

REPUBLIC OF KENYA



THE JUDICIARY

THE SPORTS DISPUTES TRIBUNAL

IN THE MATTER OF ANTI-DOPING ACT NO. 5 OF 2016 LAWS OF KENYA

IN THE MATTER OF ADAK ANTI-DOPING RULES

WORLD ANTI DOPING RULES 2015

IN THE MATTER OF INTERNATIONAL ATHLETICS FEDERATION RULES

AND

IN THE MATTER OF ARBITRATION OF SPORTS DISPUTES

ANTI-DOPING CASE NO. 4 OF 2021

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

-versus-

JOAN NANCY ROTICH..... ATHLETE

DECISION

APPEARANCE: Mr. Bildad Rogoncho for the Applicant
No Representation for the Athlete.

PANEL: Ms. Elynah Sifuna - Vice Chairperson
Mr. Gichuru Kiplagat - Member
Mr. Allan Mola - Member

HEARING: On 15th July 2021 it was noted that ADAK had filed its submissions on 24th June 2021 after the Athlete had communicated with ADAK indicating that she would like the Tribunal to render its decision in the matter.

The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, an elite National Level Athlete, (hereinafter '**the Athlete**').

I. Background

3. The Athlete is a National Level Athlete hence the IAAF (WA) Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
4. In the Charge Document of the Applicant it is stated that on 3rd March 2019, 20th October 2019 and 16th November 2019 the Athlete participated in three (3) races - the Kilimanjaro International Marathon, Rock City Marathon and the Serengeti Safari Marathon respectively in Tanzania despite being aware that she was provisionally suspended from participating in any future races.
5. The findings were communicated to the Respondent Athlete by Mr. Japhter Rugut, ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 22nd January 2021. In the said communication the Athlete was offered an opportunity to provide an explanation for the ADRV by 5th February 2021. (See Notice to Charge dated 22nd January 2021, **JNR 2** in the Charge Document).
6. The Respondent Athlete failed to respond to the charges within the specified timeline of 5th February 2021 and was yet to respond as at the time of filing of the Charge Document.
7. The Applicant therefore preferred the following charge against the Athlete Respondent:
Violation of the Prohibition of Participation During Ineligibility
8. The Notice to Charge dated 22nd January 2021 was filed at the Tribunal on 15th April 2021.
9. Upon reading the Notice to Charge dated 22nd January 2021 presented by Mr. Bildad Rogoncho on behalf of the Applicant, the Tribunal directed and ordered as follows on 22nd February 2021:
 - (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form, this Direction No. 1 and all relevant documents on the Respondent Athlete by Friday, 19th March, 2021;

- (ii) The Panel constituted to hear this matter shall be as follows; Mrs. Elynah Shiveka, Panel Chair, Mr. Edmond Gichuru Kiplagat, Member and Mr. Allan Owinyi, Member.
 - (iii) The matter to be mentioned on Thursday 25th March 2021 to confirm compliance and for further directions.
10. The Applicant confirmed having served the Athlete with the ADRV notice. The matter was to be mentioned on 15th April 2021 for further directions
 11. On 15th April 2021 the Charge Document was filed at the Tribunal Secretariat by the Applicant. The matter was mentioned at the Tribunal on 15th April 2021 to confirm compliance with filing of the Pre-Trial documents by the Applicant, when Counsel for the Applicant attended. The Tribunal was informed that this was a fresh matter against the Athlete. The Athlete was neither present nor represented. The Applicant through Mr. Rogoncho confirmed that service had not been effected on the Respondent and further submitted that they would require 21 days to effect service of the same to the Athlete. The Tribunal directed that the Applicant shall effect service on the Athlete within 21 days and the matter was set for mention on 13th May 2021 to confirm compliance by the Applicant.
 12. At another mention on 20th May 2021, Mr. Bildad Rogoncho attended for ADAK the Applicant and informed the Chair that he had filed the Charge Document in the matter. The Chairman informed him that he could not trace the Charge documents to the Court file but Mr. Rogoncho stated that he had filed them the previous day. He was given 14 days to serve the Athlete. Mr. Rogoncho also confirmed that he had the Athlete's contacts and had been trying to serve her, but she had been evasive. The Tribunal directed that the matter be mentioned on 3rd June 2021 to establish status of service of the charge on the Athlete.
 13. On 17th June 2021, Counsel for the Athlete stated that the purpose of the mention was to have the Athlete attend. He indicated that the Athlete had sent communication indicating that she would like the Tribunal to render its decision. He requested for 14 days to file the Applicant's submissions. The matter was fixed for mention on 15th July 2021 to allocate a date for ruling. The Applicant was granted a further 7 days to file its submissions.
 14. On 5th August 2021, the decision was not ready. The Tribunal was to render its decision on 26th August 2021 at 2.30 pm. On 26th August 2021, the Judgment was adjourned to 9th September 2021. On 9th September 2021 it was then adjourned to 16th September 2021.

II. Summary of Submissions by the Parties

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

A. Applicant's Submissions

16. The Applicant "*wishes to adopt and own the charge documents dated and the annexures thereto as an integral part of its submissions*". In its No. 3 the Applicant states: "*The Athlete herein is charged with an Anti-Doping Rule Violation for the **Violation of Prohibition of Participation During Ineligibility** in contravention of the ADAK ADR (herein referred to as ADAK Rules).*"
17. Mr. Rogoncho, Counsel for the Applicant in number 4 of its submissions submitted that "*The athlete is an Elite National Level Athlete and therefore the result management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2015 to constitute a hearing panel which the athlete was comfortable with.*"
18. In its No. 5 the Applicant submits that, "*The matter was set down for hearing and the Athlete was unrepresented.*" In its no 6, the Applicant further submits that the matter came up for hearing and the Athlete failed to attend, but responded vide WhatsApp and accepted the charges and further requested the panel to issue a decision in her case.
19. The Applicant stated the background/facts of the case under number 7 stating that "*The respondent is a female Athlete hence the WA competition rules, WA Anti-Doping Regulations, the WADC and ADAK ADR apply to her.*"
20. The Applicant stated under No. 8 that "*On the dates of 3rd March 2019, 20th October 2019 and 16th November 2019, the athlete knowingly participated in three races – the Kilimanjaro International Marathon, Rock City Marathon and the Serengeti Safari Marathon respectively despite being aware that she was provisionally suspended from participating in any future races.*"
21. It added under No. 9 that "*The findings were communicated to the respondent athlete by Japhther K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 22nd January 2021. In the said communication the athlete was offered an opportunity to provide an explanation by 5th February 2021.*"
22. It was the Applicant's submission under No. 10 that, "*The respondent failed to respond to the charges after being served with the Notice of Charge and had since seized communication and was yet to respond at the time of filing the Charge document.*" Consequently. Under No. 11 it was stated that "*The Charge documents were prepared and filed by ADAK's Advocates and the Athlete responded vide WhatsApp and accepted the charges and further requested the panel to issue a decision in her case.*"
23. Under No. 12, the Applicant avers that the matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed

by the rules and the matter was pending determination resulting to a request for submissions by the parties.

24. Regarding its legal position the Applicant “[...] submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.”
25. It further submitted under No. 14 that “it is provided at Article 3.2 that facts relating to Anti-Doping rule violation may be established by **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 and **presumed to have conducted sample analysis** and custodial procedures in accordance with international standards of laboratories.
 - c) Departures from any other International Standards or other Anti-Doping rule or policy set forth 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 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.
26. It also listed the Athlete’s roles and responsibilities as spelt out in ADAK ADR/WADC Article 22.1.
 - a) To be knowledgeable of and comply with the 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.”**
27. The Applicant stated under No. 16 that “The athlete herein is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;
“The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including:
 - Ethics, fair play, and honesty

- Health
- Excellence in performance
- Character and education
- Fun and joy
- Dedication and commitment
- Respect for the rules and laws
- Respect for self and other participants
- Courage
- Community and solidarity”

28. The Applicant stated under No. 17 that the burden of proof expected to be discharged by the Anti-Doping Organization under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

29. On proof of the ADRV the Applicant averred under No. 18 that *“The Athlete is charged with **Prohibition of Participation During ineligibility** Contrary to article 10.11 and 10.22 of the ADAK ADR. Prohibition of Participation During ineligibility constitutes to a new period of ineligibility equal in length to the original period of Ineligibility and shall be added to the end of the original period of Ineligibility. The Applicant further averred under No’s 19 and 20 that under Article 10.2.1 the burden of proof shifts to the athlete to demonstrate No fault, negligence or intention to entitle her to a reduction of sanction. The Applicant therefore urged the Tribunal to find that an ADRV has been committed by the Respondent herein.”*

30. Regarding intention and under No. 21 the Applicant submits that the Respondent has proved intention to participate in the event during her period of ineligibility.

“It is the Applicant’s submission that the Respondent has proved intention to participate in the events during her period of ineligibility.”

31. Laying down its position in regards to Fault/Negligence the Applicant in its No. 22 stated: *“The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-Doping rules. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.”*

32. Further under No. 23 *“The Applicant submits that the athlete has a personal duty to ensure that they disclose to their International Federation and to the Agency any decision by non-signatory finding that the Athlete committed an Anti-Doping rule violation within the previous ten years.*

22.1.2 To disclose to their International Federation and to the Agency any decision by a non-Signatory finding that the Athlete committed an Anti-Doping rule violation within the previous ten years.

22.1.6 To cooperate with Anti-Doping Organizations investigating Anti- Doping rule violations.

The Applicant further avers under No. 24 that *“It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon her before participating in the event. She was thus grossly negligent.”*

33. On Knowledge the Applicant contended that *“the principle of strict liability is applied in situations where participation during period of ineligibility by an athlete has constituted an ADRV. It means that each athlete is strictly liable for his or her own knowledge on Anti-Doping Rules Violations whether or not the athlete intentionally or unintentionally committed an ADRV or was negligent or otherwise at fault.”*

Under No. 26, the Applicant contends that the Athlete has had a long career in athletics, and it is only questionable that she has had no exposure to the crusade against ADAK Rules.

Under No. 27 the Applicant submits that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that her participation in events will not be in violation of the Code. Ignorance is no excuse.”

34. In regard to sanction, the Applicant stressed under No. 28 that *“For an ADRV under Article10.12, Article10.12.3 of the ADAK ADR provides for a new period of ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of ineligibility may be adjusted based on the Athlete or other Person's degree of Fault and other circumstances of the case.*

Under No. 29 they state that, *“In the circumstances, the Applicants are convinced that the Respondent has not demonstrated no fault/negligence on her part as required by ADAK rules and the WADAC to warrant sanction reduction.”*

35. In Conclusion and under No. 30, the Applicant submitted that the ideal considerations while sanctioning the Athlete are:

- a. The ADRV has been established as against the athlete
- b. The failure by the athlete to establish no intention to commit an ADRV
- c. Failure by the athlete to take caution by not participating in events while serving a period of ineligibility
- d. The knowledge and exposure of the athlete to Anti-Doping procedures and programs and/or failure to take reasonable effort to acquaint themselves with Anti-Doping policies
- e. The maximum sanction of four years ought to be imposed as no plausible explanation has been advanced for the Anti-Doping Rule Violation of participation during period of ineligibility

36. Therefore the Applicant urged *“the panel to consider the sanction provided for in Article10.12.3 of the ADAK Rules and sanction the athlete to 4 years period of ineligibility.”*

B. Athlete's Submissions.

37. The Athlete was unrepresented in this case.

The matter came up for hearing and the Tribunal was informed that other than the athlete failing to attend proceedings, she had communicated with the Applicant vide WhatsApp and accepted the charges and further requested the panel to issue a decision in her case.

The panel was satisfied by the position.

III. Jurisdiction

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

IV. Applicable Law

39. Article 10.12 **Status during Ineligibility** of the ADAK Rules 2016 stipulates the circumstances and conduct which constitute anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

10.12.1. Prohibition against Participation during Ineligibility

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

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.

An athlete or other Person subject to a period of Ineligibility shall remain subject to testing.¹

40. Additionally, as used in WADC's Article 3.1 provides as follows:

The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization 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.

Where the Code places the burden 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.

41. Further, Article 3.2 details methods of establishing facts and presumptions:

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

3.2.3 Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or anti-doping organization rules which did not cause an adverse analytical finding or other anti-doping rule violation shall not invalidate such evidence or results. if the athlete or other Person establishes a

¹ [Comment to Article 10.12.1: For example, subject to Article 10.12.2 below, an Ineligible Athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level event organization without triggering the Consequences set forth in **Article 10.12.3**. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Mutual Recognition.)]

departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an adverse analytical finding or other anti-doping rule violation, then the anti-doping organization shall have the burden to establish that such departure did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the athlete or other Person to whom the decision pertained of those facts unless the athlete or other Person establishes that the decision violated principles of natural justice.

42. Additionally WADC's Article 7.9 provides for principles applicable to Provisional Suspensions as follows:

Article 7.9 Principles Applicable to Provisional Suspensions

7.9.1 Mandatory Provisional Suspension after an adverse analytical finding.

The Signatories listed below shall adopt rules providing that when an adverse analytical finding is received for a Prohibited Substance or a Prohibited Method, other than a Specified Substance, a Provisional Suspension shall be imposed promptly after the review and notification described in Article 7.2, 7.3 or 7.5: where the Signatory is the ruling body of an event (for application to that event); where the Signatory is responsible for team selection (for application to that team selection); where the Signatory is the applicable international Federation; or where the Signatory is another anti-doping organization which has results management authority over the alleged anti-doping rule violation. A mandatory Provisional Suspension may be eliminated if the athlete demonstrates to the hearing panel that the violation is likely to have involved a Contaminated Product. A hearing body's decision not to eliminate a mandatory Provisional Suspension on account of the athlete's assertion regarding a Contaminated Product shall not be appealable.

Provided, however, that a Provisional Suspension may not be imposed unless the athlete is given either: (a) an opportunity for a Provisional hearing, either before imposition of the Provisional Suspension or on a timely

basis after imposition of the Provisional Suspension; or (b) an opportunity for an expedited hearing in accordance with Article 8 on a timely basis after imposition of a Provisional Suspension.

7.9.2 Optional Provisional Suspension based on an adverse analytical finding for Specified Substances, Contaminated Products, or other Anti-Doping Rule Violations.

A Signatory may adopt rules, applicable to any event for which the Signatory is the ruling body or to any team selection process for which the Signatory is responsible or where the Signatory is the applicable international Federation or has results management authority over the alleged anti-doping rule violation, permitting Provisional Suspensions to be imposed for anti-doping rule violations not covered by Article 7.9.1 prior to analysis of the athlete's B Sample or final hearing as described in Article 8.

Provided, however, that a Provisional Suspension may not be imposed unless the athlete or other Person is given either: (a) an opportunity for a Provisional hearing, either before imposition of the Provisional Suspension or on a timely basis after imposition of the Provisional Suspension; or (b) an opportunity for an expedited hearing in accordance with Article 8 on a timely basis after imposition of a Provisional Suspension.

if a Provisional Suspension is imposed based on an A Sample adverse analytical finding and a subsequent B Sample analysis (if requested by the athlete or anti-doping organization) does not confirm the A Sample analysis, then the athlete shall not be subject to any further Provisional Suspension on account of a violation of Article 2.1. in circumstances where the athlete (or the athlete's team as may be provided in the rules of the applicable Major event organization or international Federation) has been removed from a Competition based on a violation of Article 2.1 and the subsequent B Sample analysis does not confirm the A Sample finding, if, without otherwise affecting the Competition, it is still possible for the athlete or team to be reinserted, the athlete or team may continue to take part in the Competition.²

² **Note:** Under definition of 'Consequences of ADRV violations', (c) Provisional Suspension means the athlete or other Person is barred temporarily from participating in any Competition or activity prior to the final decision at a hearing conducted under Article 8.

V. MERITS

43. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

- a. *Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*
 - b. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
 - c. *Reduction based on No Fault/No Negligence/Knowledge;*
 - d. *The Standard Sanction and what sanction to impose in the circumstance.*
- A. *Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*

44. In the Charge Document of the Applicant it is stated that on 3rd March 2019, 20th October 2019 and 16th November 2019 the Athlete participated in three (3) races - the Kilimanjaro International Marathon, Rock City Marathon and the Serengeti Safari Marathon respectively in Tanzania despite being aware that she was provisionally suspended from participating in any future races.

The athlete was unrepresented and communicated her intention not to participate in the proceedings, and for the tribunal to render its decision.

The fact of the Athlete's participation at the said races was thus uncontested by the athlete.

The panel shall examine the position of the athlete vis a vis the definition of "admission" with reference to the ADRV. An admission can be express such as a written or a verbal statement, by a person concerning the truth of an action, or it may be implied by a person's conduct. If someone fails to deny certain assertions which, if false, would be denied by any reasonable person, such failures indicate that the person has accepted the truth of the allegations.

The Applicants' pleadings are uncontroverted.

The Panel shall surmise that the occurrence of the ADRV was established by the Applicant to its comfortable satisfaction.

45. The other position to discharge is whether mere participation was tantamount to commission of an ADRV by the Athlete namely, *Violation of Prohibition of Participation During Ineligibility in contravention of the ADAK ADR* in this particular case. The Applicant contended that *"the principle of strict liability is applied in situations where participation during periods of ineligibility by an athlete has constituted an ADRV. It means that each athlete is strictly liable for his or her own knowledge on Anti-Doping Rules Violations whether or not the athlete intentionally or unintentionally committed an ADRV or was negligent or otherwise at fault."*

B. Was the Athlete's ADRV intentional;

46. In the Charge Document of the Applicant it is stated that on 3rd March 2019, 20th October 2019 and 16th November 2019 the Athlete participated in three (3) races - the Kilimanjaro International Marathon, Rock City Marathon and the Serengeti Safari Marathon respectively in Tanzania despite being aware that she was provisionally suspended from participating in any future races. To prove lack of intention, the Athlete **must demonstrate that he did not participate in the event during his period of ineligibility.**

The charge was uncontested and the pleadings uncontroverted.

47. At the outset we note that the Applicant adopted and owned *“the charge documents dated and the annexures thereto **as an integral part of its submissions**”*. The panel is satisfied by the Applicants pleadings in regard to the charge.

C. Reduction based on No Fault/No Negligence/Knowledge;

48. The Notice of Charge and the Charge Documents were the evidential basis for the Applicant's case against the Athlete as seen in the Applicant's pleadings. The Applicant stressed under No. 28 that *“For an ADRV under Article 10.12, Article 10.12.3 of the ADAK ADR provides for a new period of ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of ineligibility **may be adjusted based on the Athlete or other Person's degree of Fault and other circumstances of the case.***

Under No. 29 they state that, *“In the circumstances, the Applicants are convinced that the Respondent has not demonstrated no fault/negligence on her part as required by ADAK rules and the WADAC to warrant sanction reduction.”*

The Applicant's case is uncontroverted. There is therefore no basis for reduction based on No Fault/No Negligence/Knowledge.

D. The Standard Sanction and what sanction to impose in the circumstance;

49. In the Charge Document of the Applicant it is stated that on 3rd March 2019, 20th October 2019 and 16th November 2019 the Athlete participated in three (3) races - the Kilimanjaro International Marathon, Rock City Marathon and the Serengeti Safari Marathon respectively in Tanzania despite being aware that she was provisionally suspended from participating in any future races.
50. The findings were communicated to the Respondent Athlete by Mr. Japhter Rugut, ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 22nd January 2021. In the said communication the Athlete was offered an opportunity to provide an explanation for the ARV by 5th February 2021. (See Notice to Charge dated 22nd January 2021, **JNR 2** in the Charge Document).

51. The Respondent Athlete failed to respond to the charges within the specified timeline of 5th February 2021 and was yet to respond as at the time of filing of the Charge Document.
52. The athlete allegedly communicated with the Applicant, and made it clear her intention not to participate in the proceedings and for the tribunal to make its decision.
53. *For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, she/he did not know that his conduct constituted an ADRV [...] CAS 2014/A/3820, par. 77 'the proof by a balance of probability requires that one explanation is more probable than the other possible explanation.'*

The athlete was unrepresented and did not participate in the proceedings. The Applicants case is therefore wholly uncontroverted.

VI. DECISION

54. Consequent to the discussions of the merits as above, it is directed that ADAK has made out its case against the athlete and that there was indeed an Anti-Doping Rule Violation by the athlete.
55. The sanctions meted are as prayed and as under Articles 10.12 and under 10.12.3 to wit;
 - i. The applicable ineligibility period is hereby upheld;
 - ii. The period of ineligibility shall be four years from 28th February 2023;
 - iii. All competitive results obtained by the Respondent Athlete from and including 3rd March 2019, 20th October 2019 and 16th November 2019 including prizes, medals and points;
 - iv. Each party shall bear its own costs;
 - v. The right of appeal is provided for under Article 13 of WADA Code, WA Anti-Doping Regulations and Article 13 of ADAK ADR.

Dated at Nairobi this 16th day of September 2021

Shiveka

Mrs. Elynah Shiveka, Panel Chairperson

[Signature]

Mr. Edmond Kiplagat, Member

[Signature]

Mr. Allan Owinyi, Member