REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING APPEAL NO. 15 OF 2020

ANTI-DOPING AGENCY OF KENYA ……APPELLANT

-versus-

GEORGE NG'ANG'A KIMOTHO …….. ……RESPONDENT

DECISION

Hearing: **Canvassed by way of Written Submissions**

Panel:
Mr. John M Ohaga SC, CArb - Chairman
Ms. Elynah Shiveka - Vice Chairperson
Mr. Gabriel Ouko - Member

Appellant

Mr. Bildad Rogoncho, Advocate for ADAK ('**the Agency**')

Respondent

Mr. Franklin Cheluget Advocate for the Respondent.

Abbreviations and definitions

ADAK – Anti–doping Agency of Kenya
ADR – Anti-doping Rule
ADRV- Anti-doping Rule Violation
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, 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 Appellant 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 Appellate jurisdiction of the Tribunal to hear this dispute is derived from Section 31(4) of the Anti-Doping Act, No 5 of 2015 and Article 13.2.2 of the Anti-Doping Rules, 2016.

Preliminaries

4. The background giving rise to the current proceedings is consequential of several documents filed with the Tribunal by the Appellant, which includes the Notice of Appeal filed by the Appellant with the Tribunal on the 7th October 2020, the Appeal Brief by the Appellant directed to Respondent dated 26th November 2020 informing the Respondent of the intended appeal to be brought against the decision of the Tribunal dated 28th July 2020 setting out the grounds of the intended appeal,

5. The proceedings before this Tribunal were commenced by the Appellant filing a Notice to Appeal dated 7th October 2020 against the decision of the Tribunal dated 28th July 2020 in this matter.

6. Consequently, directions were issued on 9th October 2020 that service should be effected by 8th November 2020 and an Appeal panel constituted to hear the matter and the same scheduled for mention before the Tribunal on 12th November 2020.

Historical Background

7. The Appellant lodged with the Tribunal a formal Notice of Appeal being dissatisfied wholly with the Decision of the Tribunal in Anti-Doping Case No. 15 of 2020 delivered on 28th July 2020.

8. The facts of Anti-Doping Case No. 15 of 2020 are not in contention and are set out in the Decision dated and delivered on 28th July 2020 and it is therefore not necessary to set them out here.

9. The Appellant in the Notice of Appeal seeks the following:

   a. The Appeal be deemed admissible.
   b. The Decision dated 28th July 2020 rendered by the Sports Disputes Tribunal of Kenya in the matter of ADAK v George Ng'ang'a Kimotho (Anti-Doping Case No 15 of 2018) is set aside.
   c. George Ng'ang'a Kimotho has committed an Anti-Doping Rule Violation.
   d. George Ng'ang'a Kimotho is sanctioned with four-year period of ineligibility starting on the date on which the Appeal Panel Decision is delivered. Any period of provisional suspension or ineligibility served by George Ng'ang'a Kimotho before the delivery of the Appeal Decision be credited against the total period of ineligibility to be served.
   e. All competitive results obtained by George Ng'ang'a Kimotho from and including 22nd September 2020 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).
   f. Costs of the Appeal be borne by the Respondent pursuant to ADAK ADR Article 10.10.1

10. The Respondent in the cross appeal sought orders that:

   a) That the decision of the Sports Dispute Tribunal dated 4th March 2020 in favour of the Petitioner be set aside.
   b) That the Respondent bears no significant fault or negligence;
   c) That the suit against the Appellant/Respondent be dismissed with costs.

Appellants' accompaniments

11. The Appellant lodged a Notice of Appeal, An Appeal Brief and Written Submissions in support of the Appeal and in opposition to the Cross Appeal.

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

I. The Doping Control Form;
II. The Test Report for the A-Sample;
III. The 2019 Prohibited List ;
IV. The ADRV Notice;
V. The Letter dated 8th January 2019 by the athlete accepting the consequences of the ADRV Notice;
VI. Letter dated 8th September 2019 from Doctor Njenga;
VII. The Charge Document dated 28th February 2020;
VIII. The Decision dated 28th July 2020;
IX. Doping Control Form dated 27th October 2019.

Hearing

13. The matter was canvassed by way of written submissions and the Decision reserved for Thursday, 15th April 2021. This was then adjourned to 22nd April 2021.

Submissions

14. 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.

15. Below is a summary of the main relevant facts and allegations based on parties' submissions.

A. Summary of Appellant's Submissions

Applicable Law

16. From the onset, the Appellant argued under Article 13.2.3 of the ADAK ADR that gives ADAK the right of Appeal. The Appellant sought to

demonstrate to the Appeal Panel to the comfortable satisfaction standard that the Respondent ought to be given a more severe sanction as 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 and erectile dysfunction.

17. The Appellant 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.

18. The Applicant relied on Article 2.1 of the ADAK ADR to establish the proof of the anti-doping rule violation and relied on a myriad of cases among them **CAS 2016/A/4377 WADA v IWF & Alvarez** that stated that in anti-doping cases the athlete bears the burden of establishing that the violation was not intentional; it naturally follows that the athlete must also establish how the substance entered his or her body.

19. The Appellant contends that it is an established standard that the athlete bears the burden of establishing that the violation was not intentional, and he supported this claim with caselaw.

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

21. The Appellant submitted that there are extremely rare cases at the Court of Arbitration for Sports where an athlete can demonstrate lack of intent even where he/she cannot establish the origin of the prohibited substance.

22. The Respondent finally asked that the Tribunal should 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

23. The Respondent on its part commenced by stating that the Appellant was filling the appeal out of time and thus the appeal should be dismissed.

24. The Respondent averred that the Appellant has failed to prove the existence of a doping offence. On this the Respondent relied on Article 3.1 on the Appellant's duty to establish the ADRV.

25. The Respondent further insisted that the prohibited substance entered the body through an injection for erectile dysfunction and thus he has established the source and origin of the prohibited substance and proven that it was not intentional.

26. The Respondent relied on the ADAK Rules and the WADA Code. He went further to avail to the Tribunal multiple caselaw including **CAS 2006/A/1025 Mariano Puerta** that deals with the principle of proportionality in meting out punishment.

27. 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.

28. The Respondent went ahead to claim that due to the lack of representation at the initial hearing the Appellant was able to land the 2-year suspension.

29. In conclusion the Respondent urged the Tribunal to dismiss the Appeal and also set aside the original panel's decision of 28th July 2020 while declaring an immediate elimination of the period of ineligibility.

Analysis and Determination

30. The Appeal Panel has considered the appeal, the cross appeal, submissions, and the proceedings before the Hearing Panel. The Appeal Panel has also considered the impugned decision and the authorities relied on.

31. This being a first appeal, it is by way of a retrial and parties are entitled to this Tribunal's reconsideration, reanalysis and revaluation of the evidence afresh and its own conclusion on that evidence. The Tribunal should, however, bear in mind that it did not see the witnesses testify and give due allowance for that.

32. The Respondent has not disputed the Adverse Analytical Finding in the samples but has stated that it was not at fault or intentional and that it only took medication to aid with arthritis and erectile dysfunction which may have contained the prohibited substance.

33. 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 Appellant's appeal before the Tribunal is time barred.***
    b. ***Whether the Appellant has discharged its burden of proof and in turn has the Respondent/Athlete established the source of the ADRV proving that it was not intentional;***
    c. ***Whether the Respondent/Athlete has established No Fault or Negligence.***
    d. ***The Standard Sanction and what sanction to impose in the circumstance.***

The Law

34. The Appeal Panel referred to the following regulations in arriving at its decision.

Section 31 of the Anti-Doping Act, provides:

> 4) Disputes involving national and county level athletes, athlete support personnel, sports federations, sports organisations, professional athletes and professional sports persons shall be resolved by the Tribunal both at the first instance and at appeal, each consisting of three members appointed by the Chairperson of the Tribunal. (emphasis ours)

35. Further, ***Article 13.1*** of the ***WADA Code,*** which is adopted by the same Clause of the **ADAK ADR** it is provides:

"13.1 Decisions Subject to Appeal
Decisions made under the Code or these Anti-Doping Rules may be appealed as set forth below in Articles 13.2 through 13.7 or ***as otherwise provided in these Anti-Doping Rules,*** *the Code or the International Standards. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise."*

36. Having already indicated the source of is jurisdiction to hear the present appeal in paragraph 3 hereinabove, the next step for this Tribunal is to look at the right of appeal and the timelines as provided by the Anti-Doping Act and Rules.

37. The right to Appeal the decision of this Honourable Tribunal has been provided for under Article 13.2.2 of the World Anti-Doping Agency Code. It reads;

"Appeals Involving Other Athletes or Other Persons
In cases where Article 13.2.1 is not applicable, the decision may be appealed to an appellate body ***in accordance with rules established by the National Anti-Doping Organization****. The rules for such appeal shall respect the following principles:*
- *a timely hearing;*
- *a fair, impartial, and Operationally Independent and Institutionally Independent hearing panel;*
- *the right to be represented by counsel at the Person's own expense; and*
- *a timely, written, reasoned decision.*

38. Section 31(4) of the Anti-Doping Act, No. 5 of 2016 provides for appeal level disputes involving national and lower-level athletes, athlete support personnel, sports federations, sports organisations, professional athletes and other persons subject to the Anti-Doping Rules being resolved by the Tribunal.

39. Further Article 13.2.2 of the Anti-Doping Rules, provides for the Tribunal handling appeals not covered in Article 13.2.1 which deals with International level athletes. It reads:

"In cases where Article 13.2.1 is not applicable, ***the decision may be appealed to the ADAK's Appeal Panel (Sports Tribunal).*** *The appeal*

process shall be carried out in accordance with the International Standard for Results Management."

40. Thus, in this case the Appeal falls within the jurisdiction of the Tribunal which is referred to as the Appeal Panel in the ADAK Rules.

41. Having established that the matter is properly before the Appeal Panel in terms of jurisdiction, we now need to address whether the appeal is within the timelines stipulated for lodging the said appeal.

a. Whether the Appellant's appeal before the Tribunal is time barred.

42. Article 13.6.2. of the ADAK Rules provides the timelines within which a party entitled to appeal may lodge an appeal with the ADAK's Appeal Panel (Tribunal). It reads:

"The time to file an appeal to the ADAK 's Appeal Panel shall ***be twenty-one (21) days from the date of receipt of the decision by the appealing party****……."*

43. The Respondent has submitted that the Appellant is outside the above stated time limits and that on this basis the appeal should be dismissed.

44. The Appellant in response stated that it is within the timelines and proceeded to state that the Notice of Appeal was lodged on the twenty first t day from the receipt of the decision subject to the appeal.

45. The Tribunal is aware of the Appellant's averments in paragraph 11 and 12 of its submissions. The Tribunal concurs that there was delay on its parts in transmitting the decision and this was necessitated by the Covid-19 pandemic.

46. The signed decision was transmitted to the Appellant on 17th September 2020 and the Appellant lodged its Notice of Appeal on the 7th October 2020, which was the last day of the 21 days provided for appeal.

47. The Tribunal is guided by the decision of the Court of Arbitration of Sports in **Arbitration CAS 2015/A/4215 Fédération Internationale de Football Association (FIFA) v. Korea Football Association (KFA) & Kang Soo Il, award of 29 June 2016.** The Court was faced with a similar

dilemma as the case at hand where the footballer was claiming that FIFA had lodged the appeal outside the stipulated 21-day time limit fixed under Article 80.1 of the FIFA ADR.

48. In its defence FIFA averred that its 21-day deadline started running when it received the grounds of the Appealed Decision from the AFC on 3rd September 2015, and not when the AFC received the said grounds from the KFA on 28 August 2015. The Court held that:

> *"148. Even if FIFA and the AFC were in constant communication regarding the KFA Disciplinary Proceedings as alleged by the Player,* ***he has not adduced any evidence to the effect that FIFA indeed received the grounds of the Appealed Decision on the same date as the AFC, i.e. on 28 August 2015.***
> *149……..*
> *150……..*
> *151. The Panel therefore rejects the Player's assertion that FIFA received the grounds of the Appealed Decision on 28 August 2015 merely because they were working closely with the AFC and finds FIFA's appeal deadline to have started running on 3 September 2015.*
> *152. Therefore, by filing the Statement of Appeal* ***on 23 September 2015, FIFA did so within the requisite 21-day period fixed under Article 80.1.1 of the FIFA ADR.***
> *153.* ***In view of the foregoing, this appeal is admissible****."*

49. The Tribunal is aware that transmitting of the signed decision was done at a later date as indicated in paragraphs 45 and 46 hereinabove. Taking this into consideration the Tribunal is inclined to align itself with the sentiments of the Appellant that the Appeal is within the 21-day time limit.

50. On the basis of the above decision, the Tribunal finds that the appeal is properly before it and within the stipulated timelines and thus it can address itself on the rest of the issues raised.

b. Whether the Appellant has discharged its burden of proof and in turn has the Respondent/Athlete established the source of the ADRV proving that it was not intentional;

51. When the matter was initially heard before the Tribunal, it is clear that the Respondent accepted the finding of the ADRV, and the finding was not challenged. This is provided in Paragraphs 36 and 37 of the decision in question where the Tribunal stated.

> *"36. This Panel from the foregoing therefore finds that the fact of* ***the AAF has not been contested, there being no contest, this 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…."*
>
> *37.Based on the above, this Panel finds that in this instance* ***there is an AAF from a WADA accredited laboratory which has not been challenged. There is also an admission by the Respondent to receiving medication for an alleged erectile dysfunction which is stated to be the source of the AAF****. ADAK has also stated, and it is on record that it has received substantial assistance from the Respondent in pursuing the source of the AAF"*

52. From the above reading of the excerpt of the judgement, it is clear that Appellant established an Anti-Doping rule violation and was able to meet the burden of proof expected of him.

53. In this Appeal the same finding has not been challenged. However, the Appellant is keen on showing that the AAF was intentional.

54. The ADAK Rules in Article 3.1 clearly provide the standards expected to prove an ADRV. It reads:

> *"ADAK shall have the burden of establishing that an Anti-Doping rule violation has occurred. The standard of proof shall be whether ADAK 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.*** *……..”*

55. Further, having established the existence of an ADRV and taking into consideration the acceptance of the charges against him in a letter dated 8th January 2019, the burden of proof then shifted to the Respondent herein to prove that the substance was not ingested intentionally.

56. However, the Respondent avers that the Appellant having established that the prohibited substance was present in the athlete’s sample, the Appellant still needs to prove that the Respondent ingested the same in an attempt to dope and gain an unfair advantage.

57. Counsel states in paragraph 11 of its submissions:

> *“11. Against this background, we submit that the principle of strict liability does not exempt ADAK from proving the existence of a doping offence the effect of any rule of law imposing strict liability is merely to render obsolete the proof of guilt on the part of the person subjected to the regime of strict liability,* ***while on the other hand such rule does not eliminate the need to establish the wrongful act itself*** *and the causal link between the wrongful act and the consequences”.*

58. This view could not be further from the truth. It is trite law 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.

59. The standard of proof in Article 3.1 of the ADAK ADR clearly states the extent to which the Appellant needs to establish an ADRV. 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***”

60. This clearly indicates that the regime put in place by the Respondent's rules is one of strict liability. Once the Appellant establishes an ADR it is then up to the Athlete to rebut this presumption is by proving that he/she did not act with intent or negligence.

61. In the case of Arbitration **CAS 2002/A/385 T. /International Gymnastics Federation (FIG), award of 23 January 2003,** the Court when faced with a similar predicament stated;

> *"As to the standard of proof, the Panel* ***appreciates that because of the drastic consequences of a doping suspension on a professional athlete's exercise of his/her trade*** *[Article 28 Swiss Civil Code (ZGB)] it is appropriate to apply* ***a higher standard than that generally required in civil procedure, i.e. to convince the court on the balance of probabilities.*** *Following established CAS case law, the disputed facts therefore have to be "established to the comfortable satisfaction of the court having in mind the seriousness of the allegation" "*

However, the Court did not stop there and went on to state;

> *"11.However, it would put a definite end to any meaningful fight against doping* ***if the individual federations were required to also prove the necessary subjective elements of the offence, i.e. intent or negligence on the part of the athlete*** *(CAS 95/141 C. v/ FINA, Digest of CAS Awards I, p. 215, 220; CAS 98/214 B. v/ FIJ, award of 17 March 1999, Digest of CAS Awards II p. 291, 302; CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 19 et seq.). In fact, since unlike a public prosecutor in criminal proceedings neither the federations nor the CAS have the ability to conduct their own investigations or to compel witnesses to give evidence,* ***it would be all too simple for an athlete to deny any intent or negligence and to simply state that he/she has no idea how the prohibited substance arrived in his/her body*** *(see CAS 96/156 F. v/ FINA, award of 6 October 1997, p. 41 et seq.).*
>
> *12. Therefore, once a federation is able to establish and – if contested – to* ***prove the objective elements of a doping offence, there is a presumption of fault on the part of the athlete.*** *The principle of presumed fault on the part of the athlete does not, however, leave him/her without protection because* ***he/she has the right to rebut the presumption, i.e. to establish that the presence of the prohibited substance in his/her body was not due to any***

intent or negligence on his/her part *(CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 20). The athlete may, for example, provide evidence that the presence of the forbidden substance is the result of an act of malicious intent by a third party (CAS 91/56 S. v/ FEI, Digest of CAS Awards I, p. 93, 97; CAS 92/63 G. v/ FEI, Digest of CAS Awards I, p. 115, 121; CAS 92/73 N. v/ FEI, Digest of CAS Awards I, p. 153, 157).*

13. Bearing in mind these principles, ***the Respondent has to prove the objective elements of the offence, no more and no less****. The Appellant in turn has to show that she* ***acted neither intentionally nor negligently****."*

62. In the current case, the Respondent does not contest the fact that his urine sample contained the forbidden substance 19- Norandrosterone, he cannot then be seen to claim that the Appellant has not satisfied the burden of proof by failing to prove that the doping was intentional. As seen by the caselaw cited in proving the presence of the banned substance, the organisation has met the standard of proof.

63. This is clearly set in article 2.1.2 which reads;

> *"**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 A or B Sample is split into two (2) parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split Sample"*

64. In the current case the Respondent did not challenge the findings of the ADR and waived his right for analysis of sample. Having done that the ADAK had satisfied its burden of proof and now it was up to the Respondent to prove that the ADRV was not his fault, as a result of his negligence or intentional.

65. 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.

66. The Court of Arbitration for Sports in the 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.**"*

67. In an attempt to support his claim of innocence, the Respondent gave the Tribunal his side of the story stating that he only took painkillers to soothe his arthritis and an injection into his body which was part of an ongoing treatment for Erectile Dysfunction.

68. However, the Respondent has been unable to conclusively detail to the hearing panel as to the nexus between the medication for erectile dysfunction and the AAF of 19-Norandrosterone.

69. Speaking to the need of 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 KeyterI 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.**"*

70. 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 – victims of 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**."*

71. 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.***
> *….*

The Sole Arbitrator finds that even if the Athlete's assertions were true, ***the Athlete did not prove on the balance of probability how the prohibited substance entered his body or the origin of the prohibited substance"***

72. In the present Appeal and a looking through the Respondents submissions, it is the Tribunal's view that the Respondent has failed to adduce concrete evidence to demonstrate the prohibited substance in his body was as a result of the injection.

73. This in turn precludes him from claiming for a reduction under Article 10.2.1.1 of ADAK Rules as he has failed to prove lack of intention in not justifying the source of the prohibited substance.

74. On the backdrop of the above precedents, 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.

75. Furthermore, the Appeal Panel is obliged to depart from the findings of the Hearing Panel that the AAF was not intentional.

c. Whether the Respondent has established No Fault or Negligence

76. In the Case of **Arbitrations CAS 2017/A/5301 Sara Errani v. International Tennis Federation (ITF) & CAS 2017/A/5302 National Anti-Doping Organisation (Nado) Italia v. Sara Errani and ITF, award of 8 June 2018**, 'no Fault' or 'Negligence' is defined as a situation where an athlete did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that s/he committed an ADRV.

77. The ADAK Rules in the Appendix defines No Significant Fault or Negligence as:

"No Significant Fault or Negligence: The Athlete or other Person's establishing that ***any Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping rule violation.*** *Except in the case of a Protected Person or*

Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete's system."

78. In order to appreciate the provision of No Significant Fault or evidence, we need to understand the claim of No Fault or Negligence. It is described in the Appendix of the ADAK Rules as:

> *"No Fault or Negligence: The Athlete or other Person's establishing that he or she* ***did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution****, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an Anti-Doping rule. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the* ***Athlete must also establish how the Prohibited Substance entered the Athlete's system****."*

79. Throughout the the proceedings the athlete has maintained that he is innocent and that the Non-Specified Substance 19-Norandrosterone entered into the Athletes body as a result of an injection given to him by a doctor as treatment for erectile dysfunction. He has even produced documentation from the said doctor indicating that he was undergoing the treatment.

80. It is on this basis that the Respondent prayed for a declaration that there be an immediate elimination of the period of ineligibility.

81. The Respondent while before the Hearing Panel claimed that the AAF was as a result of the injection. For him to be able to claim No fault or negligence, he needs to satisfy the Tribunal that he did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an Anti-Doping rule.

82. He was able to convince the Hearing Panel that the substance came into his body through the injection but was not able to convince the same panel that he had no fault of negligence.

83. The Hearing Panel justifies this finding in paragraph 50 of the decision where it states.

"50. In this instance, we find that the Respondent should bear normal fault having failed in conducting ***any of the basic objective elements of fault such as:***
a. Failing to take responsibility, in the context of anti-doping, for ***what he ingested and used****. Noting that an injection was administered****, he ought to have been more cautious.***
b. ***Failing to familiarize himself with the Anti-doping rules****, or to* ***make further inquiry*** *as he seemed to have self-acquired some knowledge on doping."*

84. Further reading of the decision of the Hearing Panel reveals that the athlete admitted the charges but has clearly failed to give a satisfactory explanation as to the origin of the non-specified substance in his sample. It stated in paragraph 43:

> *"Based on the foregoing, the panel having considered the circumstances as set out in the sworn testimony is of the view that the athlete did not intend to cheat or to unduly enhance his performance. For his part, he said that he informed the Doctor that he was a participating athlete therefore banned or estopped from using certain medical substances.* ***The onus and responsibility of disclosing participating status rests with the athlete pursuant to Article 22.1*** *on additional the Roles and Responsibilities of Athletes and other Persons. Specifically, Article 22.1.4 states thus:*
> *22.1.4 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.*
> *Based on the foregoing this Panel is of the view that the* ***Respondent did not fully discharge his responsibility by making sure the medication he received did not violate the anti-doping rules."***

85. It is a well settled principle that ignorance of the law is no defence. In support of this position, the Appeal Panel is guided by the case of ***Arbitration CAS 2012/A/2959 World Anti-Doping Agency WADA) v. Ali Nilforushan & Fédéderation Equestre Internationale (FEI),*** where the Court stated;

> *"The Panel accepts that Mr. Nilforushan had not received any anti-doping education and had never previously been subject to a drugs test, and that the FEI did not provide him directly with anti-doping education. The Panel also*

takes note that circumstances may exist where this can be a factor in a reduction in penalty under Article 10.5.2 ADRHA. While the Panel considers that the system of anti-doping might well be benefitted by federations providing more anti-doping education to those that fall within the ambit of their anti-doping rules, ***the Panel does not consider that Mr. Nilforushan's lack of anti-doping education alone is sufficiently exceptional to justify a reduction.*** *As recognized in CAS 2009/A/2012 at paragraph 70, "[w]hilst it is certainly desirable that a sports association should make every effort to educate athletes about doping,* ***it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body****". In the absence of other* ***mitigating factors such as exceptional youth or inexperience which in given circumstances may have a bearing, the Panel does not consider that the lack of anti-doping education in itself can operate to reduce Mr. Nilforushan's period of ineligibility*** *under Article 10.5.2 ADRHA, since an athlete competing at the level of* ***Mr. Nilforushan could and should have informed himself and been fully aware of the content of the anti-doping regulations that had been in force for a number of years"***

86. From the above case law, it is clear to the Appeal Panel that the Hearing Panel was in order when it stated in paragraph 44;

*"….****respondent 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"***

87. The Respondent has not adduced any concrete evidence before the Tribunal that supports his claim of how he ingested the prohibited substance and only claims that this happened as he did not know that the medication components fall under the prohibited substance.

88. He has however claimed that he is socio-economically disadvantaged athlete suffering erectile dysfunction and this seems to be the basis of the claim for no significant fault or negligence.

89. In the case of **Arbitration CAS 2008/A/1488 P. v. International Tennis Federation (ITF), award of 22 August 2008** the Court held that;

"20. Indeed as was evidenced during the hearing, ***the player appeared truly ignorant of all the readily available resources at her disposal****.*

While this is truly regrettable, the Panel finds that ***a player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent these very stringent and onerous doping provisions****. There must be some clear and definitive standard of compliance to which all athletes are held accountable.*

21. It is therefore the conclusion of this Panel that the decision of the ITF's Independent Anti-Doping Tribunal's was in the circumstances, the correct one, and is upheld by this Panel. ***The Panel accepts the Tribunals determination that there existed no circumstances in this case that would warrant the elimination or the reduction of the presumptive two-year period of ineligibility and upholds the Tribunal's decision and reasons in awarding the sanction."***

90. Going by Paragraph 42 of the Respondents 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.

91. 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.

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

93. 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.****"*

94. 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.

95. The Tribunal would also take this opportunity to refute the claims that the Respondent was unrepresented at trial and clarify the respondent waived such right and instead opted to represent himself at the hearing.

96. As has been clearly enunciated above, the Respondent has failed to convince this Appeal Panel that the AAF in his sample was not as a result of his fault, negligence or that it was not intentional and thus is not eligible for reduction of sanction under the no fault or negligence provision.

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

97. The Appeal 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.

98. 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.

99. Accordingly, the Tribunal finds that the Athlete has not met his burden of proof as is to be expected of him.

<u>Sanctions</u>

100. 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 <u>shall be four years where:</u>*
> *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

101. As a result of the above analysis, the Tribunal Orders as follows:

a. the Appeal herein is admissible.

b. The decision dated 28th July 2020 rendered by the Sports Dispute Tribunal of Kenya in the matter of ADAK vs George Ng'ang'a Kimotho (ADAK Case N0. 15 of 2018) is set aside.

c. George Ng'ang'a Kimotho has committed an anti-doping rule violation and is sanctioned for a four-year period of ineligibility starting on the date on which the Appeal Panel decision is delivered. However, any period of provisional suspension or ineligibility effectively served by George Ng'ang'a Kimotho before the delivery of the Appeal decision shall be credited against the total period of ineligibility to be served.

d. All competitive results obtained by George Ng'ang'a Kimotho from and including results of 22nd September 2019 are disqualified with all resulting consequences.

e. Each party to bear its own costs;.

Dated at Nairobi this ____*22nd*____day of _____*April* ,_____ 2021

John M. Ohaga

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John M. Ohaga SC, CArb
Chairperson

Mrs. Elynah Shiveka, Vice Chair	**Mr. Gabriel Ouko, Member**