

REPUBLIC OF KENYA



RESULTS MANAGEMENT PANEL

ANTI-DOPING CASE NO. 5 OF 2021

ANTI-DOPING AGENCY OF KENYA APPLICANT

-versus-

PHENUS KIPLETING RESPONDENT

DECISION

Hearing: Matter was canvassed through written submissions

Panel: Mrs.Elynah Shiveka - Deputy Chairperson
Mr. Peter Ochieng - Member
Mr. Allan Mola - Member

Appearances: Mr. Bildad Rogoncho for the Applicant

Dr. Maurice Ajwang' for Respondent

ABBREVIATIONS AND DEFINITIONS

The following abbreviations are used herein:

ADAK - Anti-Doping Agency of Kenya

ADR – Anti-Doping Rule

ADRV - Anti-Doping Rule Violation

AK - Athletics Kenya

IAAF - International Association of Athletics Federation

RMP – Results Management Panel

WADA - World Anti Doping Agency

THE PARTIES

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a national level athlete.

PRELIMINARIES OF THE CASE

3. The proceedings have been commenced by way of filing a notice to charge by the Applicant against the Respondent dated 18/5/2021.

4. Upon reading the Notice to charge dated 18th May, 2021 and filed at the Panel on 24th May 2021 by Mr. Bildad Rogoncho, on behalf of the Applicant, the Panel directed and ordered as follows;
 - i. The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, the direction No.1 and all relevant documents on the Respondent, by Friday 16th July, 2021.
 - ii. The Panel constituted to hear the matter shall be;
 - a) Mrs. Elynah Shiveka
 - b) Mr. Allan Mola Owinyi
 - c) Mr. Peter Ochieng
 - iii). The matter shall be mentioned on Thursday 22nd July, 2021 to confirm compliance and for further directions.
5. The Applicant complied by the above orders by filing the requisite and relevant documents to the Panel on 22nd July, 2021 and documents dated 28th May, 2021.
6. When the matter came up for mention on 5th August 2021, at 2.30pm the Applicant's Counsel Mr. Rogoncho informed the Panel that the Respondent Athlete required legal representative on pro bono basis to argue his case. The secretariat was tasked to look for a suitable pro bono lawyer for the Athlete. The matter was set for mention on 26th of August, 2021 to confirm the appointment of the pro bono legal representation for the Athlete and for further directions.
7. On 26th August, 2021, when the matter came up for mention at 2.30pm, Dr. Maurice Ajwang came on record as the lawyer to represent the Respondent Athlete on pro bono and was directed to

respond to the Charge within fourteen (14 days) and the matter was slated for mention on Thursday, 16th September, 2021 to confirm compliance.

8. The matter was mentioned on 23rd September, 2021 and Dr. Ajwang' confirmed filing the response to the charge and at the same time informed the Panel that he would like to proceed by way of written submissions. Mr. Rogoncho had no objection. The Panel directed and ordered that the Respondent was granted fourteen (14) days to file and serve their written submissions and likewise the Applicant/Petitioner was granted a similar period from the date of service to file their written submissions. The matter was set for mention to confirm compliance on 21st October, 2021 at 2.30pm.
9. On 21st October, 2021 the matter was coming up for mention to confirm compliance of filing and serving written submissions as directed by the Panel 23rd September, 2021. Dr. Ajwang' confirmed that he had filed and served their written submissions on behalf of the Respondent on 21st October, 2021. Mr. Rogoncho appeared for the Petitioner/Applicant agreed to file and serve their written submissions on the Respondent within fourteen (14) days from the date of the Respondent's submissions.
10. On 4th November, 2021 when the matter came up for mention to confirm compliant on the part of the Applicant/Petitioner Mr. Rogoncho confirmed filing and serving their written submissions to the Respondent and requested for a decision date. The Panel directed that the decision would be delivered on 8th of December, 2021.
11. Due to unavoidable circumstances, the date of delivery of the decision was pushed back to 16th of December, 2021 at 2.30pm via Microsoft Teams of such other medium as the Panel shall determine.

APPLICANT/PETITIONER'S SUBMISSIONS

12. The Anti-Doping Agency of Kenya wishes to adopt and own the charge documents dated 28th May 2021 and the annexures thereto as an integral part of its submission.
13. The Athlete herein is charged with an Anti-Doping Rule Violation of presence of a prohibited substance **19-Norandrosterone** contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).
14. The Athlete is a National Level Athlete and therefore the Result Management authority vests with ADAK which in turn delegated the matter to the Results Management Panel as provided for in the Anti-Doping Act No 5 of 2016 to constitute a hearing panel which the athlete was comfortable with.
15. The matter was set down for hearing and the athlete was represented by Agan and Associates Advocates who filed their defence in the cause before the Panel.
16. The Respondent through his counsel Dr. Maurice Ajwang opted for the matter to be canvassed through written submissions and there was no objection from the Petitioner who also chose to go a similar way and hence laid before the Panel evidence and supporting documents for consideration.

BACKGROUND/FACTS

17. The respondent is a male Athlete hence the World Athletics (hereinafter

WA) competition rules, WA Anti-Doping Regulations, the World Anti-Doping Code (hereinafter WADC) and the Anti-Doping Agency of Kenya Anti-Doping Rules (hereinafter ADAK ADR) apply to him.

18. On 13th February, 2021 during the National Cross Country Championships Trials held in Nairobi County, Kenya, ADAK *Doping*

Control Officers (“DCOs”) collected a urine *Sample* from the respondent.

Assisted by the DCO, the respondent split the Sample into two separate

bottles, which were given reference numbers A 4509940 (the “A Sample”) and B 4509940 (the “B Sample”) in accordance with the Prescribed WADA procedures.

19. Both *Samples* were transported to the South African Doping Control Laboratory - Bloemfontein, an Anti-Doping Laboratory (“WADA”) – accredited Laboratory in South Africa (the “Laboratory”). 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”) for presence of a prohibited substance

19- **Norandrosterone** which is listed as an endogenous AAS under S.1.1B of the 2020 WADA prohibited list.

20. The findings were communicated to the respondent athlete by Japhter K.

EBS the Chief Executive Officer of the Anti-Doping Agency of Kenya through a Notice of Charge and Provisional Suspension dated 31st March 2021. In the said communication the athlete was offered an

opportunity to provide an explanation for the same by 20th April 2021.

21. The Respondent accepted the charges and responded to the ADRV Notice vide WhatsApp forwarding medical support documents as an explanation as to how the substance entered his body.

22. The respondent athlete's AAF was not consistent with any applicable TUE recorded at the WA for the substances in question and there is no

apparent departure from the WA Anti-doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings.

23. The respondent did not request a sample B analysis thus waiving his right to the same under WA rule 37.5 and confirmed that the results would be the same with those of sample A in any event.

24. The response and conduct of the respondent were evaluated by ADAK

and it was deemed to constitute an anti-doping rule violation and referred to the Results Management Panel for determination.

25. A charge document was prepared and filed by ADAK's Advocates,

and the Athlete presented a response thereto.

26. The matter went through a process before a panel of the Results Management Panel in the manner prescribed by the rules and the matter is pending determination resulting to a request for submissions by the parties.

LEGAL POSITION

27. 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.

A. PRESUMPTIONS

28. It further 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 are presumed to have conducted sample analysis and custodial procedures in accordance with the international standards for laboratories.*
- c. *Departures from any other International Standards or other anti-doping rule or policy 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 Panel 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*

B. ROLES AND RESPONSIBILITIES OF THE ATHLETE

29. That under Article 22.1 the Athlete has the following Roles and responsibilities;

- 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.*

30. 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,

- *Health*
- *Ethics, fair play, and honesty*
- *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”*

i) ANTI-DOPING AGENCY OF KENYA POSITION

31. The burden of proof expected to be discharged by the Anti-Doping

Organisation under Article 3 of the ADAK Rules and WADC was ably

done by the prosecution.

32. In his defence, the Respondent made several admissions and a few general denials. In his **evidence in chief** the respondent made the following admission and denial;

- a) He admitted to being aware of the doping control process.
- b) The Respondent denied that he negligently or intentionally consumed any prohibited substance with the intention of enhancing his performance.

ii) PROOF OF ANTI-DOPING RULE VIOLATION

33. The Athlete is charged with presence of Prohibited Substance, a

violation of Article 2.1 of the ADAK ADR. 19-Norandrosterone is a Specified Substance and attracts a period of ineligibility of 4 years.

34. 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 to establish an ADRV.

35. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate *nofault, negligence, or intention* to entitle him to a reduction of sanction.

36. We therefore urge the Panel to find that an ADRV has been committed by the Respondent herein.

A. INTENTION

37. Rule 40.3 of the WA Rules sets out that the term intentional is meant to "identify those athletes who cheat. The term, therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk."

38. According to the established case-law of **CAS 2017/A/4962 WADA V. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi**, for an ADRV to be committed non-intentionally, the Athlete bears the burden of ¹p¹ roof of establishing 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.

39. It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on his inability to prove that the medication he took contained no prohibited substances. Under the ADAK ADR, an offence has therefore been committed as soon as it has been established that a prohibited substance was present in the athlete's tissue or fluids. There is thus a legal presumption that the athlete is responsible for the mere presence of a prohibited substance.

The burden of proof resting on the Agency is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids. If the Agency is successful in proving this requirement,

there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such offence. The CAS has held in numerous awards that this legal presumption and the allocation of the burden of proof is legally valid and enforceable, notwithstanding the fact that disciplinary sanctions in doping cases are similar to penalties in criminal proceedings in which the prosecutor normally bears the burden of proving not only the factual

elements of an offence, but also

the presence and degree of guilt on the part of the accused. On many occasions, the CAS has had the opportunity to confirm this strict liability rule in athletic competition (F. v/ FINA 1996/156, p.42; C. v/ FINA 1995/141, published in Digest of CAS Awards 1986- 1998, Stämpfli Editions, Berne, p. 215 ff; G. v/ FEI 1992/63 published in Digest of CAS Awards 1986-1998, Stämpfli Editions, Berne, p 115 ff, confirmed by the Swiss Supreme Court ATF March 15, 1993, published in Digest of CAS Awards 1986-1998, Stämpfli Editions, Berne, p. 561 ff; FCLP v/ IWF 999/A/252, in addition to other decisions).

A.ORIGIN

40. The case of **CAS 2016/A/4534 Maurico Fiol Villanueva V.**

Federation Internationale de Natation (FINA) under Par.36(i) stated that **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 such substance.** Based on the explanation provided in this case-law, the Applicant wishes to contend that from the explanation given by the Athlete, he failed miserably to disclose to the Panel how the prohibited substance entered his body.

41. In that regard, we do submit that the origin of the prohibited substance has not been established.

B. FAULT/NEGLIGENCE

42. 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 his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.
43. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body.

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 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 to establish an anti-doping rule violation under Article 2.1.

44. In **CAS 2012/A/5317 Aleksei Medvedev V. Russian Anti-Doping Agency (RUSADA)** the panel 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 or she owes under the WADC to avoid ingesting any prohibited substance.' The applicant contends that the athlete in this case fell short of this requirement as he failed to carefully consider the medication and cross check. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before ingesting the prohibited substance. He was thus grossly negligent.

45. In the case of **CAS 2016/A/4676 Arijan Ademi V. Union of European Football Associations (UEFA)**, 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 the 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 that he may have used an unsafe product. Finally, the significance is in relation to the anti-doping rule violation 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 the competition.”

46. From the foregoing, the onus is on the Respondent to ensure that he does not ingest supplements in a careless manner. Based on his vast experience, he ought to have taken measures to ensure that whatever he ingests does not contain any prohibited substance.

C. KNOWLEDGE

47. The applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily

specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

48. Further, the Applicant contends that the Athlete has had a long career in athletics, and it is only questionable that he has had no exposure to the crusade against doping in sports.

49. The Applicant holds that an athlete competing in national and international competitions and who also knows that he is subject to doping controls because of his participation in the national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited/specified substances.

50. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product.

51. In Arbitration **CAS 2006/A/1025 Mariano Puerta V. International Tennis Federation (ITF)** the panel observed that Athletes are responsible for what they ingest.

SANCTIONS

52. 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.
53. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension.
54. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADC to warrant sanction reduction.

CONCLUSION

55. Article (WADA 2.1.1) emphasizes that it is an athlete’s personal duty to ensure that no prohibited substance enters his or her body and that it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated to establish an anti-doping rule violation by the analysis of the athlete’s sample which confirms the

presence of the prohibited substance.

56. We find that ideal considerations while sanctioning the athlete are:

i) The ADRV has been established as against the athlete. Failure by the athlete to establish origin of the prohibited substance in his urine sample.

ii) The knowledge and exposure of the athlete to antidoping procedures and programs and/or failure to take reasonable effort to acquaint themselves with anti-doping policies.

iii) The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was because of his negligent acts.

57. The **maximum sanction of 4 years ineligibility ought to be imposed** as no plausible explanation has been advanced for the Adverse Analytical Finding.

58. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the athlete to 4 years ineligibility.

59. It is our submission that ADAK has made out a case against the Athlete and that there was indeed an Anti-Doping Rule Violation by the Athlete, and a sanction should ensue.

RESPONDENT'S SUBMISSIONS

ADAK'S CHARGE DOCUMENT

60. The Anti –Doping Agency of Kenya (ADAK) prefers the following

Charge against the Athlete respondent:

Presence of a prohibited substance 19 norandrosterone in Athletes sample.

ATHLETE'S RESPONSE TO CHARGE

61. The Athlete denies intentionally using the prohibited/banned substance norandrosterone *vide* the Charge Document dated 28th Day of May 2021.

62. The Athlete *vide* his witness statement dated 23rd October 2021, explains that due to an ankle injury he purchased a pain killer from a chemist for purposes of treating the said injury.

63. The Athlete received a letter of provisional suspension dated 31st March 2021.

64. That the said pain killer for purposes of treating the pain killer and not intentionally for enhancing performance and gaining unfair advantage of other competitors.

65. That this was his first ever major competition organized by Athletics Kenya or any other organization.

66. That this was also his first ever anti doping test.

SIGNIFICANCE OF ATHLETES TRANSPARENCY AND ACCURATE COMMUNICATION

67. The Respondent's honesty and provision of information in good faith is evident in the details provided in witness statement dated 23rd September 2021.

68. It is our humble opinion that a first violation warrants at a minimum a reprimand and no period of ineligibility and at maximum one year 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 knowingly participate in a competition during the period of ineligibility. The Athletes degree of fault shall be the criterion considered in reduction of any period of ineligibility.

COOPERATION BY RESPONDENT/ATHLETE

68. In this matter, the Respondent has cooperated and admits the use of the aforementioned pain killer in the Anti Doping Control Form.

CASE LAW

Re: Ashley Johnson

In this case 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 minimis, 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"

ROLE OF ADJUDICATING PANEL

69. What is ultimately expected from the hearing panel is to *strike a balance* between letting the "guilty" Athletes escape and the risk of occasionally convicting an "innocent" one.¹⁰ The hearing panel can only be satisfied to its comfortable satisfaction that use/non use of a prohibited substance or prohibited method did/did not occur, if it is able to simultaneously and independently weigh the evidence adduced on the one hand by the prosecution and the evidence adduced on the other by defense. It is also trite law that first time offence, remorse, *mens rea* and cooperation in a criminal process is deemed as mitigating factors and by leniency/ rewarded by reduced sentences.

LEGAL POSITION

a. **Burden of Proof**

Nota Bene, even where the Respondent admits culpability of using a substance for purposes of medication, the burden of proof that it was intentional with he/she who alleges i.e. it does not shift.

70. The burden of proof lies with he/she who alleges. Rule 33 (1) (2) Proof of Doping of IAAF COMPETITION RULES 2016-2017 relating to burden of proof *vide* subsection (1) states as follows:

The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred.

71. In view of the above, the World Anti Doping Code 2015 *vide* article 3 on proof of doping and specifically article 3.1 on Burdens of Proof provides that:

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.

Case Law

72. It was stated in *Republic v. Subordinate Court of the first Class Magistrate at City Hall, Nairobi and another, exparte Yougindar Pall Sennik and another Retread Limited [2006] 1 EA 330 (Nyamu J)*, that when a person is bound to prove the existence of any fact it is the law that the burden of proof lies on that person. According to section 107 (1) of the Evidence Act, the

burden is on the party who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts to prove the existence of those facts. Section 107 (2) of the Evidence Act states that when a person is bound to prove the existence of a certain fact the burden of proving that fact lies on that person.

In Kioko v Republic [1983] KLR 289 [1982-88] 1 KAR 157 (Madan, Kneller and Hancox JJA), it was held that the law does not require the accused to prove his innocence, and therefore it is erroneous for a court to refer to certain acts or omissions of the accused as being inconsistent with his innocence. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. This is founded on the maxim that 'he who alleges must prove.'

The burden of proof rests always with the prosecution, and there is never a burden on the accused person to disprove the charge.

b. **Standard of Proof**

73. Nota bene, even in cases of substantial assistance, if the Petitioner insists on making allegations against the Respondent, the standard of proof does not change and in view of the Without Prejudice Agreement they are estopped from relying on the admissions of the Respondent and the threshold of proof remains the same i.e. above a balance of probability and below beyond any reasonable doubt. 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.

74. *Nota bene*, whereas in relation to **Standards of Proof vide article 32 subsection (2)** of IAAF COMPETITION RULES 2016-2017 *it states as follows:*

*“Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, **the standard of proof shall be by a balance of probability.** (italics and emphasis mine)”* Whereas the Standard of proof *vide* the World Anti Doping Code 2015 in article 3 (1) provides that in all cases the standard is greater than a mere balance of probability but less than proof beyond a reasonable doubt. The standard of proof where the burden of proof is on the accused is on a balance of probability.

Case Law

75. It was stated in *Mwakima and three others v. Republic [1989] KLR 530*

(Bosire J), that where the law places the burden of proof on the accused person, the standard of proof is never, unless the law clearly says so, as high as that on the prosecution to prove a charge beyond reasonable doubt. In that case, the trial court had erroneously held that the duty on the accused to explain the circumstances of possession of the item in question was beyond reasonable doubt.

NO FAULT/SIGNIFICANT FAULT OR NO NEGLIGENCE/NO SIGNIFICANT NEGLIGENCE

76. The Respondent in this case, has demonstrated conclusively no fault/significant fault, no negligence/significant negligence and absence of intention to use a prohibited substance.

77. If an athlete can show that they bear no fault or negligence for the ADVR, the period of ineligibility (as defined in the Code vide Article 10.4) is eliminated altogether.

78. If an Athlete can show that their fault or negligence was 'not significant', the period of ineligibility applicable to them may be reduced based on the degree of fault. This can be as little as a reprimand (and no period of ineligibility) in the case of ADVRs involving Specified Substances or Contaminated Products, or a reduction of one half of the otherwise applicable period of ineligibility in the case of other ADVRs.

In this case it is our humble view that the Respondent has demonstrated that he bears no fault/ significant fault, no negligence/significant negligence by demonstrating that the drug he took was a pain killer without the intention of cheating..

PRESUMPTIONS

79. In criminal law presumptions can either be rebuttable or irrebuttable. In case of rebuttable presumptions, such cannot be the basis of determining culpability. The prosecution must discharge its burden and standard of proof beyond a balance of probability. It is not enough to make mere allegations. The proof must be tangible, cogent and substantial.

80. The presumption made by the Petitioner in this matter is that if a prohibited substance is taken it must be intentional is **rebuttable** in this case the Respondent took a pain killer for an ankle injury. Presumptions cannot substitute the requirement of the

prosecution to discharge its burden of proof and its standard of proof.

THE ROLE OF THE ATHLETE

81. *The role of the athlete is not disputed in terms of being knowledgeable however, the athlete should not be punished where they have demonstrated that they bear no fault/ significant fault or negligence/significant negligence for the ADVR.*

*The Athlete like any other person must enjoy presumption of innocence as provided in the Kenya Constitution 2010 vide Article 50 (2), MUST be adhered to and not derogated from on account of statutory provisions *inter alia* strict liability.*

PROOF OF ANTI DOPING RULE VIOLATION

82. The proof of ADVR against the athlete is based on rebuttable presumption, namely that the taking of the alleged prohibited substance was intentional.

REMEDIES SOUGHT

The Respondent humbly requests the Panel to rule:

83. **THAT**, in view of the Athlete's plausible explanation, and forthrightness as demonstrated in his disclosure response to the charge document dated 28th May 2021, and that he had taken a pain killer for managing his ankle injury, corroborates his plea of no fault/no negligence, the above charge be dismissed and the suspension be lifted considering this is his first charge/anti doping test and that he has already been suspended for approximately 7 months or so and has learnt his lesson painfully and the honorable panel should allow the athlete pursue

his athletics career which is his only source of livelihood and gainful employment.

CONCLUSION

84. In the circumstances, the Panel imposes the following consequences:

- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 2 years from the date of the mandatory provisional suspension which was 31st of March, 2021 pursuant to Article 10.2.2 of the WADC and ADAK ADR;
- b. The disqualification of National Cross country championship trials results of 13th February, 2021 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- c. Each party to bear its on costs;
- d. Parties have a right to Appeal pursuant to Article 13 of the WADC and Anti-Doping Act No.5 of 2016 as amended.

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

Dated and delivered at Nairobi this day of _____16th_____
December_____, 2021.

Signed:

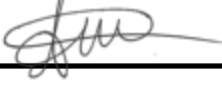
Mrs Elynah Sifuna-Shiveka

E. Shiveka

**Vice-Chairperson, Results Management
Panel**

Signed:

Mr. Allan Mola Owinyi



Member, Results Management Panel

Signed:

Mr. Peter Ochieng



Member, Results Management Panel