

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS TRIBUNAL
ANTI-DOPING CASE NO. 10 OF 2020

IN THE MATTER BETWEEN

ANTI-DOPING AGENCY OF KENYA APPLICANT

-versus-

PATRICK KIPYEGON TERER RESPONDENT

DECISION

Hearing: [Written Submissions]

Panel:	Mr. John Ohaga SC, CARb	-	Chairperson
	Mrs. Njeri Onyango	-	Member
	Mr. E Gichuru Kiplagat	-	Member

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

No appearance by the Athlete.

Abbreviations and Definitions

The following abbreviations used herein have the indicated meanings.

ADAK	- Anti-Doping Agency of Kenya
ADR	- Anti-Doping Rule
ADRV	- Anti Doping Rule Violation
AK	- Athletics Kenya
IAAF	- International Association of Athletics Federation
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.

The Parties

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).
2. The Respondent is a male adult of presumed sound mind and an Elite International Level Athlete (hereinafter '**the Athlete**').

Jurisdiction

3. The Sports Disputes Tribunal has jurisdiction under Section 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.

Applicable Laws

4. The Athlete is an international level athlete; therefore, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADC, and the ADAK ADR apply.

Background

5. On the 20th October 2019, during the Xian International Marathon held in China, CHINADA Doping Control Officers (DCOs) collected two urine samples from the Athlete. Assisted by the DCO, the Athlete split the sample into two separate bottles, which were given reference numbers A 638932 (the "A Sample") and B 638932 in accordance with the Prescribed WADA procedures (**Attached is a Doping Control Form dated 20th October 2019, PKT1**)
6. Both Samples were transported to Seibersdorf Labor GmbH, an Anti-Doping Laboratory ("WADA") - accredited Laboratory in Seibersdorf, Austria (the "Laboratory").
7. The Laboratory analyzed the Samples in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Both analysis of the "A" Sample returned an Adverse Analytical Finding ("AAF") of using *19-Norandrosterone*. (**Attached is the test report dated 13th December 2019, PKT 2**)
8. *19-Norandrosterone* is a Non-Specified Substance and is listed as an endogenous AAS under SAAB of the 2019 WADA Prohibited List.
9. The findings were communicated to the Athlete by Japhter K. Rugut, EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 10th February 2020. In the said communication the Athlete was offered an opportunity to provide an explanation for the same by 24th February 2020.
10. The Athlete did respond via a WhatsApp instant message dated 17th August 2020. In his instant message he stated that he had received the ADVR Notice, read it, understood it, and did not wish to participate in any proceedings. He requested the Tribunal to deliver a Decision in the matter based on the evidence at hand. He stated in Kiswahili:

"Nimepata parua ya adak na nime soma na kuelewa, Mimi sitaki kufuatana nayo, watoe umusi wao"
11. The Athlete did not request for testing of the "B" Sample. ADAK, therefore, filed the current Charge on 26th August 2020; Notice to Charge was filed on 24th June 2020.
12. Upon receipt of the Notice to Charge on 24th June 2020, the Tribunal issued the following directions on 29th June 2020:

- i. *The Applicant shall serve the Mention Notice, the Notice to Charge, the Notice of ADRV, the Doping Control Form, and all relevant documents on the Athlete by Wednesday 22nd July 2020.*
 - ii. *The Panel Constituted to hear this matter shall be:*
 - a. *Mr. John Ohaga;*
 - b. *Mrs. J Njeri Onyango;*
 - c. *Mr. Gichuru Kiplagat.*
 - iii. *The matter shall be mentioned on Thursday 23rd July 2020 to confirm compliance and for further directions.*
13. The matter came up for mention on 5th November 2020. ADAK had filed and served the substantive Charge with relevant supporting documents as follows:
- i. *Doping Control Form dated 20th October 2020.*
 - ii. *Test Report dated 13th December 2019.*
 - iii. *ADVR Notice dated 10th February 2020.*
 - iv. *WhatsApp instant message dated 17th August 2020.*
 - v. *World Anti-Doping Code*
 - vi. *World Athletics Rule*
 - vii. *ADAK Anti-Doping Rules*
14. At the mention on 5th November 2020, Mr. Rogoncho appeared for ADAK. The Athlete had been served but was not present. Nonetheless, Mr. Rogoncho confirmed that ADAK's submissions had been filed and served. The Tribunal indicated that a decision was to be delivered on 3rd December 2020.

ADAK Submissions

15. ADAK filed written submissions on the 14th September 2020. It is ADAK's position that under Article 3.2 that facts relating to Anti-Doping Rule Violations may be established using 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 outlined 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.*

- d. *The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of the pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.*
 - e. *The hearing panel in a hearing*
16. ADAK submits that in this instance, an analytical method has established the presence of a prohibited substance. The Athlete did not challenge the process and outcome and did not request for testing of the 'B' Sample. ADAK thus poses that it has met its burden of proving the ADRV to the comfortable satisfaction of the hearing panel.
17. ADAK further submits that under Article 22.1 the Athlete has a duty to;
- a. *To be knowledgeable of and comply with anti-doping rules,*
 - b. *To be available for sample collection always,*
 - c. *To take responsibility, in the context of anti-doping, for what they ingest and use,*
 - d. *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.*
 - e. *To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years.*
 - f. *To cooperate with Anti-doping organizations investigating Anti-doping rule violations.*
18. ADAK submitted that it had established that the presence of a prohibited substance was found in the Athlete's sample to the required standard of proof. Thus, they have discharged their burden of proof ably according to Article 3 of the ADAK Rules and the WADC. Consequently, ADAK submitted that an ADRV had been committed by the Athlete.
19. ADAK submitted that where the 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.
20. ADAK further submitted that the onus was on the Athlete to demonstrate the origin of the prohibited substance in order to establish no fault or negligence or intention.

21. With respect to the issue of intent, ADAK placed reliance on **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** and submitted that in proving a lack of intent, an athlete must not only demonstrate how the prohibited substance entered his body, but also that the ingestion of the prohibited substance was not intended to enhance the athlete's performance.
22. ADAK also placed reliance on **CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)**, **CAS 99/A/234** and **CAS 99/A/235 Meca-Medina v. FINA**, and **CAS 2006/A/1067 IRB V. KEYTER** stating that in order to establish the origin of a prohibited substance by the required balance of probability, the athlete must adduce actual evidence.
23. ADAK further placed reliance on **Canadian Weightlifting Federation and Tylor Findlay, the CAS Arbitrator Yves Frontier**, submitting that an athlete who cannot or does not establish the origin of a prohibited substance cannot be said to have proved a lack of intent.
24. With respect to the issue of fault or negligence, ADAK submitted that the Athlete had a personal duty to ensure that no prohibited substance entered his body in terms of ADAK Rules 22.1.1 and 22.1.3.
25. ADAK placed reliance on **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26**, where the panel observed that an athlete's degree of fault is measured against the duty that he or she owes under the WADC to do everything in his or her power to avoid ingesting a prohibited substance. They submitted here that the Athlete had failed to discharge this duty and that his negligence in regard to this duty was evidenced by the fact that he did not identify any particular substance by name.
26. On the issue of knowledge, ADAK contends that the Athlete ought to have known better than to use Cannabis during competitions.
27. ADAK further submitted that the Respondent's lack of knowledge does not excuse him from sanctions.
28. ADAK placed reliance on **CAS A2/ 2o11 Kurt Foggo v. National Rugby League (NRL)** stating that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of athlete's intention to enhance sport performance.
29. On the issue of sanctions, ADAK proposed that the maximum period of ineligibility be imposed on the Athlete given that the Athlete had failed

to provide an explanation and to establish the origin of the prohibited substance.

Analysis and Issues for Determination

30. The Panel in making its determination shall determine the following issues:
 - a. Whether the ADVR had been proved by ADAK to the satisfactory standard.
 - b. Whether or not there was intention to cheat or enhance performance on the part of the Respondent.
 - c. The degree of fault or negligence that can be assigned to the Respondent's conduct.
 - d. The period of ineligibility, if any, is to be imposed on the Respondent.

Whether the ADVR had been proved by ADAK to the satisfactory standard.

31. The laboratory results remain undisputed in so far as the *A Sample* was found to contain the prohibited substance 19- *Norandosterone* and the Athlete made no request to test the *B Sample*. Further, there was no record of an applicable TUE at the time of Sample Collection.
32. There being no record of an applicable TUE, and no contest as to the laboratory results, the Panel finds that the Charge regarding the presence of a Prohibited Substance "*Norandrosterone*" in the Athlete's Sample has been proved to the required standard under both the ADAK ADR and WADC article 3.2.

"The facts relating to the anti-doping rule violation may be established by any reliable Means including admissions and methods of establishing facts and set out the presumptions which include, results obtained by

a) Analytical methods or decision limits

b) WADA accredited Laboratories approved by WADA...."

33. Article 3.2 of the ADAK ADR and WADC, provide that in order to establish facts relating to an ADR, a panel may adopt that *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.*

34. Based on this, this Panel finds that in this instance there is an AAF from a WADA accredited laboratory which has not been challenged. Therefore, in accordance with Article 3.2 of the ADAK ADR and WADC, ADAK has proved to the satisfactory standard that there was an ADRV on the part of the Respondent.

Whether or not there was intention to cheat or enhance performance on the part of the Respondent.

35. Article 10.2.3 of the WADC and ADAK rules provide that in order for a violation under the code to be deemed "intentional" the Athlete should have known that the conduct constitutes an anti-doping rule violation and that there was a significant risk that the conduct could constitute or result in an anti-doping rule violation and that he or she manifestly disregarded that risk.
36. In this regard, Article 10.2.1 places the onus on the Athlete to show that the violation was not intentional. The Athlete in doing so can provide an explanation on the origin of the prohibited substance, or how the substance entered his or body.
37. In this case, the Athlete did not appear before the Tribunal and did not submit any explanations on the origin of the prohibited substance.
38. In the Applicant's submissions at *paragraph 41*, the Applicant contends that,
- "...the Athlete's actions were negligent in nature as he ought to have known better than use Cannabis during competitions."*
39. It is unclear whether the mention of the 'use' of Cannabis from the foregoing is intended to mean that the Applicant contends that the Athlete ingested the prohibited substance while using Cannabis during the competition. This raises questions as to whether or not the Applicant here is suggesting an origin of the prohibited substance on behalf of the Athlete.
40. In consideration of where the burden of proof lies according to Article 10.2.1, this Panel declines to find this confusing contention by the Applicant as an established origin of the prohibited substance. If this Panel were to do so, it would be stepping into the shoes of the Athlete and assuming the obligations of both the Tribunal and the Athlete.
41. Therefore, as confusing as *paragraph 41* is, this Panel must only look at the facts that have been established.

42. The panel is guided by the case of **Canadian Weightlifting Federation and Tylor Findlay; the CAS Arbitrator Yves Frontier** where the panel stated:

"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."

43. It follows from the above jurisprudence, that where there is no plausible explanation or where the Athlete has failed to provide an explanation as to the origin of the prohibited substance, then a lack of intention to cheat or enhance performance cannot be established.
44. This Panel therefore finds that it is not possible to establish that there was no intention to cheat or to enhance performance on the part of the Respondent.
45. The rule here is that the Athlete is under strict liability and is responsible to ensure that no prohibited substance enters his body. It is his duty, in this case, to establish circumstances for consideration in the reduction of the period of ineligibility from the prescribed period under the Code. The Athlete did not appear or offer an explanation as to the origin of the prohibited substance. Therefore, the Athlete has failed to establish a lack of intention to cheat or to enhance performance.

The degree of fault or negligence can be assigned to the Respondent's conduct.

46. Article 2 of the WADC states that;

"Athletes or other persons shall be responsible for knowing what constitutes ADRV and the substances and methods which have been included on the Prohibited list"

47. Additionally, Article 2.1 WADC states that;

"It is each athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their sample."

48. The essence of establishing a degree of fault or negligence, is to mitigate the period of ineligibility an athlete may be subject to, if an ADRV has been established.

49. The Athlete in this case, did not appear before the Tribunal. Therefore, the Athlete did not establish or provide any persuasive arguments to support any possible finding that he had discharged his personal duty to ensure that a prohibited substance is not found in his body; neither did he establish that he discharged his duty in complying with the Article 22 of the Anti-Doping Rules.
50. The Tribunal therefore finds that the Athlete is to bear fault and negligence for the ingestion of the prohibited substance and in the commission of an ADRV.

The period of ineligibility, if any, is to be imposed on the Respondent.

51. Article 10.2 of the WADA Code provides:

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:

10.2.2 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.

10.2.3 The anti-doping rule violation involves a Specified Substance, and the anti-doping organization can establish that the anti-doping rule violation was intentional.

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

52. Upon considering these provisions, it is clear that in this case the applicable period of ineligibility that should be imposed on the Athlete is four (4) years.


Decision

53. The Panel therefore decides and finds that;
 - i. The ADRV has been established to the comfortable satisfaction of the Panel;
 - ii. The origin of the prohibited substance has not been established;
 - iii. The Athlete has failed to establish that there was no intention to cheat on his part;
 - iv. The Athlete bears fault and was negligent in his conduct which led to the ingestion of a prohibited substance.

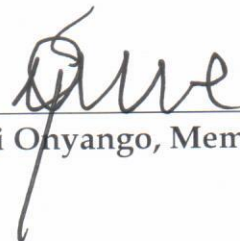
Sanction

54. Upon reviewing the facts put forward by the Applicant and the circumstances in this matter, the Panel imposes the following sanctions:
- i. The period of ineligibility for the Athlete shall be four (4) years from 24th February 2020, this being the date of the provisional suspension pursuant to Article 10.2.2 of the WADC. The end date shall be **23rd February 2024**;
 - ii. The disqualification of the Xian International Marathon results of 20th October, 2019 and any subsequent event pursuant to Article 9 and 10 of the WADA code;
 - iii. Each party to bear its own costs.
 - iv. Parties have a right to appeal pursuant to Article 13 of the WADC and ADAK ADR.
 - v. Any other prayers and motions are dismissed.


Dated at Nairobi this 4th day of February, 2021.



John M Ohaga, SC: Carb,
Chairperson



Mrs. Njeri Onyango, Member



E Gichuru Kiplagat, Member