

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  
IN THE RESULTS MANAGEMENT PANEL  
ANTI-DOPING CASE NO. 7 OF 2021

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

-versus-

MARTHA WANJIKU NJOROGE ..... RESPONDENT

DECISION

**APPEARANCES:**

Mr. Bildad Rogoncho for the Applicant.

There was no Representation for the Athlete (In person)

**PANEL:** Ms. Elynah Sifuna – Deputy Chairperson  
Mr. Peter Ochieng - Member  
Mr. Allan Mola - Member

**HEARING:**

During a Mention on 4<sup>th</sup> November 2021, Mr. Rogoncho informed the Tribunal that the Respondent had requested to be heard during the Eldoret Circuit on 11<sup>th</sup> November 2021. The Respondent did not wish to have any legal representation, had not filed any documents and wished to be heard orally. That position was clarified with the Respondent before the hearing in Eldoret, and the Athlete was heard orally, in Court.

## 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**

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 her.

3. On 6<sup>th</sup> June 2021, ADAK Doping Control Officers (DCOS) collected a urine Sample from the Athlete. Assisted by the DCO, the sample was split into two separate bottles which were given reference numbers **A 4589608** (the "A" Sample) and **B 4589608** (the "B" Sample).
4. Both Samples were transported to South Africa, to a WADA accredited laboratory in Bloemfotein, Free State South Africa (hereinafter "the laboratory") for doping analysis. The laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding (AAF) presence of a prohibited substance **Nandrolone 19-Norandrosterone**.
5. **19-Norandrosterone** is listed as an Exogenous Anabolic Androgenic Steroid (AAS) under S.1.1 under WADA's 2021 Prohibited List
6. The finding was communicated to the Respondent Athlete by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 4<sup>th</sup> August 2021. In the said communication the Athlete was offered an opportunity to provide a written explanation for the AAF by 24<sup>th</sup> August 2021.
7. The same letter also informed the Athlete of her right to request for the analysis of B Sample and/or to accept or deny the charges and/or request for a hearing and gave a deadline of 5.00 pm, 24<sup>th</sup> August 2021 for her detailed response.
8. The Athlete responded via email on 24<sup>th</sup> August 2021, at 8.14 pm and acknowledged receipt of the ADRV Notice
9. A Notice to Charge dated 4<sup>th</sup> September 2021 was filed by ADAK on 21<sup>st</sup> September 2021.
10. On 22<sup>nd</sup> September 2021 upon reading the Notice to Charge, the Tribunal ordered the Applicant to serve the Mention Notice, the Notice to Charge, the Notice of ADRV, Doping

Control Form, the Direction No. 1 and all other relevant documents to the Respondent/Athlete by 20<sup>th</sup> October 2021. Consequently, a Panel was constituted as follows to hear the matter:

Elynah Shiveka –Member  
Gabriel Ouko - Member  
Allan Owinyi – Member

The matter was to be mentioned on 21<sup>st</sup> October 2021 for further directions.

11. On 4<sup>th</sup> November 2021, Mr. Rogoncho informed the Tribunal that the Athlete had requested to be heard during the Eldoret Circuit on 11<sup>th</sup> November 2021. The Athlete did not wish to have any legal representation, had not filed any documents and preferred to be heard orally. The Tribunal directed that the matter be heard in Eldoret on 11<sup>th</sup> November 2021.
12. On 11<sup>th</sup> November 2021, the Athlete was present in Court. The matter was fully heard.
13. Mr. Rogoncho was directed to file written submissions in 14 days after which a mention date was to be taken to confirm filing of submissions.
14. On 25<sup>th</sup> November 2021 the Applicant's submissions were filed at the Tribunal. The Respondent did not wish to file any submissions.

## II. Parties

### Submissions

#### Applicant's Submissions

15. The Applicant stated that it wished to adopt and own the Charge Documents dated 19<sup>th</sup> October 2021 and the annexures thereto as an integral part of its submission.
16. Regarding their legal position the Applicant submitted 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."
17. The Applicant also listed the various presumptions and roles/responsibilities of the Athlete as stipulated under WADC/ADAK ADR's Article 3.2. The Applicant also stressed the Athlete's duty to uphold the spirit of sports as laid down the WADC's Preface.
18. ADAK stated that the burden of proof expected to be discharged under Article 3 of ADAK Rules and WADC was ably done by the prosecution.
19. The Applicant submitted that the Athlete, "In her defense ... made several admissions and a few general denials including that: -

- a. She admitted to being aware of the doping control process as she has been tested thrice
- b. She admitted to having attended an anti-doping workshop in 2013
- c. She admitted to not conforming and cross-checking the ingredients of the medication before ingesting them
- d. She admitted to not informing the doctor that she was an athlete before she received treatment
- e. She admitted to never taking time to do any research on the fight against doping
- f. She admitted ingesting the prohibited substance which was prescribed to her by her doctor for an underlying condition to which she provided supporting documents
- g. She denied that she negligently or intentionally consumed any prohibited substance with the intention of enhancing her performance

20. Regarding proof of an ADRV, the Applicant said that the respondent is charged with the presence of a prohibited substance, a violation of Article 2.1 of the ADAK ADR. **19-Norandrosterone** is a Non-Specified Substance and attracts a period of ineligibility of 4 years, and 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.

21. It was the Applicant's contention that similarly 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. They urged the Tribunal to find that an ADRV has been committed by the Respondent herein.

22. Laying down its arguments regarding **„intention“**, the Applicant relied on the established case-law of CAS 2017/A/4962 WADA V. **Comitato Permanente Anti-doping San Marino Nado (CPA) & Karim Gharbi** that stated that, "For an ADRV to be committed non-intentionally, **the Athlete bears the burden of proof of establishing that that the anti-doping rule violation was unintentional and thus to establish how the relevant forbidden substance entered his/her body**". The same case went on to state under Par.56 that the **Athlete bears the burden of establishing that the violation was not intentional and therefore must establish how the substance entered his or her body on the "balance of probability"**, a standard long established in CAS jurisprudence.

23. It is the Applicant's submission that the Athlete must prove that, **he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV and that the Athlete has failed to prove a lack of intention to cheat based on his inability to prove that the supplements he took contained no prohibited substance and therefore, under the ADAK ADR, an offence has been committed as soon as it is established that a prohibited

substance was present in the Athletes fluid or tissue. There is a legal presumption that the Athlete is responsible for the presence of the prohibited substance present in his system.

24. On the issue of **Origin**, the Applicant stated that from the explanation given by the athlete, she confirmed the presence of the prohibited substance in her sample through ingestion of **Nandrolone (19-Norandrosterone)** that was prescribed to her as she stated. They contended that the origin had thus been established.
25. It is worth noting that, as held in the case of CAS 2016/A/4534 **Maurico Fiol Villanueva V. Federation Internationale de Natation (FINA)** under par.36 (i) that stated...“it is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of that substance.”
26. Under **Fault/Negligence**, the Applicant stated that Athlete is charged with the responsibility of being knowledgeable of and to comply with anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. They contend that the Athlete failed to discharge her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR. Relying on **CAS 2012/A/5317 Aleksei Medvedev V. Russian Anti-Doping Agency (RUSADA)** the Applicant observed that „to have acted with no fault the athlete must have exercised “utmost caution” in avoiding doping as the athlete’s fault is measured against the fundamental duty which he/she owes under the WADC to avoid ingesting any prohibited substance.” The Applicant contends that the Athlete fell short of this requirement as she failed to carefully consider the medication and cross-check. They aver that the athlete ought to have known better the responsibilities bestowed upon her before ingesting the prohibited substance. She was apparently thus grossly negligent.
27. The Applicant also relied on the case of **CAS 2016/A/4676 Arijan Ademi V. Union of European Football Associations (UEFA)**, where the panel observed that, „*The definition of no significant fault/negligence requires the player to establish his fault or negligence when viewed in the totality of the circumstances and considering that no fault or negligence criteria, was not significant in relation to the anti-doping rule violation. The totality of the circumstances includes the level of a professional player purchasing a product from a non-secure source and using a suspicious package and pills. The no fault or negligence criteria refers to the player not knowing or suspecting, and not being able to reasonably have known or suspected even with the exercise of utmost caution hat he may have used an unsafe product. Finally, the significance is in relation to the ADRV which here is the use of a prohibited stanozolol, a prohibited steroid which is notoriously used for doping, and which is not allowed in and out of competition.*”

28. On knowledge, the Applicant contends that the Athlete has had a long career in athletics and has been exposed to the anti-doping crusades in sports and she cannot simply assume as a general rule that the products she ingests are free of prohibited/specified substances. In Arbitration **CAS 2006/A/1025 Mariano Puerta V. International Tennis Federation (ITF)** the Applicant observed that athletes are responsible for what they ingest.
29. On **sanction**, the Applicant submitted, “For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance “and the agency can establish that the (ADRV) was intentional”. If Article 10.2.1 does not apply, the period of ineligibility shall be two years.”
30. The Applicant also stated that on its face, Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which are that the athlete (i) Must establish how the specified substance entered his/her body and (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. Then upon submission of satisfactory evidence, can the degree of culpability be reduced with a view of eliminating or reducing the period of suspension.
31. The Applicant in summing up stated that, in the circumstances, the Respondent has adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, they are convinced that the Respondent has not demonstrated no fault/negligence on her part as required by the ADAK rules and the WADC to warrant sanction reduction.
32. The Applicant concluded by praying that “The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

### **Athlete's Submissions**

33. The athlete appeared in Eldoret for hearing.
34. In her submissions during the hearing (Examination and confirmation by the panel) the athlete confirmed her identity and profession. She confirmed that she is single, with no children, that she was a form 4 leaver and that she is an athlete in the marathon division. She has been running since the year 2013, and competitively since the year 2016.
35. The Athlete confirmed having run quite a number of races including the Ndakaine Marathon where she finished 5<sup>th</sup>, in Madoka where she finished 4<sup>th</sup>, and at the 2021 Eldoret City Marathon where she finished 4<sup>th</sup>. Internationally, she confirmed participation at a 10k race

in Germany where she finished 6<sup>th</sup>, and at Napoli in Italy where she finished 4<sup>th</sup> at the 2019 Napoli half marathon.

36. The Athlete confirmed that she was tested while in Madoka, at the Napoli race and also at the Eldoret City Marathon. She alleged not to know what it is that they test.
37. The Athlete confirmed training in Iten with a group of athletes and without a manager. She confirmed knowing ADAK and attending an ADAK training in Iten.
38. The Athlete stated that she was informed that she had tested positive during the Eldoret City Marathon, for a banned substance. The communication was via email from ADAK. She stated that she didn't know what ***norandrosterone*** was and that she responded with medical documents in support of her case.
39. The Athlete confirmed being prescribed with androgen. She confirmed that a sample was collected on 6<sup>th</sup> June 2021. It was also confirmed that the androgen prescribed to her contained nandrolone and norandrosterone. It was confirmed from the prescription from Iten County Referral Hospital dated 18<sup>th</sup> February 2021. She confirmed finishing the first tablet on the prescription in May and that the androgen was injected twice and finished in April.
40. The Athlete stated that she googled the drugs but that she did not understand much. She confirmed being aware of her responsibilities as an athlete. She stated that her left arm had been ailing since 2018 and that she had a nerves issue. The issue developed on its own and was not from any accident. She further stated that the prescription of 18<sup>th</sup> February 2021 was for rushes and irregular periods, the latter complication having started in 2017.
41. The Athlete averred that she didn't know the drugs would have such an effect on her and that she used the drugs strictly to help her medical situation and therefore could not have been for the purpose of acquiring an unfair advantage in any competition and consequently enhancing her performance and winning.

### III. The Charge

The Anti-Doping Agency of Kenya preferred the following charge against the Athlete:- **Presence of 19-Norandrosterone a Non-Specified substance in the Athlete's Sample contrary to Article 2.1 of ADAK ADR, Article 2.1 of the WADC and Rule 32.2 (a) and Rule 32.2 (b) of the IAAF rules.**

*19-Norandrosterone* is a Non-Specified substance and is listed as an Exogenous Anabolic Androgenic Steroid (AAS) under S.1.1 under WADA's 2021 Prohibited List.

#### IV. Jurisdiction of the Tribunal

42. The Tribunal has jurisdiction under Section 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 and hear and determine the case.
43. The Athlete also admitted the jurisdiction of this Tribunal to determine the case.

#### V. Applicable Law

44. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 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 ...

#### VI. Merits

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

46. The Tribunal will address the issues as follows:

- (i) *Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*
- (ii) *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
- (iii) *Reduction based on No Fault/No Negligence*
- (iv) *Implications of Substantial Assistance*
- (v) *Sanction*



A. The Occurrence of an ADRV, the Burden and Standard of proof.

47. As used in WADC's Article 3.1:

*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.*

*[Comment to Article 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]*

VII. Burden and Standard of Proof

48. First in regard to the **Standard of proof**, the Panel would wish to point the attention of the parties to the aforementioned „Comment to Article 3.1“ in regard to WADA Code“s applicable standards. In particular, the Code“s introductory comments on Purpose, Scope and Organization of the World Anti-Doping Program and the Code;

*The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are:*

- To protect the athletes' fundamental right to participate in doping-free sport and t h u s promote health, fairness and equality for athletes worldwide, and*
- To ensure harmonized, coordinated an effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.*

*The Code*

*The Code is the f u n d a m e n t a l and un i v e r s a l document upon which the World A n t i -Doping P r o g r a m in s p o r t is based. The purpose of the Code is to advance the anti-doping effort through universal*

*harmonization of core anti-doping elements. it is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The Code has been drafted giving consideration to the principles of proportionality and human rights.*

*The World Anti-Doping Program*

*The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs.*

*The main elements are:*

*Level 1: The Code*

*Level 2: International Standards*

*Level 3: Models of Best Practice and guidelines"*

49. Further to this, Kenya became the 123<sup>rd</sup> State Party to ratify the UNESCO International Convention against Doping in Sport on 25/08/2009; in particular,

*„The UNESCO Convention allows Governments of the world to align their domestic laws and policies with the World Anti-Doping Code, which in turn creates synergy between the rules governing anti-doping in sport and national legislation. Therefore, whenever a country ratifies the Convention, it further strengthens the global system.“*

50. It is in furtherance of this ratification that Kenya passed legislation for effective implementation of the WADA Code namely, Anti-Doping Act of 2016 (together with its subsidiary Anti-Doping Rules-ADR), see Code

INTRODUCTION:

*„All provisions of the Code are mandatory in substance and must be followed as applicable by each anti-doping organization and athlete or other P e r s o n . The Code does not, however, replace or eliminate the need for comprehensive anti-doping rules to be adopted by each anti-doping organization. While some provisions of the Code must be incorporated without substantive change by each anti-doping organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each anti-doping organization or establish requirements that must be followed by each anti-doping organization but need not be repeated in its own anti-doping rules.“*

Additionally,

*„Each Signatory shall establish rules and procedures to ensure that athletes or other Persons under the authority of the Signatory and its member organizations consent to the dissemination of their private data as required or authorized by the Code, and are bound by and compliant with Code anti-doping rules, and that the appropriate Consequences are imposed on those athletes or other Persons who are not in conformity with those rules. These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, **are distinct in nature from criminal and civil proceedings.** They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.“*

**Occurrence of ADRV**

51. Going back to the issue of the ADRV this Panel observes that, the „presence“ of the prohibited substance in the Athlete’s body was not a contested fact in this case. In actual fact, the Athlete admitted to using androgen and submitted a prescription from Iten General Referral Hospital.

52. Further, the Panel notes that WADC’s Article 3.2 provides that „[...] *Facts related to anti-doping rule violations may be established by any reliable means, including admissions.* [...]“.

Having looked at and satisfied itself that the Athlete in responding to the Applicant’s notification of an ADRV, and during the hearing, admitted to the use of androgen for her medication, and that androgen contained the prohibited substance, the Athlete was quite upfront with this information, disclosed the use of the medication in reasonably good time, and being aware of her duty to provide the relevant information at the earliest opportunity presented, the Athlete did not conceal facts that were well known to her and therefore did not set out to mislead the Agency as to the possible origin of the prohibited substance. In spite of that, the Panel rules that via her own admission coupled with the reliable analytical results from the accredited laboratory (another uncontested issue), the fact of her commission of the ADRV had been established to its comfortable satisfaction.

53. It is worth bringing to the parties attention that, under WADC’s Article 2.1 „*Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample*“ constitutes an ADRV. Following therefrom, WADC’s Article 2.1.1 stipulated, „*It is each Athlete’s personal duty to ensure that that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples.* Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.“

54. For fine measure, the Panel also notes that in absence of a Sample B analysis to contradict the A Sample result as is in this case, the Panel finds that as per WADC’s Article 2.1.2, an ADRV had been committed by the Athlete:

„2.1.2 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. 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 *or Markers* found in the athlete’s A Sample;  
*Metabolites*  
or, where the athlete’s B Sample is split into two bottles and the  
analysis  
of the second bottle confirms the presence of the *Prohibited*  
*Substance*  
or its *Metabolites or Markers* found in the first bottle.“

## B. Was the Athlete's ADRV intentional?

55. Under Article 10.2.1 on the *period of ineligibility*, it states that subject to further reductions in Article 10.4 and 10.5 or 10.6, the period of ineligibility shall be four years where:

The anti-doping rule violation does not involve a specified substance or a specified method, *unless* the athlete or other person can establish that the anti-doping rule violation was not intentional.

The prohibited substance in question in this case being a Non-Specified Substance, the burden is firmly upon the Athlete to establish that the anti-doping rule violation was not intentional.

56. From the onset, the Athlete has denied the „intention to cheat“ and “improve her performance” and in her own words vide the email response of 24<sup>th</sup> August 2021, she states that “.....kwa wiki kadhaa nilikuwa mgonjwa nikaenda hospitalini kupata matibabu na baada ya matibabu siku chache tu ndyo nikakimbia na kupimwa, nimetumia Stanley Mwakio makaratasi ya matibabu na maagizo ya matumizi ya madawa” (see copy of Athlete’s email to the Applicant dated 24<sup>th</sup> August 2021. The Athlete maintained her position all through the hearing.

57. The Athlete’s position is corroborated by the provision of among other prescriptions, the prescription of 18<sup>th</sup> February 2021 for androgen issued at Iten County Referral Hospital. On a balance of probability, it is indeed very plausible that the Athlete is being honest about her intention behind ingesting the **nandrolone** containing substance.

58. The Applicant contends that, “*it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional*”, this Panel observes that it must be borne in mind that the default sanction for such an offender is four years. According to the wording of the Code, the term “intentional” is meant to establish those athletes who **cheat**. The athlete **MUST** prove that she did not engage in conduct which she knew constituted an ADRV or that she did not know that there was a significant risk that the conduct, which she without a doubt engaged in, must constitute or result in an ADRV and **MUST** show that she did not manifestly disregard that risk.

59. Jurisprudence such as “CAS A2/2011 Kurt Foggo v. National Rugby League (NRL) the panel observed that “*The athlete must demonstrate that the substance was not intended to enhance the athlete’s performance. The mere fact that*

*the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent*”.

This Panel has been presented with evidence of origin of the substance with prohibited qualities.

60. Striving to establish that the Athlete’s ADRV was intentional the Applicant submitted 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 doping in sports.*”

Further the Applicant wrote, that in the case of CAS 2017/A/4962 WADA VS Comitato Permanente Anti-Doping Sanmarino NADO (CPA) & karim gharbi, for an ADRV to have been committed non-intentionally the athlete bears the burden of proof of establishing that the ADRV was unintentional and thus to establish how the relevant forbidden substance entered his/her body. The case went on to emphasize that that would have to be done....**on a balance of probability**. The Panel is of the view that, that as much as 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, on the totality of the evidence provided by the parties, the Athlete has proven, on a balance of probabilities that she did not specifically intend to break the rules and/or cheat. The Athlete has discharged the onus of showing that the ADRV was not intentional.

61. We reiterate on the reading of WADC’s Article 10.2.3:

*„10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those athletes who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk”*

**C. Reduction Based on No Fault or Negligence/ No Significant Fault or Negligence/Knowledge**

62. It was the Applicants assertion that, the Athlete has a personal duty to ensure no prohibited substance enters his body. In CAS 2012/A/5317 Aleksei Medvedev V. Russian Anti-Doping Agency, the panel observed to have acted with no fault, the athlete must have exercised “utmost caution” in avoiding doping. The Panel has observed that the Athlete has participated in national and international competition, also the contention of the Applicant that “[...] *Based on her experience, she ought to have taken measures to ensure that whatever she ingests does not contain any*

*prohibited substance.*” This being his first time to have his sample returned an Adverse Analytical Finding (AAF) shows the Athlete has previously exercised “utmost caution”.

63. In her email response of 24<sup>th</sup> August 2021 and all through this hearing, the Athlete has shown the different medication she was taking for different medical issues, and attached the official doctor’s prescriptions to wit. The Athlete should have indeed exercised utmost caution as part of her responsibilities as an athlete and the Panel finds her actions as negligent.

*“The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. The respondent hence failed to discharge her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.”*

64. WADC’s Article 21.1 ***Roles and Responsibilities of Athletes*** that by all means bound the Athlete in this case were: as follows:

„21.1.1. *To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code;*

21.13. *To take responsibility, in the context of anti-doping, for what they ingest ad use;*

21.1.4. *To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code.*”

65. Ultimately, the WADA Code defines No fault or Negligence, such that the Athlete or other person’s establishing that he or she did not know or suspect, and could not have reasonably 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. ***The Athlete MUST also establish how the prohibited substance entered his or her system.*** This similarly applies to No significant fault or Negligence when viewed in the totality of circumstances and taking into account that the criteria for No Fault or Negligence was not significant in relationship to the anti-doping rule violation.

66. In due consideration of the aforementioned Code factors, it is the finding of this Panel that the Athlete did not adequately discharge her responsibilities under the Code and hence a pleading of No Fault/ Negligence under WADC’s Article 10.4 could not be sustained. As stressed in CAS 2017/A/5015 FIS v. Therese Johaug & NIF

para. “185. CAS jurisprudence is very clear that a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, Ms. Johaug **must have exercised the “utmost caution” in avoiding doping**. As noted in CAS 2011/A/2518, the Athlete’s fault is *“measured against the fundamental duty which he or she owes under the Program and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance”*. It also emphasized the personal duty of care, citing the basic principle that it is *“each Competitor’s personal duty to ensure that no Prohibited Substance enters his or her body”*. 186. Even where the circumstances are “extraordinary” and there is minimal negligence, athletes are not exempt from the duty to maintain “utmost caution” (CAS 2006/A/1025).”

### *Athlete’s Transparency*

67. It is important to note that it would do an Athlete great good if they are able to determine the source of their positive test and establish a lack of intent to cheat. This is where a complete disclosure of medications and supplements used by the athlete can be so important. Article 10.4 of the WADA Code provides that, „where an athlete can establish how a specified substance entered his or her body and such a specified substance was not supposed to enhance the athlete’s sports performance or mask the use of performance enhancing substance the period of ineligibility found in article 10.2 shall be replaced with the following:

First violation at a minimum a reprimand and no period of ineligibility and at maximum two years of ineligibility.

To justify any reduction or elimination an Athlete must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance or the absence of intent to mask the use of performance enhancing substances. The Athlete’s degree of fault shall be the criterion considered in reduction of any period of ineligibility.

68. The panel notes that the quick admission of use of the relevant drug by the Athlete and its possible source and provision of prescriptions to back her up is a sign of honesty and good faith.

In the **Ashley Johnson case**, it was noted that the Wasp’s RFC player was given a six month ban backdated to the date of sample collection as opposed to the four year ban for intentional doping. The explanation given by Johnson was that he mistakenly took his wife’s weight loss pills which were contaminated with hydrochlorothiazide instead of his own supplement which was in a similar bottle. The Panel accepted Johnson’s evidence and were satisfied that



it was the truth. The Panel explained that the „No Significant Fault or Negligence“ (NSF) provisions are designed to provide flexibility of sanction depending on the degree of fault in a particular case, as seen in the cases of Marin Cilic and Maria Sharapova. It stressed the need to avoid a literal interpretation of NSF, instead taking a purposive approach, in line with CAS jurisprudence. The Panel explained that NSF does not mean that any fault must be de minimum rather that a panel must weigh up degrees of fault and negligence and decide the sanction accordingly. Finally, the Panel considered that, under Regulation 21.10.11.2, Johnson’s ban should be backdated to the date of the sample collection owing to his „prompt admission“.

### *Commencement of Ineligibility Period*

69. This Panel recalls that the Athlete’s ADRV was established via the urine sample test and thereby finds ADAK Rules Article 10.3.3 preferable to sanction the Athlete to a 4 years ineligibility. Article 10.2.1 also states clearly that the period of ineligibility shall be four years where 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.

70. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

*If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. ...*

## **VIII. DECISION**

Consequent to the discussions on merits of this case:

- (i) The applicable period of Ineligibility shall be 2 years;
- (ii) The period of Ineligibility shall be from **4<sup>th</sup> August 2021** the date on which the Athlete was provisionally suspended up until **4<sup>th</sup> August 2023**;
- (iii) All Competitive results obtained by the Respondent Athlete from and including 6<sup>th</sup> June 2021 are disqualified 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, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this 21st day of December, 2021

*Bhiveka*

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**Ms Elynah Sifuna - Panel Chairperson**



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**Mr. Peter Ochieng, Member**



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**Mr. Allan Owinyi, Member**