REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. ADAK 5 OF 2020

IN THE MATTER BETWEEN

ANTI- DOPING AGENCY OF KENYA…….APPLICANT

-versus-

JOSEPH MBATHA……..……... ATHLETE

DECISION

Hearing : 5th March, 2020

Panel : Mrs. Elynah Shiveka - Panel Chair
Ms. Mary N Kimani - Member
Mr. Peter Ochieng - Member

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

The Athlete represented himself.

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 male adult of presumed sound mind, a National Level Athlete, on Passport Number A2459615 (hereinafter **'the Athlete**').

II. Factual Background

3. The Athlete is an International Athlete hence the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
4. On September 29th, 2019, during the Semi-Marathon Route Duvin'e in Luxembourg, ALAD Doping Control Officers (DCOS) in an In - competition testing collected a urine Sample from the Athlete. Assisted by the DCO the Athlete split the Sample into two separate bottles which were given numbers **A 6412721** (the "A" Sample) and **B 6412721** (the "B" Sample) respectively.
5. Both Samples were transported to the German Sports University Cologne, a WADA accredited laboratory for doping analysis. The laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding (AAF) for ***Erythropoietin (EPO)*** which is a Non-Specified substance listed as *Peptide hormones growth factors, related substances and mimetics/erythropoietin* under S.2 of WADA's 2019 Prohibited List.
6. The finding was communicated to the Respondent Athlete by Japhter K. Rugut, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 6th December 2019. In the said

communication the Athlete was offered an opportunity to provide a written explanation for the AAF by 20th December 2019.

7. The same letter also informed the Athlete of his right to accept or deny the charges and/or request for a hearing and gave a deadline of 20th December 2019 for his detailed response.
8. The Athlete responded vide WhatsApp conversation dated 19th December 2019. In the conversation he confirmed that it was his number *"but have not agreed with the resorts. Have never taken anything of that nature in my life. What I took is supplements which are, magnesium, calcium, B12, B Complex, iron and ferro sadol duodenal. I would like to go for sample B analysis if possible am ready. Am just upcoming athletes what is there I don't know. Am humbled. Yours faithful Joseph mbatha Nzioki*", (see a copy of his Whattsapp date 19/12/2019 marked page 15 in the Charge Document.
9. A Notice to Charge dated 28th January 2020 was filed by ADAK on similar date.
10. The following directions were issued by the Tribunal:
    (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, The Doping Control Form, this Direction No. 1 and all relevant documents on the Respondent by Friday, 21st February 2020.
    (ii) The Panel constituted to hear this matter shall be as follows; Mr. John Ohaga Panel Chair, Ms. Mary N Kimani, Member and Mr. Gichuru Kiplagat, Member.
    (iii) The matter shall be mentioned on 26th February 2020 to confirm compliance and for further directions.
11. On 26th February 2020 the Athlete appeared in person while Mr. Rogoncho appeared for the Applicant. Mr. Rogoncho told the Tribunal that the Charge

Document had been served. The Athlete after presenting his identification documents told the Tribunal that he wished to represent himself and did not require the services of a lawyer. Mrs. Elynah Shiveka replaced Mr. John Ohaga as the panel chair. The Tribunal ordered that the matter be heard on 5th March 2020.

12. On 5th March 2020 the Athlete appeared in person while Mr. Rogoncho represented the Applicant. In the absence of Mr. Gichuru Kiplagat, Mr Peter Ochieng replaced him as a member of the hearing panel and the hearing proceeded as scheduled. At the close of the hearing the Tribunal ordered that the Athlete present a medical summary and also bring the supplement bottles. Meanwhile Mr. Rogoncho was to find out if there was a cheaper laboratory for the Sample B to be analyzed as requested by the Athlete.
13. The matter was next mentioned on 4th June 2020 via Zoom where Mr. Rogoncho represented the Applicant and the Athlete was not present. Mr. Rogoncho informed the Tribunal that the Athlete had provided copies of his medical summary however the documents were blurry so he requested the Athlete to scan and send the documents afresh
14. The Chair of the Tribunal enquired whether the Athlete's sample B had been tested and Mr. Rogoncho notified the Tribunal that the Applicant had contacted WADA to enquire if the sample B could be tested at a more affordable lab. WADA's response was that the sample B could only be tested in the lab where sample A had been tested or in a WADA approved facility and there was no cheaper alternative.
15. Regarding direction that the athlete provide supplement bottles and medical summary documents, panel member clarified that those were for evidentiary purposes and/or for Athlete to establish origin. A cheaper lab had been sought because the Athlete had testified that his agent was willing

to fund the Sample B test but the initial quote provided was too expensive. Referencing Article 5.3.4.5.4.8(2) of the International Standard for Laboratories, Mr. Rogoncho submitted that Sample B confirmation was to be done in the same lab where Sample A had been tested; anywhere else would not be possible unless under exceptional circumstances determined by WADA.

16. Before the Applicant could submit their submissions the Tribunal directed that the Athlete be given an opportunity to offer his position on the matter and the case was set for mention on 11th June 2020. The Applicant was to duly notify the Athlete of this mention date and also send him the link.
17. During the mention on 11th June 2020 when both the Applicant and Athlete were present, the Applicant was granted 14 days to put in its submissions and the Athlete was granted time to comment on those submissions if he so wished. The matter would next mentioned on 2nd July 2020.
18. On 30th June 2020 when the matter was heard the Athlete was present while Mr. Rogoncho appeared for the Applicant. Mr. Rogoncho confirmed that the Athlete had provided the medical summary as well as the supplement bottles and the same had been forwarded to the Tribunal. The panel was asked to confirm if the material was sufficient. Mr. Rogoncho requested 14 days to complete filing their submissions and the Respondent Athlete would be allowed 7 days after receipt of the submissions to comment on the same. Next mention of the matter was on 9/7/2020.
19. At the mention on 9th July 2020 which was to confirm if the Athlete wanted to put in any submissions it was noted that though the Applicant's submissions and link for mention date had been shared via email it seemed the Athlete has not checked it. The decision was set to be delivered on 19th August 2020.

III. The Hearing

20. The hearing was conducted on 5th March 2020

IV. Submissions

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

A. Applicant's Submissions

22. Mr. Rogoncho, Counsel for the Applicant, informed the Panel that the Agency wished to adopt and own the Charge Document dated *25th September 2020* and the annexures thereto as an integral part of its submissions. The Panel notes that the Charge Documents filed with the Tribunal was dated 25th February 2020, (see page 3 of the Charge Document).

23. He submitted that the Athlete was *"charged with an Anti-Doping Rule Violation of Presence of a prohibited substance* ***Erythropoietin (EPO)*** *in contravention of the ADAK ADR (herein referred to as ADAK Rules)".*

24. The Athlete being a National level Athlete, the results management authority vested with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in Anti-Doping Act No. 5 of 2015 as amended to constitute a hearing panel which the Athlete was comfortable with.

25. At his No. 5 he states *"The matter was set down for hearing and the athlete represented himself."*

26. Counsel for the Applicant further stated that, *"The respondent is a Male Athlete hence the World Athletics competition rules, World Athletics Anti-Doping Regulations, the WADC and the ADAK ADR apply to him."*

27. In regards to the Athlete's response to the Applicant's service of the ADRV Notice, Counsel stated in its number *"13. The Respondent responded vide a WhatsApp conversation dated 19th December2019, he denied the charges and stated he took the following supplements Magnesium, Calcium, B12, B complex, Iron and Ferro. He wrote a letter dated 9th January 2020, requesting for B-sample analysis. On 21st January 2020 via a telephone conversation, he was notified of the price to have B-sample analysis. After consulting with his manager, he responded vide a letter dated 27th January 2020 stating he is not able to afford the amount of B-sample analysis."* Further in its number *"14. The response was evaluated by ADAK and it was deemed to constitute an Anti-Doping rule violation and referred the matter to the Sports Disputes Tribunal for determination."*

28. In his submissions he listed the legal position under Article 3 of ADAK ADR/WADC… the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel. He also listed the Presumptions under Article 3.2 which included that facts relating to an ADRV may be established by any reliable means including admissions. He laid down the roles and responsibilities of the athlete as under WADC's Article 22.1 and also the principals enunciated in preface to the ADR regarding the duties of the athlete.

29. The Applicant also submitted that "[…] *at Article 3.2 that facts relating to anti-doping rule violation may be established by any* ***reliable means*** *including admissions and the methods of establishing facts and sets out the presumptions. Which include;*

   a) ***Analytical methods or decision limits*** *…*
   b) *WADA accredited Laboratories and other Laboratories approved by WADA are presumed* ***to have conducted sample analysis and*** *custodial procedures in accordance with the international standards for laboratories*
   c) *Departures from any other International Standards or other anti-doping rule or policy set forth in the code or these Anti-Doping* ***Rules which did not***

cause an Adverse Analytical Finding* or** *other anti-doping rule violation shall* ***not invalidate *such evidence or results."*

30. At No. 22 Counsel for the Applicant stated, *"In his defence, the Respondent made several admissions and a few general denials. In* ***evidence in chief*** *the respondent made the following admissions;*

    a) *He admitted being aware of the existence of energy boosting prohibited substances and methods.*

    b) *He admitted that he is aware of sample collection rules as he has been an active participant in Athletics events both nationally and internationally.*

    c) *He admitted to using various supplements during his trainings and recovery.*

    d) *He admitted to being aware of the WADA Rules and list of prohibited substances and the PNBA list of prohibited substances.*

    e) *He admitted to attending three Anti-Doping Education workshops organized by ADAK.*

31. Counsel for the Applicant submitted that, *"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."*

32. The Applicant submitted that *"the athlete is required to prove the origin of the prohibited substance and on a "balance of probability". The Balance of Probability Standards entails that the athlete has the burden of convincing the panel that the occurrence of the prevailing substance is more probable than their non-occurrence."*

33. Quoting **CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)** Counsel for the Applicant said, *"30.It is clear from the above-mentioned CAS case law that it is not sufficient for an athlete to merely suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine, food or other product the athlete was taking at the relevant time. Rather an athlete must adduce concrete evidence to*

demonstrate that the supplements and/or medication the athlete took contained the particular substance. 31. The athlete in this case supposes that the substance may have entered his body through the various medication and suplements he was ingesting at the given time. The Respondent failed to prove origin of the prohibited substance in his urine sample as none of the items in the list of supplements and the medication prescribed to him in the case summary from the hospital do not contain the prohibited substance. His omission casts a shadow of doubt on his explanation as he has failed to adduce concrete evidence as dictated by CAS Jurisprudence."

34. Relying on **CAS 99/A/234 and CAS 99/A/235 Meca-Medina v. FINA,** *'The raising of unverified hypothesis is not the same as clearly establishing the facts'* and **CAS 2006/A/1067 IRB V. KEYTER** *"The Respondent has stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of the cocaine occurred"*[3] the Applicant submitted that "*the origin of the prohibited substance has not been established."*

35. Regarding intention the Applicant submitted that "*A failure to explain the concrete origin of the prohibited substance only means that an athlete cannot prove the lack of intent. In the matter of* ***Canadian Weightlifting Federation and Tylor Findlay, the CAS Arbitrator Yves Frontier*** *stated that:*

> *77. "it appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence to show how she had ingested the product which, she says, contained Clenbuterol. With respect to the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I don't know how the substance entered her body"*

36. Further the Applicant argued that *"contrary to the oral submission made by the athlete that merely stating he used a variety of supplements and medication. The following facts challenge the statement.*

a) The athlete did not disclose all the supplements or medication on the Doping Control Form, yet he had been using them before the period of participation

b) The athlete has demonstrated by way of certificate his participation in various events prior to this one and he must clearly be understanding the Doping Control Process.

c) He signed the DCF and indicated that the process was good he cannot turn and claim that the process was not conducted accordingly"

Therefore the Applicant urged *"the Panel to disregard the Respondent's assertions as it has been rendered unable to weight the likelihood based on absence of evidence."*

37. On the matter of Fault/Negligence it was the Applicant's submission at its para.41 that "*The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR."*
38. Concerning knowledge the Applicant contended that, *"the Athlete has had a long career in Athletics and it is only questionable that he has had no exposure to the crusade against doping in sports. In his Evidence-in-Chief, the athlete stated that he has participated in local competitions and international competitions."*
39. The Applicant further held *"that an athlete competing at a national and international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances"*
40. While arguing on the sanction the Applicant stated at its para 48 that, *"For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance "and the agency … can establish that the (ADRV) was intentional".*

If Article 10.2.1 does not apply, the period of ineligibility shall be two years. 50.On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his degree of culpability with a view of Eliminating or reducing his period of suspension. 51. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADAC to warrant sanction reduction."

41. The Applicant concluded by stating that, *"54. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding."*

B. Athlete's Submissions

42. The Athlete's very brief letter submission is set out verbatim as follows:

JOSEPH M. NZIOKI
P.O. BOX
MACHAKOS
KENYA
6/7/2020

THE CEO
MR. JAPHTER K. KUGAT

Dear Sir,

RE APOLOGY LETTER

I take this opportunity to apologize for what was found in my sample.

I have never taken something of that nature in my life.

Finally it was my prayer to go for sample b test but because of high amount you requested for the test I couldn't afford.

Humbly writing for your decision.

Thanks in Advance

Yours Faithfully
(Signed)
JOSEPH MBATHA NZIOKI

43. Additionally the Panel will rely on written material on record (including the oral hearing).

V. Jurisdiction

44. 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

45. 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 …

VII. MERITS

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

47. The Tribunal will address the issues as follows:

a. ***Whether there was an occurrence of an ADRV, the Burden and Standard of proof;***
b. ***Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***
c. ***Reduction based on No Fault/No Negligence/Knowledge;***
d. ***The Standard Sanction and what sanction to impose in the circumstance.***

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

48. 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. […]. ***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.***

49. The Athlete had asked to have his Sample B tested at least twice; he first did so via the WhattsApp conversation with ADAK dated 19th December 2019, (see page 15 of the Charge Document). Next he expressed the intention to have the B Sample tested in his handwritten letter to the CEO ANTI-DOPING dated 0101/2020, (see page 16 of the Charge Document). His letter read:

"[…] REQUEST FOR SAMPLE B TESTING, I hereby deny the charges of sample and guided by my manager would wish to request for B sample analysis. We shall pay for the charges. Kindly provide the laboratory name details as soon as possible. […]"

50. Then in a letter to CEO, ADAK dated 27/1/2020, (see copy in page 17 of the Charge Document) the Athlete retracted the request writing *"[…] Am not able to proceed with Sample B analysis because am not able to pay the amount […]*."

51. During the oral hearing on 5th March 2020 the Athlete explained to the Panel that his agent was willing to pay for the B Sample test but when ADAK got back to them with the costs required by relevant laboratory, his agent deemed that figure to be high and the Athlete being otherwise unable to afford the said costs was forced to formally withdraw his request. The Panel asked whether it was possible for the test to be conducted at a more affordable rate in another laboratory but ADAK responded that, being

bound by ISL's Article 5.3.4.5.4.8(2), the test could only be repeated at the same lab where the A Sample had been tested.

52. Premised on the above the Athlete's B Sample was not tested hence only the A Sample could be considered by the Panel. As such WADC's Articles 2.1/2.1.1 kicked in '[…] ***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.'**

53. In absence of a Sample B analysis to contradict the A Sample result, the Panel finds that as per WADC's Article 2.1.2, an ADRV had been committed by the Athlete:

> '**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, where the** ***athlete's*** **B** ***Sample*** **is analyzed and the analysis of the** ***athlete's*** **B** ***Sample*** **confirms the presence of the** ***Prohibited Substance*** **or its** ***Metabolites*** **or** ***Markers*** **found in the** ***athlete's*** **A** ***Sample;*** **or, where the** ***athlete's*** **B** ***Sample*** **is split into two bottles and the analysis of the second bottle confirms the presence of the** ***Prohibited Substance*** **or its** ***Metabolites*** **or** ***Markers*** **found in the first bottle.**

B. Was the Athlete's ADRV intentional?

54. The burden then shifted to the Athlete to prove that commission of his ADRV was not intentional as under Article 10.2 of the WADC:

‘10.2 *Ineligibility* for Presence, *Use* or *Attempted Use* or *Possession* of a *Prohibited Substance* or *Prohibited Method*

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 y e a r s 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.

55. The main relevant rule in question in the present case then 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. […]

56. 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.*

57. The Athlete submitted the following medical summary and supplement containers:

Medical Summary (dated 3/6/2019 and stamped 03 AUG 2019) *IMP: pneumonia*	**Supplements Used**
RX	*Omega-3 1500mg*
1. PO Augmentin 62mg bd x5/7	*Vitamin B12*
2. PO Mefenamic 250mg bd x5/7	*Vitamin B Komplex*
3. IM Diclofena 150mg stat	*Magnesium 250mg*
4. IV Ceftrione ig od x5/7	

58. The Athlete flatly denied having used the prohibited substance both in writing and at the hearing and while he submitted a medical summary and images of various supplements he had used, none of them seemed to evidence the source of the Erythropoietin component found in his urine sample. Oddly the medical summary is dated 3/6/2019 at the top, in hand writing and then stamped 03 AUG 2019 at the bottom. Interestingly, the Athlete is prescribed quite a number, (in total 6 injections specific to pneumonia), that is, IM Dinac 150mg stat and IV Cef ig od x 5/7. It is the opinion of this Panel that the Athlete was not able to articulate his medical history very well either deliberately in order to camouflage the source of the prohibited substance or inadvertently by reason of his limited education, (he said he did not complete his secondary education because of lack of school fees).

59. There was a dearth of reliable evidence from the Athlete to show how the prohibited substance entered his body; note that Erythropoietin being a Non-Specified substance, the burden fell squarely on the Athlete to show lack of intention. As submitted by the Applicant, "*A failure to explain the concrete origin of the prohibited substance only means that an athlete cannot*

prove the lack of intent. In the matter of ***Canadian Weightlifting Federation and Tylor Findlay, the CAS Arbitrator Yves Frontier*** *stated that:*

> *77. "it appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence to show how she had ingested the product which, she says, contained Clenbuterol. With respect to the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I don't know how the substance entered her body"*

60. During the hearing, the Panel did note that the Athlete seemed to not know how the prohibited substance came to into his body. But given the strict liability requirement whereby the Athlete was strictly liable for any Prohibited Substance or its Metabolites or Markers found to be present in his Sample, his consistent and vehement denial was insufficient rebuff. As held in Kurt Foggo at 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. Hence the void of evidence proved insurmountable in trying to establish the origin of the prohibited substance by 'he who had the burden to prove lack of intent for the prohibited substance detected in his urine sample, that is, the Athlete'.

61. The Panel particularly noted, as put by the Applicant, that the Athlete had plenty of athletic experience under his belt and had attended at least 3 doping classes, two at Moi International Sports Center, Kasarani and one at Nyayo National Stadium, including representing the country once at an East African event in 2018. He had also undergone about 14 doping tests hence

it did appear rather strange that he could offer the Panel no plausible explanation of how the proscribed substance had got into his system. In the absence of evidence, the Panel rules that the lack of intention was not established by the Athlete.

C. Reduction Based on No Fault or Negligence/No Significant Fault or Negligence/Knowledge

62. Since it is already concluded above that the Athlete's ADRV was ruled intentional, the Panel does not deem it necessary to assess whether the Athlete may have had No fault or Negligence in committing the anti-doping rule violation.
63. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had no fault or negligence in committing an anti-doping rule violation.
64. Additionally, the Tribunal finds that the above reasoning also applies to "no significant fault or negligence" (Article 10.5 of the ADAK Rules). The Tribunal observes that the comment to Article 10.5.2 of the ADAK Rules takes away any possible doubts in this respect:

> *"Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation […] or an element of a particular sanction […]".*

65. In regards to knowledge, the Panel noted that the Athlete had an extensive athletic career and having been tested more than 10 times including attending a couple of awareness workshops, the Doping Program was not novel to him and even if it were, ignorance of sports doping by adherents of the Code would be not be an adequate shield; 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.*

D. Sanctions

66. With respect to the appropriate period of ineligibility, Article 10.2 of the WADC/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 involv**e 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.*

67. 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.* …

68. 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.

69. The Athlete in his submission apologized for the prohibited substance found even as he held that he had never taken it and bemoaned his financial inability to have an analysis of his Sample B undertaken. While we commiserate with the lack of funding to undertake the Sample B analysis as so highly desired by the Athlete, this Panel points the Athlete to **CAS 2017/A/5015 FIS v. Therese Johaug & NIF**, CAS 2017/A/5110 Therese Johaug v. NIF paras. '185. CAS jurisprudence is very clear that a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, Ms Johaug must have exercised the "utmost caution" in avoiding doping. As noted in CAS 2011/A/2518, the Athlete's fault is *"measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance".* It also emphasized the personal duty of care, citing the basic principle that it is *"each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body"*. 186. Even where the circumstances are "extraordinary" and there is minimal negligence, athletes are not exempt from the duty to maintain "utmost caution" (CAS 2006/A/1025).

70. This case is a salutary reminder to athletes to never let down their guard while undertaking their fundamental duty which they owe under the Programme and WADC to do everything in their power to avoid ingesting any Prohibited Substance.

VIII. DECISION

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

(i) The applicable period of Ineligibility of 4 years is hereby upheld;

(ii) The period of Ineligibility shall be from **20th December 2019** the date on which the Athlete was provisionally suspended up until **20th December 2023;**

(iii) All Competitive results obtained by the Respondent Athlete from and including 29th September 2019 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, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this _____*19th*___day of _____*Augus*t, _____2020

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Mrs. Elynah Shiveka, Panel Chairperson

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Ms. Mary N. Kimani, Member **Mr. Peter Ochieng, Member**