REPUBLIC OF KENYA.

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ADAK CASE NO. 4 OF 2020

ANTI-DOPING AGENCY OF KENYA(ADAK)……APPLICANT

-versus-

BONIFACE MBUVI MUEMA……RESPONDENT

DECISION

Hearing: 10th September 2020

Panel:

Mr. John M Ohaga SC	-Chairman
Ms. Elynah Shiveka	-Vice Chairperson
Ms. Njeri Onyango	-Member

For the Applicant

Mr. Bildad Rogoncho Advocate for ADAK (‘**the Agency**’)

For the Respondent

Mr. Obegi Maranga Advocate for the Respondent.

Abbreviations and definitions

ADAK – Anti–doping Agency of Kenya
ADR – Anti-doping Rule
ADRV- Anti-doping Rule Violation
AK- Athletics Kenya
WA – World Athletics
S.D.T- Sports Disputes Tribunal
WADA – World Anti-doping Agency

Applicable Laws

The Constitution of Kenya 2010, The Sports Act No. 25 of 2013, The Anti-Doping Act No. 5 of 2016, World Anti-Doping Code 2015, World Anti-Doping Code 2015, Anti-Doping Rules, and International Athletics Federation Rules (hereinafter "the Constitution", "the Act", "the Rules" "the Statute", and "the Code" respectively).

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No. 5 of 2016 (hereinafter 'the Applicant').

2. The Respondent is a male Athlete of presumed sound mind (hereinafter 'the Athlete').

Jurisdiction

3. The Sports Disputes Tribunal has Jurisdiction under *Sections 31* of the **Anti-Doping Act, 2016** to hear and determine this case.

Preliminaries

4. The background giving rise to the current proceedings is consequential of several documents filed with the Tribunal by the Applicant, which includes the Notice of Charge filed by the Applicant with the Tribunal on the 14th January 2020, the Letter by the Applicant directed to the Respondent dated 6th December 2019 informing the Respondent of the intended charge to be brought against him by the Applicant and the Charge Document filed by the Applicant with the Tribunal dated 19th February 2020 setting out the charge against the Respondent and all the

accompanying documentation setting out the Applicant's case against the Respondent.

5. The proceedings before this Tribunal were commenced by the Applicant filing a Notice to Charge against the Athlete dated 9th January 2020 addressed to the Chairman of the Sports Disputes Tribunal.

6. Consequently, directions were issued on 30th January 2020 that service should be effected by 11th February 2020 and a panel constituted to hear the matter and the same scheduled for mention before the Tribunal on 18th February 2020.

Background

7. The Applicant issued the Respondent with a formal notice of charge and mandatory provisional suspension pursuant to ADAK rules on 6th December 2019.

8. In the Notice, it was stated that on 27th October 2019 during the Chosunilbo Chuncheon Marathon held in Chunchon South Korea, KADA Doping Control Officers, collected a Urine sample from the Respondent. Assisted by the Doping Control Officers the Respondent split the Sample into two samples which were given reference numbers A4406969 (the "A Sample") and B 4406969 (the "B sample") respectively.

9. The samples were transported to the Doping Control Centre – Korean Institute of Science and Technology, a WADA accredited Laboratory in South Korea "the laboratory". The Laboratory analysed the "A sample" in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The Analysis of the A sample returned an Adverse Analytical Finding ("AAF") for presence of a prohibited substance 19- Norandrosterone which is a Non-Specified Substance and is listed as an endogenous AAS under S.1.1B of the 2019 WADA Prohibited List.

10. The notice also communicated to the Respondent that from 20th December 2019 he was provisionally suspended from participating in any IAAF and AK sanctioned competition prior to the decision of this Tribunal. The Respondent was further informed that he may elect to avoid the

application of the provisional suspension by providing the Applicant with an adequate explanation for the Adverse Analytical Finding by 5.00pm on 20th December 2019 failing which the suspension would take effect.

11. ADAK has preferred the following charge against the Athlete: **-**

"Presence of a prohibited substance or its Metabolites or Markers in the Athlete's sample in violation of Article 2.1 of ADAK ADR."

12. The Applicant sought for the following outcome;

a. All competitive results obtained by the Respondent from and including 27th October 2019 until the date of determination of the matter herein be disqualified, with all resulting consequences including forfeiture of medals, points and prizes pursuant to Article 10.1 of the WADA Code and the ADAK rules;

b. Boniface Mbuvi Mwema be sanctioned to a four- year period of ineligibility as provided by the ADAK Anti-Doping Code, Article 10 of ADAK and WADC Rules; and

c. Costs, Article 10.10 of WADC

Applicant's accompaniments

13. The Applicant attached a Verifying Affidavit sworn by Sarah Shibutse, Director of Standards and Compliance for the Applicant confirming the contents of the charge document to be true and correct.

14. The Applicant further lodged a list of documents, and a list of witnesses; both dated 19th February, 2020.

15. The Applicant also placed before this Tribunal the following documents and authorities to support its case:

I. Doping Control Form dated 27th October 2019
II. Test report dated 19th November 2019
III. ADRV Notice dated 6th December 2019
IV. Email correspondences dated 8th January 2020

V. Letter dated 9th January 2020
VI. World Anti – Doping Code
VII. World Athletics ules
VIII. The ADAK Anti- Doping Rules

Hearing

16. The physical hearing proceeded on 10th September 2020 at the Tribunal and the date for a decision was set for 5th November 2020.

Submissions

17. The Tribunal has carefully considered all the parties' submissions, and the following summary is to assist in understanding its reasons as below and does not need or purport to be more comprehensive.
18. Below is a summary of the main relevant facts and allegations based on parties' submissions.

A. ***Summary of Applicant's Submissions***

Applicable Law

19. From the very onset the Applicant argued that under Article 3 of the ADAK Rules and the World Anti-Doping Code, the Applicant sought to demonstrate to the hearing panel on a comfortable satisfaction standard that the Respondent ought to be penalized in accordance with the rules having been tested and found guilty of taking a prohibited substance and failing to adduce any evidence to support his claim that he had not taken the said substance to aid him in his performance but to deal with pre-existing pains.

20. The Applicant submitted that the Respondent, as an athlete, had roles and responsibilities laid down in Article 22.1 of the ADAK Rules and had failed to be knowledgeable of and comply with these Anti-Doping Rules, to take responsibility, in the context of anti-doping, for what they ingest and use and to inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-Doping Rules.

21. The Applicant relied on Article 2.1 of the ADAK ADR to establish the proof of the anti-doping rule violation and relied on myriad of cases among them **CAS 2017/0/5218 IAAF v RUSAF & Vasiliy Kopeykin, Par 134** on its assertion that the athlete is now required to prove the origin of the prohibited substance and "on a balance of probability".

22. With regard to intention, the Applicant contends that it is an established standard that the athlete bears the burden of establishing that the violation was not intentional.

23. On the issue of fault and negligence, the Applicant averred that the Respondent had failed to discharge his responsibilities under ADAK Rules 22.1.1 and 22.1.3.

24. The Applicant submitted that by virtue of being an Elite National Level Athlete, the Respondent should have known better with regard to matters relating to doping.

25. The Respondent finally prayed that the Tribunal to be guided by Article 10.2.1.1 of the ADAK Rules for a regular sanction of a four (4)year period of ineligibility against the athlete.

B. Summary of Respondent's Submissions

26. The Respondent on his part commenced by stating that he had not taken the prohibited substance but had instead taken a painkiller by the name diclofenac.

27. The Respondent relied on the ADAK Rules and the WADA Code but did not adduce any caselaw to support his claim.

28. The Respondent had no issue with the chronology of events leading to the Adverse Analytical Finding save that he insisted that he had not intentionally doped.

29. The Respondent sought to have the Tribunal take notice of the fact that the Applicant during the hearing acknowledged that the diclofenac tablet does not contain 19-Norandsterone.

30. On this ground the Respondent submitted that the charge against him was an inadvertent offence which the Tribunal should assess in the totality of its circumstances.

31. In conclusion the Respondent urged the Tribunal to grant a substantial reduction from the standard penalty, and such penalty should be reduced to the minimum prescribed reprimand and the costs of the suit to be borne by the Applicant.

Analysis and Determination

32. The Tribunal has considered and weighed the charge document, the submissions by both counsel for the Applicant and the Respondent and the oral testimony of the Respondent.

33. The Respondent has not disputed the Adverse Analytical Finding arising from the samples but has stated that he only took a painkiller that does not contain the prohibited substance.

34. This narrows down the issues for analysis for the Tribunal. It is our analysis that the issues for determination are as follows:

    a. ***Whether the Respondent/Athlete has established the source of the ADRV and has proven that it was not intentional;***

    b. ***Whether the Respondent/Athlete has established No Fault or Negligence;***

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

The Law

35. The Tribunal referred to the following regulations in arriving at its decision.

Section 31 of the Anti-Doping Act, provides:

1) The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organisations.

2) The Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency's Anti-Doping Rules, amongst other legal sources

36. Further, ***Article 10.12.1*** of the ***WADA ADR,*** which are adopted by the same Clause of the ADAK ADR provides as follows:

Prohibition Against Participation During Ineligibility:

No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international or national level Event organization or any elite or national-level sporting activity funded by a governmental agency.

a) <u>Whether the Respondent Athlete has established the Source of the ADRV and proven that it was not intentional</u>

37. Article 3.1 of the Anti- Doping Act of Kenya provides for the burden and standards of proof. It clearly states that:

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

38. The Applicant relied on Article 3.2.1 which deals with the "Analytical methods or decision limits approved by WADA" and the Panel is satisfied that the ADRV is proven on account of the following facts:

i. The samples provided by the Athlete on 27th October 2009 that had been transported to a WADA accredited laboratory in South Korea for the analysis of the A Sample resulted in the Adverse Analytical Finding ("AAF") for presence in the Athlete's body of a prohibited substance 19- Norandrosterone which is a Non-Specified Substance and is listed as an endogenous AAS under S.1.1B of the 2019 WADA Prohibited List.

ii. Additionally, according to the records provided by the Respondent, he had not offered a Therapeutic Use Exemption ("TUE") to justify the presence of 19- Norandrosterone in his system.

iii. The available documentation indicated the Athlete after Notification as under WADC's Article 7.3 (c) [*the athlete's right to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived;]* did not request for a test of his B Sample by 20th December 2019 as had been indicated and failing such request the B Sample analysis was deemed waived thereby confirming the A Sample results.

39. The Code provides 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.

40. The Applicant has proven the existence of ADRV by availing the Charge Documents, the Notice of ADRV , the Doping Control Form and other relevant documents supporting the finding of an Adverse Analytical Finding in the Respondents samples collected on 27th October 2019.

41. The Athlete now bears the burden of establishing that the source of the prohibited substance and that the violation was not intentional within the meaning of Article 10.2.3 of the ADAK Rules and it naturally follows that the Athlete must also establish how the substance entered his or her body on the "balance of probability" a standard long established in CAS jurisprudence.

42. Article 3.1 of the ADAK Rules sets out the threshold of proof needed in such an instance. It reads:

"Where these Anti-Doping Rules place the ***burden of proof 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****"*

43. The Court of Arbitration for Sport at paragraph 3 of the case **Arbitration CAS 2017/O/5218 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Vasiliy Kopeykin, award of 12 July 2018** states:

"The ***"balance of probability"*** *standard entails that the athlete has the burden of convincing the adjudicating body that the occurrence of the circumstances on which s/he relies regarding the origin of the prohibited substance is more probable than their non-occurrence. The "balance of probability standard" requires the* ***athlete to prove that his scenario is more likely than not to be correct.*** *Establishing the origin of the prohibited substance requires* ***substantiated, supported and corroborated evidence by the athlete.*** *It is not sufficient for the athlete merely to make* ***protestations of innocence, provide hypothesis or suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time.*** *Rather,* ***the athlete must provide concrete, persuasive and actual evidence, as opposed to mere speculation, to demonstrate that a particular supplement, medication or other product that s/he took contained the prohibited substance.****"*

44. In an attempt to support his claim of innocence , the Respondent alleged that he was not aware of how the prohibited substance may have made its way into his body as he only took painkillers by the name diclofenac for pain he experienced in his back and legs and the pain killers do not contain 19-Norandrosterone.

45. However, The Tribunal from the onset noted discrepancies in the story arising from the fact that at the hearing the Respondent stated that he was attacked by an assailant while training while in the submissions tabled before the Tribunal he states that he was knocked down by a motorcycle while training.

46. The Respondent has been unable to provide the Occurrence Book Number issued after reporting the attack since he stated he did not report to the nearest police station. He has been unable to provide the prescription of the said drug from the chemist where he bought the drug and has been unable to provide the receipt he was issued with after purchase.

47. Speaking to the need by the Respondent to prove how the substance came to be in his/her body, the panel in Arbitration **CAS 2006/A/1067 International Rugby Board (IRB) v. Jason Keyter** stated in paragraph 14 that:

> *"The **Respondent has a 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 cocaine occurred.**"*

48. Further, in this present case, it has been well settled and agreed by both parties that the prohibited substance 19- Norandsterone is not a by-product of the painkiller alleged to have been taken by the athlete. Thus, the Athlete has not established the source of the said prohibited substance.

49. As was stated in the case of **CAS 2010/A/2230 International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs**:

> *"*
>
> *To permit an athlete to establish how a substance came to be present in his body **by little more than a denial that he took it would undermine the objectives of the Code and Rules.** Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, **given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body**. The Sole Arbitrator has sympathy with athletes who are – as, he accepts they can be – victimsof spiking without evidence to prove its occurrence**; but the possible unfairness to such athletes is outweighed by unfairness to all athletes if proffered, but maybe untruthful, explanations of spiking are too readily accepted**."*

50. Against the backdrop of the above decisions, the Tribunal is satisfied that the Respondent has not established on a balance of probabilities the source of the ADRV in his samples and thus cannot claim that it was unintentional.

b) Whether the Respondent has established No Fault or Negligence

51. Throughout the proceedings the Athlete has maintained that he is innocent and that the only medication he took was the Diclofenac painkiller. The athlete has gone further to claim that in an attempt to show that he had no malice in taking the painkillers, he declared that he had ingested them on his DCF before the race.

52. Article 10.2 of the WADA Code, which the Respondent placed reliance on, provides for potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6 of the same code.

53. Going by Paragraph 33 of the Respondent's submissions he is seeking a reduction of sanction claiming that he lacked the intention to cheat and that the medication was taken to alleviate pain he was suffering from the said incident.

54. In the Case of **Drug Free Sport New Zealand v Lee Marshall**, the athlete was found to have significantly elevated levels of androsterone, testosterone and 5βAdiol, which are all non-specified substances prohibited at all times. *'It should be noted that Mr Marshall had listed a variety of supplements and one medication (all that he had taken in the last seven days) on the Doping Control form'*.

55. As is the same in the present case, Mr. Marshall proceeded to claim to have been taking the medication to assist with his personal challenges and difficulties as a result of his military service.

56. The Panel hearing the matter was of the opinion that:

> *"By the narrowest of margins, Mr Marshall has proved on the balance of probabilities that the **clearly admitted anti-doping rule violation was not intentional**. However, every athlete has the **responsibility to ensure***

that whatever they may be doing for a nonsport related reason is not at the same time a violation of the requirements of the Code."

57. Article 2.1.1 of the ADAK Rules and the WADA Code clearly state that it is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples.

58. In the case of Arbitration **CAS 2017/A/4962 World Anti-Doping Agency (WADA) v. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi**, it was stated in paragraphs 51 and 52 that:

> *"To establish the origin of the prohibited substance, it is nowhere near enough for an athlete* ***to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.***
>
> *Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the substance in question, as a preliminary to* ***seeking to prove that it was unintentional, or without fault or negligence."***

59. In the Present case, it is the Tribunals view that the Respondent has failed to adduce concrete evidence to demonstrate the origin of the prohibited substance.

60. The Respondent's claim that he only took the painkiller that does not contain the prohibited substance cannot stand because no evidence has been adduced before the Tribunal to justify the presence of 19-Norandrosterone in his urine sample.

61. The Athlete has failed to establish the source of 19-Norandrosterone and thus has not proven no fault or negligence on his part.

62. As has been clearly enunciated above, the Respondent has failed to convince the Tribunal that the AAF in his sample was not intentional and thus he is ineligible for reduction of sanction under the no fault or negligence provision.

c) <u>The Standard Sanction and what sanction to impose in the circumstance.</u>

63. The Panel considers that at the centre of the present case is the issue of intention and whether the actions of the Athlete were intended to give him an unfair advantage in competition.

64. Consequently, the Tribunal finds that the Athlete had the intention to violate the anti-doping rule for he has failed, on a balance of probabilities, to demonstrate the lack of intention and the source of the prohibited substance in his sample.

65. Accordingly, the Tribunal finds that the Athlete has not met the burden of proof imposed on him under the Rules and the Code.

<u>Sanctions</u>

66. 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"

Conclusion

67. Accordingly, the Panel Orders as follows:

i. Benard Mbuvi Mwema is sanctioned to a period of four (4) Years ineligibility commencing on the 20th December 2019 being the date of the provisional suspension pursuant to Article 10.2.1.1 of the WADC and the ADAK ADR;

ii. The disqualification of the in-competition in South Korea results of 27th October 2019 and any subsequent event pursuant to Article 9 and 10.1 of the WADC and the ADAK ADR.

iii. Each party to bear its own costs.

iv. Parties have a right to appeal pursuant to Article 13 of the WADA Code and Part IV of the Anti-Doping Act, No. 5 of 2016.

Dated at Nairobi this ____*5th* _____day of _____***November*** ,_____ 2020

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John M. Ohaga SC; CIArb, Chairperson

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Ms. Elynah Shivekah, Vice Chairperson **Ms. Njeri Onyango, Member**