics meets.

e. The fact that Nike has not complained of non-performance of the services paid for under the Agreement shows that the Appellant and AK used the payments for their intended purpose.

f. The fact that AK never complained that it had not received money due to it from Nike, also supports the conclusion that the funds were not diverted.

g. The IAAF Panel misinterpreted the intended use of the honorariums (ground 14).

h. The fact that the auditors approved the accounts as a true and correct representation of the financial affairs of AK (ground 15) shows that the payments were properly accounted for.

77. On grounds 7-9, 14 and 15 the Respondent argued as follows (see Answer paragraphs 57-70):

a. The IAAF Panel's conclusion that it was proved to the appropriate standard that the Appellant had diverted the relevant sums for his own personal benefit was "*unimpeachable*". The Respondent supported this argument on the basis of the

evidence considered by the IAAF Panel and the conclusions that it drew from that evidence (see Answer paragraphs 59.1-59.6).

b. The Appellant's argument that the nature of Kenya's cash economy was such as to explain that the honorarium payments were withdrawn in cash to cover legitimate expenses is "*utterly fanciful*" (see Answer paragraphs 62-67). The Respondent's position is supported by: (i) the timing of the withdrawals; (ii) the admission by Mr Okeyo that none of the elements of the ordinary running of an event was intended to be covered by the honorarium payments, and that allowances were paid directly by the regions and the money wired to their direct accounts by AK; (iii) the discrepancy between the size of the cash withdrawals and the typical budget for a weekend athletics meet, and Mr Okeyo's inability to reconcile those amounts to each other; (iv) the fact that withdrawals were in US dollars but payments in remote parts of Kenya would need to be made in Kenyan Shillings; (v) the late introduction of a new excuse that the cash withdrawals were designed to enable AK to benefit from currency exchange rates, and other evolutions in the Appellant's arguments over time; (vi) the fact that Nike was never going to complain given that it would not have wanted confirmation that the payments it was making were being misappropriated by Mr Okeyo and Mr Kinyua; and (vii) the reason that AK did not complain was because its members never knew about the payments, as these were never declared to its members.

c. The Respondent also relied upon the decision of the English High Court in *Kazakhstan Kagazy Plc v Baglan Abdullayevich Zhunus* [2017] EWHC 3374 (Comm), at paragraphs 159, 160 and 162, for the proposition that the IAAF Panel did not have to establish what had happened to the money, as long as it knew who took it.

d. As regards ground 9, the Respondent asserted that even though Mr Okeyo was not an accountant or in charge of accounting, it was his responsibility as a member of the Executive Committee to oversee the accounts.

e. As regards ground 14, the 25 September 2003 letter from Nike to Mr Kiplagat is itself a strong indication that the Nike payments were not intended for the use set out in the letter, and there was ample evidence to support the IAAF Panel's interpretation of the intended use of the honorariums (see Answer paragraph 80).

f. As regards ground 15, the IAAF Panel *did* expressly consider the role of AK's auditors, and it noted and accepted Mr Dean's evidence that no good accounting reason existed in this case for the use of the Clearance Account, there were accounting discrepancies, and there were potential explanations for the auditor's failures to pick those discrepancies up (see Answer paragraph 82). It is also notable that the Appellant still could not offer any legitimate explanation for the use of the Clearance Account in the Appeal.

g. More generally, the Respondent argued that this CAS Panel should draw adverse inferences from the Appellant's non-attendance at the hearing. The Respondent relied upon the decision of 19 July 2012 in *CAS 2011/A/2625 Mohamed Bin Hammam v FIFA*, at paragraph 46.

e. The severity of the sanction

78. On the application of an overly severe sanction (ground 19), the Appellant submitted that the severity of the sanction does not match the alleged offence at all.

79. The Respondent argued that the sanction was proportionate to the offence, and that the CAS Panel should not interfere in the sanction unless the decision of the IAAF Panel was "evidently and grossly disproportionate" or possibly irrational in some way (see Answer paragraph 103), which it was not in this case. Moreover, the CAS has consistently upheld life bans in cases of corruption (see Answer paragraphs 104 to 106).

f. Other Grounds

80. Regarding the other grounds not further supported by the Appellant at the hearing, the Respondent asserted as follows:

a. Grounds 11-13 should be dismissed given the absence of Executive Board minutes and the fact that the Executive Board did not exist at the relevant time, so it could not have ratified Mr Okeyo's actions.

b. Grounds 16-17 should be dismissed as the allegations about Mr Ndegwa are completely without foundation (see Answer paragraphs 87-97).

c. Ground 18 should be dismissed because the evidence of Mr Maingi related only to the separately heard Extortion Charge and not the Diversion Charge that is the subject of the Appealed Decision (see Answer paragraphs 98-99).

d. Ground 20 should be dismissed because there is no evidence of any bias whatsoever, and the Appellant has not met the high burden on this issue (see Answer paragraphs 107-110). In any event the *de novo* nature of the appeal remedies any bias even if the Appellant had met its burden.

e. Ground 21 should be dismissed as it is totally unfounded.

VI. JURISDICTION

81. Article R47 of the CAS Code states that *"an appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body"*.

82. In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal.

83. Article 35 of the IAAF Code provides that:

"*All decisions taken by the Ethics Commission and its Panels are final, subject to appeals lodged with the Court of Arbitration for Sport (CAS) except that there is no right of appeal against decisions of the Ethics Commission under rule C16(v) of the Statutes of the Ethics Commission (appeals against decisions of Members).*"

84. The Respondent does not contest the jurisdiction of the CAS and so agreed when signing the Order of Procedure.

85. In consideration of the foregoing, the CAS Panel finds that it has jurisdiction to hear this appeal.

VII. ADMISSIBILITY

86. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against."

87. Pursuant to Articles 35 and 37 of the IAAF Code, a party to proceedings before the IAAF Panel has 21 days from the date of receipt of the decision to lodge an appeal with the CAS. The Appealed Decision, furthermore, expressly advised the Parties of their right to appeal with the CAS within a 21-day time limit (see paragraph 198 of the Appealed Decision).

88. According to the information provided by the Appellant, and not contested by the Respondent, he was notified of the Appealed Decision on 30 August 2018. The Appellant filed his Statement of Appeal on 20 September 2018. Neither party has challenged the jurisdiction of the CAS.

89. The Respondent expressly confirms the admissibility of this appeal.

90. In consideration of the foregoing, the CAS Panel finds that the appeal is admissible.

VIII. APPLICABLE LAW

91. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

92. Neither Party submitted arguments on the applicable law. In arguing the appropriate burden of proof, the Parties relied on prior CAS decisions and holdings of the European

Court of Human Rights. In the absence of arguments on the applicable law, the CAS Panel considers that the Parties have chosen for their dispute to be determined in accordance with the IAAF Regulations, and the law of Monaco (where the IAAF has its seat) shall apply subsidiarily.

IX. MERITS

93. The CAS Panel has carefully considered all of the arguments presented by Appellant. It rejects each and every one of the Appellant's arguments and upholds the sanctions imposed by the Respondent. On the basis of Mr Dean's written reports and his testimony at the hearing, including cross-examination by Mr Okeyo's counsel, the CAS Panel upholds the findings of fact in the Appealed Decision. The bases for the CAS Panel's decision are summarized below. Only the facts and arguments necessary to reach that decision are described.

94. The CAS Panel deals with the grounds for appeal set out in paragraph 62 above as follows.

95. **Ground 10** (as set out in paragraph 62 above): The preamble to the 2003 IAAF Code provides that "*there are two groups of persons subject to this Code: those who are in a position of trust within the IAAF,* ***such as members of*** *the Council,* ***Committees*** *and Commissions, and those who are otherwise entitled to act for, or on behalf of the IAAF, such as* ***IAAF officials****, as well as the IAAF consultants, agents etc. when acting for or on behalf of the IAAF*" (Emphasis added). There is no dispute that Mr Okeyo was a Committee member at the time of the alleged misconduct. He was a member of the IAAF cross country and road running committees from 1991 to 2011 and a member of the cross country committee from 2011 to 2015. Mr Okeyo was therefore subject to the provisions of the 2003 IAAF Code. It is not a requirement under the 2003 IAAF Code that Mr Okeyo should have been acting on behalf of the IAAF when engaging in the alleged misconduct. The words "*when acting for or on behalf of the IAAF*" appearing in the above-cited section of the preamble of the 2003 IAAF Code apply only to "IAAF consultants, agents etc.". Those words do not apply to IAAF Committee members or IAAF Officials. This conclusion is supported by the decision of the CAS in *CAS 2016/A/4558 Mitchell Whitmore v International Skating Union (ISU)* (at paragraphs 49-64).

96. As an IAAF Committee member, Mr Okeyo is also caught by the scope of the 2012 IAAF Code. The 2012 IAAF Code provides that it applies to "*IAAF Officials*", and IAAF Officials are defined as "*those who are in a position of trust within the IAAF, such as members of the IAAF ... Committees...*". Mr Okeyo is therefore an IAAF Official under the 2012 IAAF Code. As with the 2003 IAAF Code, by its terms, the 2012 IAAF Code does not require that the prohibited conduct must be carried out while acting in a particular capacity. Accordingly, the IAAF Panel properly concluded that it had jurisdiction over Mr Okeyo under the 2012 IAAF Code as well. This conclusion is supported by the decision of the CAS in *CAS 2016/A/4558 Mitchell Whitmore v International Skating Union (ISU)* (at paragraphs 49-64).

97. The CAS Panel rejects the Appellant's argument made at the hearing that the CAS has no jurisdiction because it cannot police the performance of a contract between private parties. The CAS is not policing a private contract. The CAS is considering whether the Appellant engaged in conduct that breached the terms of the 2003 and 2012 IAAF Codes, and the standards set out therein. The IAAF Codes give the CAS jurisdiction over conduct that breaches the IAAF Codes.

98. In consideration of the foregoing, the CAS Panel finds that its jurisdiction in this matter includes the determination as to whether the Appellant's conduct breached the provisions of the 2003 and 2012 IAAF Codes.

99. **Grounds 1-5** (as set out in paragraph 62 above), involving the fairness of the IAAF's procedures, are easily rejected. Because this proceeding was a *de novo* hearing and the Appellant had a full opportunity to present his case, if the IAAF did commit any procedural errors – and the CAS Panel does not accept that any occurred – they would in any event be irrelevant to this proceeding. CAS decisions have consistently so held (see the decisions in *CAS 98/211 De Bruin v FINA* at paragraph 8; and *CAS 2017/A/5155 Necmettin Erbakan Akyuz v IWUF*, at paragraph 45).

100. **Ground 6** (as set out in paragraph 62 above): The CAS Panel agrees with the Respondent that "comfortable satisfaction" is the appropriate standard of proof.

101. While the sanctions imposed are strong, this is not a criminal proceeding, and Mr Okeyo's liberty is not at stake. Comfortable satisfaction imposes a sufficiently high burden in cases involving alleged corruption. It is a standard of proof that is significantly higher than a "preponderance of the evidence" standard, but it also reflects that absolute proof is not always available in corruption cases. Applying this standard in corruption cases is consistent with CAS jurisprudence (see the decisions in CAS 2009/A/1920, CAS 2010/A/2172, CAS 2011/A/2625 and CAS 2014/A/3832 & 3833)

102. Prior CAS decisions have previously applied the standard of "comfortable satisfaction" while imposing lifetime bans (see CAS 2008/A/1572, 1632 & 1659, and CAS 2016/A/4487), and lifetime bans have also been imposed when applying the lower standard of a "preponderance of the evidence" (see CAS 2011/A/2490). Additionally, the present case does not fall within the categories of cases in which the higher "beyond a reasonable doubt" standard has been applied (see, for example, IAAF Ethics Commission Decision 02/2016 in *Balachnichev, Melnickov, Dolle and Massata Diack*).

103. **Grounds 7-9, 14 and 15** (as set out in paragraph 62 above): As noted above, the CAS Panel accepts the findings of fact of the IAAF Panel. On the basis set out below, the CAS Panel therefore concludes that Mr Okeyo did indeed convert the funds intended for AK for his own personal use.

104. Mr Dean's reports and his testimony at the hearing presented compelling evidence that Mr Okeyo and others converted funds intended for AK for their own personal use.

105. Mr Dean and the IAAF Panel relied upon strong documentary evidence to conclude that payments were received in cash by Mr Okeyo (among others), including: direct communications from Nike acknowledging that the honorarium payments were made

(see for example the Nike email of 25 September 2003); written acknowledgment by Nike that payments in 2003 were made to the individual bank accounts of Mr Okeyo, Mr Kinyua and Mr Kiplagat (see letter of 17 November 2017 from Nike); payment vouchers and schedules recording cash payments made to Mr Okeyo (see, for example, Mr Dean's 15 November 2018 Report at paragraphs 5.52 to 5.64, 5.89, 5.121/122 and 5.134), cheques signed by Mr Okeyo (for example, Cheque numbers 384, 364, 509 and 551 referred to in paragraphs 5.78, 5.87, 5.119 and 5.132 of Mr Dean's report), cash book records (see, for example, Mr Dean's report at paragraphs 5.88, 5.91, 5.120 and 5.133). Mr Okeyo also admitted at the hearing before the IAAF Panel that he received payments directly into his bank account (see Transcript of the IAAF hearing at Volume 5/202).

106. Having concluded that Mr Okeyo received a number of substantial payments in cash, the question is whether those funds were applied to his own personal use or for the benefit of AK. The use of the Clearance Account, the failure to inform AK of these payments, and the inability of Mr Okeyo to explain what use was made of these funds lead this Panel to conclude that the IAAF Panel was correct in determining that the funds were converted by Mr Okeyo to his own personal benefit.

107. The Clearance Account avoided the inclusion of the honorarium and service payments in AK's accounts, and Mr Okeyo was unable to present any evidence that the payments he received were notified to AK. The CAS Panel considers that if the funds had been paid out for legitimate expenses, the payments would have been recorded in AK's ordinary accounts. The Appellant asserts that he was not an accountant and cannot therefore be responsible for the accounting failures. The CAS Panel rejects this argument. It was Mr Okeyo's responsibility as a member of the Executive Committee to oversee the accounts, and the CAS Panel therefore rejects the Appellant's argument that the burden should fall on the IAAF to show that the funds were misapplied. Having kept these payments out of AK's accounts, the burden falls on Mr Okeyo to demonstrate what happened to the funds after they were paid out to him. However, he has presented no credible evidence to the IAAF Panel or to the CAS Panel on the application of the funds to the benefit of AK.

108. Moreover, it is not sufficient explanation to rely on the "cash" nature of Kenya's economy, because Mr Okeyo could still have ensured that the payments were included and properly accounted for in AK's accounts. In addition, the CAS Panel accepts the IAAF's arguments that: (i) the cash payments received by Mr Okeyo, Mr Kinyua and Mr Kiplagat were much larger than necessary to pay for the events and other expenses that Mr Okeyo has contented the funds were used for; and (ii) the ever evolving nature of Mr Okeyo's explanations casts material doubt on their truth.

109. As regards ground 14, the 25 September 2003 letter from Nike to Mr Kiplagat is itself a strong indication that the Nike payments were not intended for the use set out in the letter, and the CAS Panel accepts the IAAF Panel's interpretation of the intended use of the honorarium payments.

110. As regards ground 15, the CAS Panel agrees with the Respondent that the IAAF Panel did consider the role of AK's auditors, and accepts Mr Dean's evidence that: no good accounting reason existed in this case for the use of a Clearance Account; there were

accounting discrepancies; and there were potential explanations for the auditor's failures to identify those discrepancies. The Appellant did not offer any legitimate explanation to the CAS Panel for the use of the Clearance Account.

111. **Grounds 11-13** (as set out in paragraph 62 above) may be quickly rejected: Mr Okeyo did not present any evidence of ratification, and the Board minutes that were submitted into evidence do not show any ratification. Indeed, the use of the Clearance Account indicates a desire that the payments not be subject to any scrutiny by the Board or others. In light of these circumstances, the CAS Panel does not accept Mr Okeyo's argument that he did not have access to the minutes.

112. **Grounds 16-18** (as set out in paragraph 62 above) are also easily rejected. The allegations about Mr Ndegwa have not been supported and indeed are far-fetched. Mr Maingi's evidence did not relate to the charges that are the subject of this proceeding.

113. **Grounds 20-21** (as set out in paragraph 62 above) are rejected for the same reason as the alleged grounds of procedural unfairness. The CAS Panel does not find any bias in the Respondent's decision. A party making such serious allegations should present substantial evidence to support them, but Mr Okeyo has not presented any such evidence. In any event, the *de novo* nature of this proceeding would have remedied any such bias even if it had existed.

114. Finally, the CAS Panel believes that the sanctions imposed by the Respondent were appropriate (**ground 19**, as set out in paragraph 62 above). The Respondent has presented substantial evidence that Mr Okeyo and others diverted payments by Nike to AK for their personal use. These funds did not go to legitimate and necessary activities of AK, which certainly could have used them to further its goals and to benefit its athletes. Corruption of this sort goes to the heart of the integrity of the sport and cannot be countenanced. The sanctions – lifetime bans from the IAAF Council and from holding any office in the sport of athletics and fines and financial penalties – are appropriate in the circumstances. The CAS has consistently upheld life bans in cases of corruption (see, for example, the decisions in CAS 2009/A/1920, CAS 2010/A/2172 and CAS 2011/A/2490 relating to corruption through match-fixing).

115. For all these reasons, Mr. Okeyo's appeal is dismissed.

X. COSTS

116. Article R65.3 of the CAS Code applies and provides that:

> "*Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"

117. While the Respondent is the successful party, given the significant delays in the underlying investigation and proceedings before the IAAF Panel, the CAS Panel believes that it would be appropriate in these circumstances for each party to bear its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by David Siwa Okeyo against the Decision 10/2018 of the IAAF Ethics Board dated 30 August 2018 is denied.

2. The decision imposed on David Siwa Okeyo by the Appealed Decision shall remain in effect:

   a. Expulsion from his offices as a member of the Council of the International Association of Athletics Federations;

   b. A lifetime ban from taking or holding any office in the sport or taking part in any athletics related activity;

   c. A fine of USD 50,000 to be paid to Athletics Kenya, which shall now be paid within 30 days of this award; and

   d. Payment to the International Association of Athletics Federations for its costs of USD 100,000, related to the Ethics Board proceedings, within 30 days of this award.

3. This award is rendered without costs, except for the CAS Court Office fee of CHF 1,000, which was paid by David Siwa Okeyo and is retained by the CAS.

4. Each party shall bear its own costs and other expenses incurred in connection with this arbitration.

5. All other motions or prayers for relief are dismissed.

Done at Lausanne, Switzerland, on 11 March 2020
Operative part of the award notified on 22 May 2019

THE COURT OF ARBITRATION FOR SPORT

David W. Rivkin
President of the Panel