

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 6 OF 2020

IN THE MATTER BETWEEN

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

-VERSUS-

MICHAEL OGUNDA ODHIAMBO..... RESPONDENT

DECISION

HEARING : 10th September, 2020

PANEL :

1. Elynah Shiveka(Mrs).....	Panel chair
2. Njeri Onyango (Mrs)	Member
3. E Gichuru Kiplagat	Member

APPEARANCES

Mr. Bildad Rogoncho for Applicant. (ADAK)

No appearance for the Respondent. (Respondent did not participate in these proceedings)

ABBREVIATIONS AND DEFINITIONS

The following abbreviation used herein have the indicated

ADAK - Anti-Doping Agency of Kenya

ADR - Anti-Doping Rule

ADRV - Anti Doping Rule Violation

BAK – Boxing Association of Kenya

IBA - International Boxing Association

S.D.T- Sports Dispute Tribunal

WADA- World Anti-Doping Agency

All the definitions and interpretations shall be construed as defined and interpreted in the constitutive document both local and international.

1. THE PARTIES

- 1.1** The Applicant is the Anti-Doping Agency of Kenya (hereinafter ‘ADAK’) A State Corporation established under *section 5 of the Anti-Doping Act No 5 of 2016* (as amended) (hereinafter the Applicant)
- 1.2** The Respondent is a male adult of presumed sound mind, an Elite National Level Athlete (hereinafter ‘the Respondent’).

2. JURISDICTION

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

3. APPLICABLE LAWS

- 3.1** The Respondent is a Male Boxer hence the IBA competition rules, IBA Anti-Doping Regulations, the WADC and the ADAK ADR apply to him.

4. BACKGROUND

- 4.1 The facts as set out in the charge document show that on 23rd February 2018, 3rd November 2018 and 17th January 2019, the Respondent participated in the in boxing matches held at Swazi Royal Spa Casino, Paine college in Augusta and Grand Garden, Las Vegas respectively despite being aware that he was serving a four – year ineligibility period, imposed on him on 20th September, 2018 for a previous Anti-Doping rule violation, being Presence of Prohibited Substance, *Cannabinoids/9-tetrahydrocannabinoids* in his Urine sample collected by Doping Control Offices on 2nd December, 2017 during the Bigger Than Life Entertainment Boxing Tournament held in Nairobi, Kenya.
- 4.2 Under the current charge, ADAK’s position is that the Respondent was informed that his participation in the boxing matches was contrary to Article 10.12.3 of ADAK Anti-Doping Rules (ADR) and World Anti-Doping Code (WADC) vide a letter dated 10th June, 2019 wherein, the Respondent was required to provide an adequate explanation for the violation by 24th June, 2019. (Page 16-18 of the Charge Document).
- 4.3 There was no response filed by the Respondent admitting, denying or giving any explanation for the claims as raised by ADAK in their letter of 10th June, 2019.
- 4.4 On 6th February, 2020 ADAK filed a Notice to Charge with SDT and the Chairperson made following directions on 12th February 2020:
- i) The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, and all relevant documents including these Directions on the Respondent within fourteen (14) days from the date hereof;
 - ii) The Panel Constituted to hear this matter shall be:
 - a. Elynah Shiveka
 - b. E Gichuru Kiplagat
 - c. Gilbert M T Ottieno (later substituted with Mrs Njeri Onyango)

- iii) The matter shall be mentioned on **Wednesday 4th March 2020** to confirm compliance and for further directions.

4.5 The matter came up for mention on 4th March 2020. ADAK had filed and served the Substantive Charge with relevant supporting documents as follows:

1. Investigative Report date 20th May 2019
2. ADRV Notice dated to June 2019
3. World Anti - Doping Code
4. ADAK Anti - Doping Rules

4.6 At the Mention on 4th March 2020, Mr. Rogoncho, appearing for ADAK, informed the hearing Panel that the Charge document had not been served upon the Respondent and he requested for more time to effect the same. The matter was set for mention on 25th March 2020 to confirm compliance.

4.7 The matter did not proceed on 25th March 2020 as set earlier due to the lockdown occasioned by the Covid-19 Pandemic.

4.8 The matter came up for Mention(Virtual) on 4th June 2020 and Mr. Mwakio, holding brief for Mr. Rogoncho, appeared for ADAK. He informed the Panel that the Respondent had not been served and he requested for 14 days to serve the Respondent. The matter was set for Mention on 18th June 2020.

4.9 The matter did not proceed on 18th June 2020 and was mentioned on 15th July, 2020. At the mention, Mr. Rogoncho informed the Panel that the Respondent had been evasive but they were able to serve him via email. Mr. Rogoncho further asked for 14 days to allow the Respondent an opportunity to file and serve his Response. The matter was set for mention on 29th July, 2020.

4.10 When the matter came up for mention on 29th July 2020, Mr. Mwakio holding brief for Mr. Rogoncho for ADAK confirmed to the Panel that the Respondent had been served

through his rightful email as used in his previous case before the SDT. Mr. Mwakio informed the Panel that the Respondent had not yet filed his response. He proceeded to request for 7 more days to await the Respondent's response and thereafter the matter to proceed by way of submissions. The matter was set for mention on 5th August 2020.

- 4.11 When the matter was mentioned on 5th August, 2020 Mr. Rogoncho confirmed to the Panel that the Respondent had neither filed nor served his Response. He requested that the hearing of the matter be conducted physically at the SDT premises. The hearing Panel allowed Mr. Rogoncho's request on condition that only the hearing panel, 1 witness and himself will be allowed at the physical hearing. The matter was set for hearing on 10th September, 2020.

5. HEARING

- 5.1 The matter came up for hearing on 10th September, 2020. The Applicant was represented by Mr. Rogoncho. The hearing proceeded *ex-parte* as there was no appearance from the Respondent in person or through an Advocate. The hearing panel was satisfied that the Respondent had adequately been notified of these proceedings and of the hearing.
- 5.2 During the said hearing ADAK presented Mr. Dennis Kiprop Keitany as their only witness. Mr. Keitany is a compliance officer at the Anti –Doping Agency of Kenya (ADAK).
- 5.3 The witness testified before this Panel that the Respondent is being charged for breach of prohibition of participation during a period of ineligibility. He continued to testify that the Respondent had been previously charged in **ANTI-DOPING CASE NO. 1 OF 2018** for usage of a prohibited substance, being *Cannabinoids/9-*

tetrahydrocannabinoids and was serving a four-year period of ineligibility imposed on him by this Tribunal at the time of the current violation.

- 5.4 The witness testified that he came to learn of the Respondent's participation in the matches in question through a whistle blower who had notified the director of standards and compliance at ADAK.
- 5.5 The witness testified that the director in turn notified him on 23rd April, 2019 that there was an athlete participating in matches in the USA whose name was similar to an athlete sanctioned by the SDT for 4 years due to presence of a prohibited substance in his urine sample. He was assigned the matter to follow up.
- 5.6 The witness further stated that that he checked out the link forwarded to him by the Whistle blower, <http://boxrec.com/en/boxeer/474209>, which contained details of an athlete by the name Michael Odhiambo Ogundo. The witness said that the date of birth for the athlete was indicated as 1982-09-18 / age 36 and when he counterchecked the same with the ones for Michael Odhiambo Ogunda in his Doping Control Form from the Anti-Doping Administration & Management System (ADAMS), he confirmed that the details belonged to both individuals. The witness Further testified that he viewed the career history of the athlete through the same link and he noted that he had competed in a boxing match on 2nd December, 2017 against Amos Mwamakula at Carnivore Grounds Nairobi the same date where Michael Odhiambo Ogunda's sample was collected by ADAK officials.
- 5.7 The witness said that he further referred to SDT's decision, being **Anti- Doping Case No. 1 of 2018**, and noted that the Respondent had been declared ineligible to participate

in any athletic competition/event for a period of 4 years with effect from 5th February, 2018.

- 5.8 The Witness stated that he confirmed the Respondent's identity from reading his career history at <http://boxrec.com/en/boxeer/474209> and by referring to **ADAK CASE NO. 1 OF 2018**.

6. SERVICE

- 6.1 The Respondent was served with the Notice of charge, the charge document and other relevant documents via his email, being michaelodhiambo1@gmail.com. The panel takes note that the above email is registered as an address of service by the Respondent and was previously used to effect service and facilitate communication in **Anti-Doping No. 1 of 2018** against the Respondent. In view of this, the Panel took the position that the Respondent was duly notified of the charge filed and these proceedings, and on account of his silence, he is taken to have waived his right to a defence. The panel therefore proceeded to decide the matter based on the documents availed and attached to the Charge Document, the Witness' testimony and ADAK's written submissions filed on **28th September, 2020**.

7. DECISION

- 7.1 The Panel needs to consider whether the evidence tendered by ADAK and the testimony of Denis Kiprop Keitany are sufficient for the Respondent to be sanctioned to a new period of ineligibility as provided by the ADAK Anti-Doping Code, Article 10 of ADAK and WADC Rules.
- 7.2 Furthermore, the hearing Panel needs to consider whether there was a violation of the Prohibition during the period of ineligibility.

7.3 With reference to the grounds for additional period of ineligibility:

7.3.1 WADC Article 10.12.1 provides thus:

“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.

An *Athlete* or other *Person* subject to a period of *Ineligibility* longer than four years may, after completing four years of the period of *Ineligibility*, participate as an *Athlete* in local sport events not sanctioned or otherwise under the jurisdiction of a *Code Signatory* or member of a *Code Signatory*, but only so long as the local sport event is not at a level that could otherwise qualify such *Athlete* or other *Person* directly or indirectly to compete in [or accumulate points toward] a national championship or *International Event*, and does not involve the *Athlete* or other *Person* working in any capacity with *Minors*.....”

7.4 The Respondent did not bother to respond to the Charges or communicate with ADAK or the Tribunal in any way. He treated these proceedings and evaded communicating with ADAK. The Tribunal was satisfied that sufficient notification of the proceedings had been effected

7.5 The Panel notes that the Respondent failed to file any response to the charges or even appear before the tribunal either in person or by way of legal representation though duly notified about the proceedings.

7.6 Therefore, having regard to the aforementioned the Panel concurs with the inference made and evidence tendered by ADAK that above a mere balance of probability and to the comfortable satisfaction of this Panel, that the Respondent was;

- i) Well aware of his ineligibility during the Swazi Royal Spa Casino, Paine College in Augusta and Grand Garden, Las Vegas Boxing Matches.
- ii) That his ineligibility period ran from 5th February, 2018 to 5th February, 2022.

7.7 In *Robert Kajuga and Africa Zone v RADO APPEAL CASE NO. 1/2016*, the Appeal Panel held that when considering the degree of fault on the part of the Athlete the following factors are relevant; the athlete's experience; whether the athlete is a minor; the degree of risk that should have been perceived by the Athlete; the level of care and investigation exercised by the Athlete to what should have been the perceived level of risk; whether the Athlete suffers from any impairment; any other relevant factors and specific circumstances that can explain the Athlete departure from the expected standard of behavior.

7.8 The Respondent is a 36-year old elite Athlete, who had been charged before the SDT, in Anti-Doping No. 1 of 2018 as a Respondent for presence of a Prohibited Substance. There is no response or explanation to ADAK or this Panel from the athlete after receiving the Notice of rule violation. The Respondent made no effort to contact ADAK

or SDT to admit or deny the charges leveled against him or even explaining the basis under which he participated in the three (3) boxing events.

7.9 Therefore, when assessing the degree of fault on the part of the Athlete, there is a possibility for sanction of additional period of ineligibility in this instance, we find that there is no basis to depart from the view that the athlete bears a high degree of fault for his illegal participation in the 3 boxing matches while serving a four-year ineligibility sanction.

7.10 ADAK has successfully charged and proved the violation of the Prohibition of Participation During Ineligibility as sanctioned by this Tribunal in Anti- Doping Case No. 1 of 2018.

7.11 Based on the foregoing, the sanction applicable to the Respondent in terms of Article 10.12.3 of shall be a period of FOUR (4 years) with effect from 5th February, 2022.

7.12 All results obtained by the Respondent from and including 7th February, 2018, 3rd November, 2018 and 17th January, 2019 inclusive of any points and prizes are disqualified.

7.13 Each party shall bear its own costs of these proceedings.

7.14 The right to appeal is provided for under Article 13.2.1 of the WADC and Article 13 of the ADAK rules.

DATED at NAIROBI this...19...day of...NOVEMBER...2020

Signed

MRS. ELYNAH SHIVEKA...*Shiveka*.....(PANEL CHAIR)

MRS NJERI ONYANGO..... ..... PANEL MEMBER

MR GICHURU KIPLAGAT..... ..... PANEL MEMBER