REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. AD 2 OF 2019

IN THE MATTER BETWEEN

ANTI- DOPING AGENCY OF KENYA.....APPLICANT

-versus-

JEDIDAH WANJIRU KARUNGU..... ATHLETE

DECISION

Hearing : 14th March 2019

Panel : Mrs. Elynah Sifuna - Chair
Ms. Mary N Kimani - Member
Mr. Gichuru Kiplagat - Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant;

The Athlete represented herself

I. The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, an Elite and International Level Athlete, (ID No. 26446355 Nyeri County) of Mobile Phone No. +254 7298995, (hereinafter '**the Athlete**').

II. Factual Background

3. The Athlete stated that she was 32 years, was not otherwise employed and has been running since 2012 as a self-managed athlete; as an Elite and International Level Athlete, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.
4. On October 27th, 2018, CHINADA Doping Control Officers in an in-competition testing during the Dongfeng Nissan Chengdu International Marathon in China collected a urine sample from the Respondent Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 6357036 (the **"A Sample"**) and B 6357036 (the **"B Sample"**) in accordance with the prescribed WADA procedures.
5. All the Samples were sent to a WADA accredited Laboratory in Seibersdorf, Austria. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance Norandrosterone, (see test reports in page 8-10 of the Charge Document).
6. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.
7. The findings were communicated to the Athlete by Mr. Japhter Rugut, the ADAK Chief Executive Officer through a Notice and mandatory Provisional Suspension dated 5th December, 2018. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 20th December, 2018 and the option for Sample B analysis (see page 14-15 of the Charge Document).
8. The Athlete responded to the Notice from ADAK in a letter dated 17-12-2108 which stated in part, *"I hereby wish to state the possible source I can think of I had*

been using Gabanerue, Cerebrex, Bena, Cramp block, Myrspact, Isostarpower. After the race I was required to fill anti-doping form indicating what supplement or medicine I had used in the past two weeks. The only thing I never indicated was PRIMOLIT.N as back in my mind I never consindered it have any effect. I never remembered it. I have never used any enhancing substance and even never thought of it. I know the consequences behind it.", (see folio 16 of the Charge Document).

9. The Athlete did not request a Sample B analysis thus waiving her right to the same under IAAF Rule 37.5
10. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule Violation. A Notice to Charge dated 7th January 2019 was filed by ADAK on 15th January 2019 following which the Tribunal issued directions that:
    (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form and all relevant documents on the Athlete within 15days from date of directions.
    (ii) The Panel constituted to hear this matter shall be as follows; Elynah Shiveka, Panel Chair, Mary N. Kimani, Member and Edmond Gichuru Kiplagat, Member
    (iii) The matter to be mentioned on 7th February 2019 to confirm compliance and for further directions.
11. On 7th February, 2019 with Mr. Rogoncho Counsel for Applicant in attendance, all matters were adjourned generally and next mention was set for 20/02/2019.
12. The Athlete appeared before the Tribunal at the mention on 20th February 2019 and confirmed that she had been served with the ADRV Notice and she wished to represent and defend herself. The Applicant represented by Mr. Rogoncho was ordered to file the Charge Document within 7 days and matter was set mention on 28th February 2019.
13. The Charge Document was filed at the Tribunal on 25th February 2019 together with its verifying affidavit. Not all copies of documents listed in its folio numbered 6 were attached namely Nos.6 – 8.

14. At the next mention held on 27th February 2019 the Applicant was represented by Mr. Rogoncho while the Athlete appeared in person. The Applicant's Counsel confirmed having served the Athlete with the Charge Document on 27th February 2019. The matter was set to be heard on 14/3/2019.
15. The hearing of the matter proceeded on 14th March 2019 with Counsel Mr. Rogoncho appearing for the Applicant while the Athlete took to the stand and defended her case.
16. At the mention on 21st March 2019, the Athlete filed a copy of her passport as directed after the hearing. Mr. Rogoncho was requested to provide the optional lab package with enhanced result details in order for the Tribunal to embark on writing the decision. He requested for a month to do so. Next mention was set for 25th April 2019.

III. The Hearing

17. At the hearing ADAK was represented by Mr. Bildad Rogoncho, Advocate while the Athlete appeared in person and made her representations.
18. ADAK has preferred the following charge against the Athlete: -

> **Presence of a prohibited substance 19-*Norandrosterone* or its metabolites or markers in the athlete's sample in violation of Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2(b) of the IAAF rules.**

IV. Submissions

Below is a summary of the main relevant facts and allegations based on Parties submissions.

A. Applicant's Submissions

19. Mr Rogoncho, Counsel for the Applicant, informed the Panel that the Agency would rely on the Charge Document as presented and did not wish to put in further written submissions.

20. The Applicant stated that the Athlete was an international level athlete.
21. Notable in the Charge Document was the Applicants No. 8 "The *same letter also informed the athlete of her right to request for the analysis of the B-sample; and other avenues for sanction reduction including prompt admission and requesting for a hearing and gave a deadline of 20th December 2018 for the same.*"
22. The Applicant also stated in No. 9 that the "*athlete responded vide a letter dated 17th December 2018. She denied ever using the prohibited substance. She stated that she had, prior to the event, used Gabanerue, Celebrex, Cramp block, Myrspact and Isostarpower medications which she had indicated on the Doping Control Form; declaration of medical use and blood transfusion section. She stated that she failed to indicate Primolet N medication for she had not considered it to have contained any prohibited substances as she barely remembered to have used the medication. She further provided medical prescriptions in support of her defense (Attached is a printed copy of the letter and medical prescriptions dated 17th December 2018, 20th November 2018, 14th July 2018 and 22nd October 2018 respectively, JWK4)*"
23. Further the Applicant preferred the charge of "*Presence of a prohibited substance Norandrosterne in the athlete's sample*" noting the "*Respondent Athlete's AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at the IAAF for the substance in question and there was no apparent departure from IAAF Anti-Doping Regulations or from WADA International Standards for Laboratories which may have caused the adverse analytical findings*".
24. Moreover, the Applicant noted that "*no plausible justification was advanced for the adverse analytical finding*".
25. The Applicant prayed that:

    a) All competitive results obtained by the Respondent from and including 27th October 2018 until the date of determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals points and prices), Article 10.1 ADAK ADR

    b) Jedidah Wanjiru Karungu be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code, Article 10 of ADAK and WADC Rules.

26. At the end of the hearing Counsel for the Applicant submitted an article sourced from the internet titled "Doping in sport -1. Elimination of 19-norandrosterone by healthy women, including those using contraceptives containing norethisterone. Walker CJ, Cowan DA, James VH, Lau JC, Kicman AT."

B. Athlete's Submissions

27. These were condensed from the Hearing session: The Athlete was 32 years; she resided in Ngong and said her sole work was running which she has been doing since 2012. Her running talent was nurtured while in primary school, where she raced as a student in county races up to a divisional level in 5000m/10,000m though she did not make it to national level.
28. In 2003 she sat her standard 8 exam and got 205 marks. She said she had no money to continue school and in any case got a baby in 2005, so concentrated on raising the child till around 2009. She is the 1st born and has three other siblings.
29. Working as a house help in Nyeri town her employer recognized she had a running talent and referred the Athlete to her cousin who facilitated her. In 2010 she resumed running the 1500m & 800m; performed well in Nyeri County and was assisted by Athletic Kenya's Nyeri branch Mutahi Kahiga to participate in events at Kasarani. She won the Karatina 10km race in 2010 but did not fare well in 2011.
30. Eventually Coach Macharia from the Army took her to train at Kabiroini Camp in Nyeri. There she met Alice Waithera, a 1500m runner and Wambui, a high jumper who were employed in the Army. The two girls brought her to Ngong and she shared their house there; they would leave her there when they periodically reported to the official training camp in Kabiroini. Asked why she too was not recruited by the Army, the Athlete said she did not have a form four leaving certificate which was a basic/minimum requirement. She

explained that she sat her form four exam (as a private student) in 2018 to try bridge that gap.

31. She started participating in international races in 2012. In October of 2012, Isaac Macharia himself a runner but who also functioned as the head at her Ngong area sourced for her a race in Germany. The travel documents she acquired on her own and Urike, the contact in Germany paid for the tickets which he reimbursed himself from whatever winnings she accrued there so her final pay packet from that outing was 20,000Ksh only; while in Germany she did four races. She also did one 21km race in Switzerland and no doping tests were conducted in any of these first races.
32. In 2013 around March went to Turkey for about a month and participated in 3 races, one a half marathon where she emerged position 8. She said she did other races in Taiwan, Netherlands and France, in all of which, she was not dope-tested. Her first dope testing happened in 2016 in Turkey when she won a full marathon race there. The only other race she won was in Switzerland.
33. China was her last race in 2018 and she emerged 3rd position, that is, in the race where the AAF arose.
34. The Athlete said she heard about doping in 2014, "... *if you are caught with dawa [medicine-prohibited substances] you get banned and I don't want to be involved in it...*" She recalled that even during her last race in China they had been warned on the eve of race day (as they were briefed about the route) that, at the completion of the race, athletes who posted Nos. 1 to 3 would be tested; they were told to write what they had used 2 weeks before the race.
35. Asked how she came to know about the many items she listed on the Doping Control Form, she said she had been showed the BCAA & Isostarpower supplements by the agent who handled her in Germany. The Cramp block she said a salesman in Ngong told her relaxes the muscles. She said she had a lingering injury in her right leg that nagged especially when she trained for the long races so she used Gabanerue for pain killer purposes. Asked if she always used all these additional items she said that for one whole year she did not use

because she did not have the money to buy them as they were costly, retailing at about a total of 11,000Ksh.

36. Asked why she did not see a doctor over the painful leg, she said she saw a physiotherapist then absconded over cost factor and went to using over the counter painkillers.

37. On being prodded she also said she would have very heavy and painful periods (menses) but sometime in 2015 a nurse and friend of hers at the local Ololua Dispensary told her to go to the chemist for medication to stop/control the heavy periods and accompanying pain, especially when she was due for her races. The chemist she visited and purchased the medication from wrote out the prescription to help her understand how to use the medication.

38. The chit for the Primolet N she said she used on the occasion she participated in the race in China was dated on 22/10/18. The Panel was curious as to why she had submitted yet another prescription dated 20/11/18 written out by a Hillsway Medical Centre (see a copy in page 17 of Charge Document); the Athlete said that when the AAF was brought to her notice (i.e. after being summoned and interrogated at ADAK offices) she retraced her steps and sought out the copies of the Primolut N medication which as she had explained earlier, she had been regularly using since around 2015. It was at this point that she was requested to furnish her travel documents so it could be determined if her said date of purchase of the tablets she used during her particular outing in China tallied with her said dates of travel.

39. Asked how come she had attached copies of chit and prescription for only the two months yet she said she used the medication regularly, she said that of the couple of outlets she bought the medicines from, only the two agreed to give her written documents retrospectively, these including the latest place where she had purchased the drugs from. Asked why she went back for prescription later and not at the time purchase, she said it was because she did not usually as a matter of practice ask to be given her copy as she by now she had been buying some of it over the counter regularly since her nurse friend prescribed

and advised her to get her first prescription in 2015. She also said she needed the medicine to manage her heavy periods especially when her menses coincided with her travel and competition endeavors. She also admitted that she did not inform the doctor who gave her prescription prior to event in China that she was an athlete.

40. The reason as to why she did not declare the Primolut N in the DCF despite being advised to note down any medication taken within a period of 2 weeks was in her own words, *"The only thing I never indicated was PRIMOLIT.N as back in my mind I never consindered it have any effect. I even never remembered it."*, stating it was only after she had the face to face talk with ADAK officials when being notified of the AAF that, following their discussion/advice she remembered and revisited the chemists she had purchased it from to gather more information about the drug.

41. The Athlete submitted a downloaded Patient Information Leaflet, Bayer plc in regard to Primolut N which she admitted to having used during the event where she was tested and an AAF found.

V. Jurisdiction

42. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti- Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

VI. Applicable Law

43. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any

Prohibited Substance **or its** ***Metabolites*** **or** ***Markers*** **found to be present in their** ***Samples.*** **Accordingly, it is not necessary that intent,** ***Fault,*** **negligence or knowing** ***Use*** **on the** ***Athlete's*** **part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.**

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a ***Prohibited Substance*** **or its** ***Metabolites*** **or** ***Markers*** **in the** ***Athlete's*** **A** ***Sample*** **where the** ***Athlete*** **waives analysis of the B** ***Sample*** **and the B** ***Sample*** **is not analyzed; or, [...].**

VII. MERITS

44. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

45. The Tribunal will address the issues as follows:

a. ***Whether there was an occurrence of an ADVR, the Burden and Standard of proof;***

b. ***Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***

c. ***Whether there should be reduction based on the Athlete's prompt admission;***

d. ***The Standard Sanction and what sanction to impose in the circumstance.***

A. The Occurrence of an ADRV, the Burden and Standard of proof.

46. As used in WADC's Article 3.1:

> ***The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.***

47. The Applicant relied on Article 3.2.1 *"Analytical methods or decision limits approved by WADA [...]"* and the Panel was comfortably satisfied that the ADRV was proven on account of the following facts:

(i) The laboratory analysis of the A Sample provided by the Athlete on 27th October 2018 resulted in the AAF; for presence in the Athlete's body of 19- Norandrosterone, a non-specified substance prohibited in-and out-of-competition under the Prohibited List

(ii) The Athlete had no Therapeutic Use Exemption to justify such presence

(iii) The Athlete after Notification as under WADC's Article 7.3 (c) did not request for a test of her B Sample, and failing such request the B Sample analysis was deemed waived thereby confirming the A Sample results.

48. The Code surmises; *"Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated in order to establish an ADRV."*

B. Was the Athlete's ADRV intentional?

49. The Applicant in its charge document prayed for the Athlete to be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code Article 10 of ADAK and WADC Rules. Article 10.2.1 of WADC which speaks about the period of Ineligibility requires the Panel to examine the subject of intentionality. The Athlete has provided explanations which the Applicant has termed as not plausible. As a starting point, in the present case, the Athlete bears the burden of proof that the ADRV was not intentional (Article 10.2.1.1 of the ADAK ADR) and it naturally follows that the Athlete must also establish how the substance entered her body.

50. Pursuant to WADC's Article 3.1:

> [...]. ***Where the Code places the burden upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a***

presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

51. The Panel notes that this standard requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relied were more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51.

52. The main relevant rule in question in the present case is Article 10.2.3 of the ADAK ADR, which reads as follows:

> ***As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was unrelated to sport performance.***

53. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

> *'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.*

Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional, [...].

54. First it will be noted that the Applicant did not expressly address the element of intention in its Charge Document, (the Applicant also elected not to submit any written submissions - and neither did the Athlete).

55. At the hearing both the Applicant and Athlete agreed the substance that might have caused the AAF was the Primolut N (not listed by the Athlete in her DCF - reasons she gave for not listing it are discussed further below) and not the other medications she wrote in the Form as those were basically painkillers. At page 16 of the Charge Document was attached the Athlete's explanation which the Applicant termed "not reasonable and likely to be true"; in this explanation dated 17-12-2018, she stated, "*The only thing I never indicated was PRIMOLIT. N as back in my mind I never considered it have any effect. I even never remembered it.*" At the end of the hearing the Athlete submitted a Patient Information Leaflet she said she sourced from the internet after she was summoned by ADAK and alerted of the ADRV via the Applicant's letter of 5-12-2018 and, in discussions with ADAK officials it begun to emerge to her where the prohibited substance may have originated from. This Patient Information Leaflet she submitted indicated Primolut@ N (Norethisterone), i.e. the medication contains the compound Norethisterone.

56. On page 19 of the Charge Document was a copy of a Primolut N (o.d7/7) dated 22/10/18 which at the hearing she explained was written at the chemist shop where she had purchased it. During the hearing she had testified that she was prone to heavy menses and so she approached a friend who was a nurse at Ololua Hospital who advised her to go purchase the Primolut N as it could alleviate the heavy flow. The travel document showed she exited the country on 24/10/2018; having purchased her Primolut N on 22/10/2019 and with instructions to swallow one tablet for seven days, she likely had swallowed a pill prior to the race held on 27th October 2018, therefore the amounts found in

her system, at face value, may well have been on levels commensurate with medication she said she believed caused the AAF. The Athlete did not invite a medical expert to explain the intricacies on use of/dosage of the Primolut N which could have shed light on why she needed to medicate on levels detected in her A Sample for the purpose of stopping or postponing her heavy periods.

57. Turning to her doping test results on page 10 of the Charge Document, accompanying her stated results is a Comment: *"19-Norandrosterone, a metabolite of the anabolic steroid nandrolone, was found. The estimated urinary concentration is approx. 25 ng/ml. The 19-Norandrosterone finding **is not** consistent with pregnancy **or the use of norethisterone**."* [Our Emphasis]. The next logical question was, what finding would be consistent with the use of norethisterone and why were this particular Athlete's findings not consistent with use of norethisterone yet, she claimed that that was the product/medicine she had used?

58. Further, the Panel requested the additional package from the WADA Accredited Lab but the same was not available for scrutiny. What was availed was an email query by the Applicant's Counsel to its medical department dated 29 April 2019. A medical personnel, Dr. Ogeto in medical department answered that *"[...] The Norandrosterone found in the athlete's sample is in no way related to the medication prescribed, Norethisterone, by the Medical Personel."*[Our Emphasis]. The Applicant's expert doctor categorically stated that what the Athlete said she ingested was in no way related to the 19-Norandrosterone levels found in her Sample whereas the official Lab test results document issued its characteristic standard disclaimer, a disclaimer that would seem to point to the fact that Norethisterone is a source of 19-Norandrosterone only this particular Athlete's results were not consistent with the use of it. The Athlete tabled her prescription on page 17 of the Charge Document, dated 20/11/2018, (whose authenticity was not actively challenged by the Applicant) and at the end of the hearing she also submitted a Package leaflet concerning Primolut N.

59. It is also noted that Counsel for the Applicant tabled an internet publication *"Doping in sport – 1..."* which read in part at the Abstract, *"[...] Little is known*

about the urinary concentrations of 19-NA that can occur in women who are not using anabolic steroids, including those using oral contraceptives containing the 19-nor progestogen norethisterone. [...]. In this investigation, single untimed urines collected from 1202 female volunteers, 38 of whom were taking norethisterone containing contraceptives, were analyzed for 19-NA. None of the women was a competitive athlete and [...]. Only one sample exceeded the 19-NA reporting threshold having a concentration of 4.1ng/ml. This sample was from a user of norethisterone-containing contraceptive", an extract that left us with as much knowledge as espoused therein.

60. Under the presumptions set out in Article 3 of the WADC, in particular Article *3.2 Methods of Establishing Facts and Presumptions* and specifically Article *3.2.1 Analytical methods or decision limits approved by Wada after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid.* This Panel adopts the Test Results document as the technical authority on the obvious account that the Athlete did not seek to rebut "this presumption of scientific validity" as set out in the WADC. In any case by waiver of her Sample B analysis as set out before, the Athlete accepted the test results. And the Panel not being of appropriate scientific expert orientation aside from a curiosity or a seeking to understand in order to render a reasoned decision, does not wish to embark on such scientific evaluation.

61. The science of it notwithstanding and exploring the specific circumstances further (in particular the Athlete's explanation), why did the Athlete not *"even remember"* to state on her DCF a medication, the evidence of the prescription which she tendered later? It is noted that what the Athlete attached (see page 19 of the Charge Document) was not an official purchase receipt but just a branded slip of paper indicating how she may ingest the drug listed therein. At the hearing she said that the purpose for using the drug was to stall her periods and on page 17 of the Charge Document was a copy of a prescription the Athlete had submitted together with her explanation; this prescription of

PRIMOLUT N from HILLSWAY MEDICAL CENTRE was dated 20/11/18. Again the Applicant did not challenge the authenticity of this prescription. Could it have been possible that the Athlete had been using the Primolut N medication 'without incident' in the past as she testified and that could have been a reason why she did not write it down on her DCF, perhaps what in her own words she termed, "[...] *as back in my mind I never considered it have any effect.*"

62. It is also noted from the 14th July 2015 "drug advisory chit" that, the Athlete did not list down the Fami-plan injection given together with the litany of medicines she jotted down in her DCF. Asked at the hearing why she did not indicate this injection in her DCF, she shyly proffered that she did not know "such" ought to have also been declared.

63. The Athlete pleaded that she had not used the prohibited substance in order to enhance her sports performance and the evidence she laid before the Panel seemed to hold up to that possibility; as averred in **CAS A2/2011 Kurt Foggo v. National Rugby League (NRL),** the account of intent is charged against time of ingestion, that is, what was the deducible purpose of the user at that point, see para. "14. The next issue is the issue of intent, the determination of which depends upon the proper construction of the phrase in Rule 154 (WADC 10.4): *"that such specified substance was not intended to enhance the Athlete's sport performance"*. We are of the view that the task of the Panel is to give effect to the natural and ordinary meaning of these words having regard to the context of the rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance. **The time at which the absence of intent is to be shown is the time of ingestion of the substance. The athlete must negate an intention at that time to enhance his or her performance in the relevant sport, in this case rugby league, by the taking of the substance.** The rule focuses on the nexus or link between the taking of the substance and the performance as a player of the sport. Whether or not the link will be established will depend on the particular circumstances of the case."

64. Even with the competing assertions of both parties, that is, the disclaimer by both the ADAK Doctor and Lab Test Results Comment (ruled on a technical basis in favor of the Applicant) versus Athlete's prescription and Package leaflets, this Panel opines that it was conceivable, *"that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51."*

65. More so, the evidence she attached was not actively vetoed by the Applicant and the doubt expressed at the hearing about time of purchase of the said prohibited substance was settled by production by the Athlete of copy of travel document which tallied accordingly; Again as recognized by the panel in Kurt Foggo, para "16. Rule 154 (WADC 10.4) also requires the production of corroboration evidence in addition to the athlete's word which establishes *"...the absence of an intent to enhance sport performance"*. Accordingly, the corroborating evidence must be sufficient to demonstrate the absence of intent, e.g. conduct inconsistent with intent at the relevant time. This is to be determined by the Panel undertaking an objective evaluation of the evidence as to the facts and circumstances relevant to the issue of intention."

66. The Athlete stated she was first tested in 2016 after winning a full marathon in Turkey and the only other race she won was in Switzerland. It was not clear exactly how many times the Athlete had been tested though it does appear she was not tested at most of the events she attended and the Applicant did not contest her assertion that until notification of her AAF she had not yet received any structured anti-doping education.

67. Under a stringent requirement to explain the origin of the proscribed substance the Athlete provided evidence which indicated that she may have been using a product that contained the prohibited substance possibly right up to the day she underwent the test. And according to information on the leaflet she provided, the said product was an indicated

treatment for heavy periods she claimed to suffer from. Further she had attached a retrospectively sourced prescription which indicated she required the medication for gynecological disorder.

68. It is rather strange that the Athlete remembered to jot down the old drugs given on 14th July 2018 and forgot the newer one given 22/10/18 when participating in an event held on 27th October 2018. From the discomfiture exhibited during the discussion of gynecological aspects at the hearing though, it looks like she did not consider the family planning injection also given on 14th July 2018 and 'period-stopping' Primolut N given later on 22/10/18 as medication necessary to be declared in her DCF, which could be chalked down to her rather limited anti-doping experience. As acknowledged by CAS jurisprudence, this strange state of affairs does manifest even with some of the most experienced athletes; CAS 2017/A/5015 FIS v. Therese Johaug & NIF/CAS 2017/A/5110 Therese Johaug v. NIF para. "210. Considering Ms Johaug's extremely high level of experience and success as an international athlete, her failure to conduct a basic check is very surprising. Throughout her ten-year career as a professional cross-country skier she has been subject to approximately 140 doping control tests. As such, she should have been very familiar with the rigorous standards expected of an athlete such as herself. Therefore, in light of her personal capacities, Ms Johaug would certainly have been expected to at very least check the label and conduct a basic internet search.

69. Nevertheless as averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF):**

> *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.*

A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

70. Even if the 19-Norandrosterone found in the Athlete's body might have been a result of inadvertence and that there was no intention to cheat and that she might have established origin, the unrebutted text of the Test Result Document triumphs. Coupled with this presumption of scientific validity is the ultra-strict Code obligations which the Athlete is firmly bound by, see Johaug para. 187. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations.

71. It was noted that the Athlete admitted use of a prohibited substance over a prolonged period in total oblivion to her Code obligations and not once (until notification of the AAF) did she say she thought it wise to investigate her medications, (in the same way she was conscious of her supplementations). At the hearing she did acknowledge she had heard about "dawa" which translates to "medicine" and perhaps that should have jolted her to find out more about these doping medicines given the propensity for drugs to contain a lot of prohibited substances and therefore requiring a guarded approach as the observation in CAS 2016/A/4609 WADA v. Indian NADA & Dane Pereira surmises at para. 38, "Regarding the first requirement (*i.e.* the Player did <u>not</u> know that his conduct might result in an anti-doping rule violation), WADA submits that the Player manifestly did not discharge his burden of proof, since he ignored an overwhelming amount of stop signs:1)

The prohibited substance was contained in a medication. It is generally accepted that the duties of athletes in terms of anti-doping are heightened with respect to medications. <u>There is indeed an inherent significant risk that medications may contain prohibited substances;</u> Just as she finally was able to furnish the Panel with an information leaflet at the end of the hearing, she would have realized the

content of the medicines she was ingesting had she studiously logged into the internet in study about these, say perhaps when she was hunting for suitable races to participate in.

72. Likewise the Athlete relative inexperience in doping matters was not of paramount consideration as this Panel concurs with CAS 2016/A/4377 WADA v. IWF & Yenny Fernanda in para.59, "[...] In any event, the Panel notes that youth and inexperience are not factors to be considered in determining fault but are only relevant in assessing degree of fault should the Panel undertake that analysis."

73. Flowing from the above, the Tribunal finds that the Athlete has not met her burden of proof.

74. Regarding No Fault/Negligence - No Significant Fault/Negligence, since as already concluded above, the Athlete, being responsible for her anti-doping rule violation under Article 2.1 of the WADC, did not discharge the burden of establishing a lack of intention, the Tribunal does not deem it necessary to assess whether the Athlete may have had no fault or negligence in committing the anti-doping rule violation in consensus with Pereira para "81.[...] Indeed, the Sole Arbitrator finds that the finding that a violation was committed intentionally excludes the possibility to eliminate the period of ineligibility based on no fault or negligence."

C. Reduction Based on the Athlete's Prompt Admission?

75. Reference is made to Article 10.6.3 of the WADC, that reads as follows:

> *10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1 An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 [...] by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping*

Organization, and also upon approval and at the discretion of both WADA and the Anti-Doping Organization with results management responsibility may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.

76. The Athlete responded within the 20th December 2018 deadline stipulated by the Notification served on her by the Applicant, her response on page 16 of the Charge Document aptly dated 17-12-2018 but, granted that this Panel accepts that the *"19-Norandrosterone finding is not consistent with pregnancy or the use of norethisterone."*, the exact drug she submitted that she had used, the prompt admission would fail on that account.

VIII. SANCTIONS

77. With respect to the appropriate period of ineligibility, Article 10.2 of the ADAK ADR provides that:

The period of ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of ineligibility shall be four years where:

10.2.1.1 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

....

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

78. The Tribunal notes that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete can establish that the ADRV was not intentional.

79. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

> *If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. ...*

80. In regard to Disqualification, Article 10.8 of the ADAK ADR reads as follows:

> *Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*
>
> *In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes.*

81. It is also noted by the Panel that this was the Athlete's first ADRV.

IX. DECISION

82. Consequent to the discussions on merits of this case:

(i) The applicable period of Ineligibility of four years is hereby upheld;

(ii) The period of Ineligibility shall be from 20th December 2018 when the Athlete was Provisionally Suspended;

(iii) All Competitive results obtained by the Respondent Athlete from and including 27th October 2018 are disqualified including prizes, medals and points;

(iv) Each party shall bear its own costs;

(v) The right of appeal is provided for under Article 13 of WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of ADAK Rules.

83. The Tribunal thanks both Parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated at Nairobi this 17th **day of** October **,** **2019**

Mrs. Elynah Shiveka, Panel Chairperson

Ms. Mary Kimani, Member

Mr. Gichuru Kiplagat, Member