

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASES NO. 21 & 25 OF 2019

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

-versus-

BEATRICE JEPKORIR RUTTO..... RESPONDENT

DECISION

Hearing: 12th August,2020

Panel: Gichuru Kiplagat - Panel-Chairperson
Allan Owinyi - Member
Mary Kimani - Member

Appearances: Mr.Rogoncho for Applicant
Mr. Njoroge for Respondent

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is an elite female athlete competing in national and international events.

Background and the Applicant's Case

3. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 08th August 2019.
4. The Applicant brought charges against the Respondent that on 21st April 2019 ADAK Doping Control Offices in an in-competition testing during the Eldoret City Marathon in Kenya collected urine sample from the Respondent. The urine sample was split into two separate bottles with references or Sample codes A 4363465 (Sample "A") and B 4363465 (Sample "B") under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The sample was subsequently analysed at the WADA accredited laboratory in Bloemfontein, South Africa and an Adverse Analytical Finding revealed the presence of prohibited substance *Heptaminal and Enobosarm* which are listed as stimulants under S.6(b) and Other Anabolic Agents under S1.2 of the 2019 WADA Prohibited List (S6(b)).
6. The findings were communicated to the Respondent by Japhter K. Rugut, Chief Executive Officer of ADAK vide Notice of Charge and mandatory provisional suspension dated 21st May 2019. In the letter the Respondent was offered an opportunity to provide an explanation for the same by 04th June 2019.
7. The Respondent responded vide letter dated 17th July 2019. She denied the charges and stated that she fell ill and visited a chemist and was prescribed asthmatic medication, however, the Applicant allege that the Respondent did not provide the name of the chemist or receipts for purchase of the said medication. She further stated that she has never used any prohibited substances or methods in her athletic career.

8. On 16th June 2019 AFRICA ZONE V RADO Doping Control Officers in an in-competition testing during the 2019 Kigali Peace Marathon in Kigali, Rwanda collected urine sample from Respondent. Assisted by the DCO, the Respondent split the sample into two separate bottles which were given reference numbers A4284876 ("A" Sample) and B 4284876 ("B" Sample) in accordance with the prescribed WADA procedures.
9. The sample was subsequently analysed at the WADA accredited laboratory in Bloemfontein, South Africa and an Adverse Analytical Finding revealed the presence of prohibited substance *Heptaminol and Enobosarm* which are listed as stimulants under S.6(b) and Other Anabolic Agents under S1.2 of the 2019 WADA Prohibited List (S6(b)).
10. The findings were communicated to the Respondent by Japhther K. Rugut, Chief Executive Officer of ADAK vide Notice of Charge and mandatory provisional suspension dated 07th August 08/2019. In the letter the Respondent was offered an opportunity to provide an explanation for the same by 21st August 2019.
11. The Respondent responded vide letter dated 17th July 2019. She denied the charges and stated that she fell ill and visited a chemist and was prescribed chest medication such as *francol, geinsumin* and *piriton*. However, she did not provide the name of the chemist or receipts for purchase of the said medication. She further stated that she has never used any prohibited substances or methods in her athletic career.
12. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substances *Hemptaminol and Enobosarm* in the athlete's sample.
13. The Applicant further stated that the Respondent had no TUE recorded at the IAAF for substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused the adverse analytical finding. Furthermore, the Applicant stated that there is no plausible explanation by the Respondent to explain the adverse analytical finding.

14. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act.
15. The Applicant prays that:
- a) The disqualification of all competitive results obtained by the Respondent from and including 21st April2019 and 16th June2019 including forfeiture of medals as per Article 10.1 of the ADAK ADR;
 - b) Sanction to a four (4) year period of ineligibility as provided for by WADA Code Article 10.
 - c) Costs, as per WADA Article 10.10

The Response

16. The Respondent filed a response to charge and a witness statement dated both 14th November2019.
17. She denied every allegation against her in the charge sheet. She denied that she waived her right to request a sample B analysis as she was not informed of this right by ADAK and that the documents are of a legal nature and fairly complex for her to understand with her humble educational background.
18. She also contends that she provided explanation as requested by the Applicant as how she ingested the prohibited substance and that there was departure from the IAAF Anti-Doping Regulations which may have caused her adverse analytical findings.
19. She added that she has asthmatic conditions and chest pains which require her to take certain medications
20. She availed a letter dated 17th July2019 stating that she had chest pains days before the race of 14/04/06/2019 where her condition was managed by *franor*, *geisumin* and *piriton* tablets. She also denied that she intentionally ingested the drugs to gain advantage in the competition.
21. She also submitted a medical chit from Jericho Medical Centre showing she had suffered a severe asthmatic attack where she was given *Aminophyltine*, *Amoxil*, *Piriton* and *Ascoril* drugs to help treat her condition.

22. With respect to her response for the ADRV arising from the 16th June 2019 competition she stated in her response dated 10th August 2019 that she fell ill and visited a chemist and was prescribed asthmatic medication, however, she did not provide the name of the chemist or receipts for purchase of the said medication immediately but requested for time to do so. She further stated that she has never used any prohibited substances or methods in her athletic career.
23. She also indicated that she has been honest in her declarations while filling both Doping Control Forms by revealing all the medications she ingested before and after these charges were levelled against her.
24. She admitted the Tribunal's jurisdiction and prayed for the Applicant's charges be dismissed with costs to the Respondent.

Hearing

25. ADAK Case Numbers 21 & 28 of 2019 were consolidated by the Tribunal on 16th October 2019 given that they arose from doping violations touching on the same athlete in the same year under question.
26. The matter was heard on diverse dates and parties ordered to file written submissions. On 12th August 2020 when the matter came up in court, the parties and requested for a decision date.

Discussion

27. We have carefully considered the matter before us and also taken into account the parties' pleadings, *viva voce* evidence and written submission. We apply our mind as follows.
28. Section 31 of the Anti-Doping Act states that:

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.

29. Indeed, our decision will be guided by the Anti-Doping Act, the WADA Code and other legal sources.
30. *Heptaminal and Enobosarm* which are listed as stimulants under S.6(b) and Other Anabolic Agents under S1.2 of the 2019 WADA Prohibited List (S6(b).
31. According to Articles 3 and 10.2.1.2 of the WADA Code, when the Anti-Doping Rule Violation (ADRV) involves a specified substance such as *Heptaminal and Enobosarm* the Anti-Doping Organization (ADO) in this case is the Applicant has the burden of proof to establish that the anti-doping rule violation was intentional.
32. The Respondent has offered a rebuttal stating that her ingestion of the prohibited substance was not intentional as she was sick in the chest and asthmatic. She also stated that she was took the earliest opportunity to state what she had ingested on both doping forms. Article 10.2.3 of the WADA Code defines “intentional” to mean:

“...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 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 rebuttedly 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 used Out-of-Competition in a context unrelated to sports performance.”

33. The burden to prove intention is squarely on the Applicant. Having looked at the material before us we find that the Applicant has not proved intention on the part of athlete on both accounts to our comfortable satisfaction. The Athlete was unwell and sought medication for her illness. The CAS had this to say in the subject matter in *WADA v. Indian NADA & Dane Pereira CAS 2016/A/4609*:-

The finding that a violation was committed intentionally excludes the possibility to eliminate the period of ineligibility based on no fault or negligence or no significant fault or negligence.

34. We also note that the Respondent was provisionally suspended on 04th June 2019 for her ADRV arising from her competition of 21st April 2019. She responded to the notice to charge and provisional suspension dated 21st May 2019 via her letter of 17th July 2019. Did the notice to charge and provisional suspension reach her late explaining her participation in the Kigali Peace Marathon of 16th June 2019? In her witness statement dated 14th November 2019 though the Respondent stated that she received documents on the ADRVs on various dates during the months of September and August 2019. It is curious though that her letters are dated 17th July 2019 and 10th August 2019.
35. Our findings are that there is compelling evidence that the Applicant sent out the notice to charge and provisional suspension to the Respondent and she received it in time before the Kigali Meet. The Respondent has unequivocally admitted in paragraph five (5) of her response to charge dated 14th November 2019 that on diverse dates she was informed about the charges as set out in the charge document. Indeed, she was aware of her provisional suspension but she still chose to participate in the Kigali Peace Marathon of 16th June 2019.
36. What about the question of “no significant fault”? The test in **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** guides us. The Panel stated that when assessing the degree of fault on the part of an Athlete we need to consider: the Athlete’s professional experience; his or her age; the perceived and actual degree of risk; whether the athlete suffers from any impairment; the disclosure of medication on the Doping Control Form; the admission of the ADRV in a timely manner; any other relevant factors and specific circumstances that can explain the athlete’s conduct. The relevant legal provision is WADA Code Article 10.5.1.1.
37. It was incumbent upon the Athlete to seek a TUE which she did not. She certainly understands the rules that apply to her as an athlete on doping and doping violations despite her humble educational background. She is fairly well travelled and this exposure lends itself in her favour in terms of what she is facing before this Tribunal given her expanded world view.

38. However, we note that she took the earliest opportunity to fill out the doping control forms and stated the medication she had used before taking part in the competition on both dates. As we navigate the contours of this case we cannot help but inescapably conclude that the case warrants reduction on the ineligibility period on both occasions.

Conclusion

39. In these circumstances, the following orders commend themselves to the Tribunal:

- i. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 2 years from 04th June 2019 pursuant to Article 10.2.2 of the WADA Code with respect to her ADRV arising from her competitive race of 21st April, 2019;
- ii. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 4 years from 05th June 2021 pursuant to Article 10.2.1.2 of the WADA Code with respect to her ADRV arising from her competitive race of 16th June 2019;
- iii. The period of ineligibility in (a) and (b) above shall run consecutively.
- iv. The disqualification of the Eldoret City Marathon Race of 21st April 2019 and the Kigali Peace Marathon of 16th June 2019 and all resultant medals and cash prizes and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- v. Each party shall bear its own costs;

40. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated and delivered at Nairobi this ___ 5th ___ day of ___ *November*, ___ 2020.

Gichuru Kiplagat, Panel-Chairperson

Allan Owinyi, Member

Mary Kimani, Member