REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 9 OF 2021

ANTI-DOPING AGENCY OF KENYA…… APPLICANT

VERSUS

WYVONNE ISUZA……..…… ATHLETE

DECISION

Panel:

John M Ohaga SC, CArb – Chairperson
J. Njeri Onyango FCIArb – Member
Mary N. Kimani – Member

Appearances:

Mr. Bildad Rongocho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant.
Mr. Victor Omwebu and Mr. Muhuyu appearing for the Athlete.

Abbreviations:

ADAK – Anti Doping Agency of Kenya
ADAK ADR- Anti-Doping Rules 2016
WADA- World Anti-Doping Agency
DCO- Doping Control Officer
ADAMS- Anti-Doping Administration and Management System.
ISRM- International Standard for Results Management
ISTI- International Standard for Testing and Investigations

Contents

A. INTRODUCTION

i. Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter referred to as **ADAK**), a state corporation established under section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Athlete is a male adult of presumed sound mind, a national level athlete, more specifically, a footballer signed as a mid-fielder with Bandari FC in the Football Kenya Federation Premier League (hereinafter referred to as **the Athlete**).

ii. Factual Background

3. On 10th March 2021, an ADAK Doping Control Officer (hereinafter referred to as **DCO**) by the name of Veronica Osogo received instructions to conduct a doping control process for the collection of a sample from the Athlete as part of the random testing conducted on athletes included in the Random Testing Pool (herein after referred to as the **RTP).**
4. Thereafter, she proceeded to Marist International University, the last indicated whereabouts on the Athlete's Anti-Doping Administration and Management System portal (hereinafter referred to as **ADAMS**) to implement the sample collection session.
5. On arrival, the DCO informed the athlete, in the presence of his coach and physiotherapist, of the requirement to provide a sample for random testing.
6. Consequently, the Athlete expressed to the DCO his frustration with the testing process, indicating that he had become a target of ADAK being

the only player in the team who was constantly tested. Furthermore, he indicated that he had written a complaint to ADAK expressing similar frustrations, to which no response had been forthcoming.

7. The Athlete was nevertheless encouraged by his physiotherapist to provide a sample to the DCO despite expressing his reservations on the testing procedures.
8. Regardless, the Athlete was adamant that he would not provide a sample.
9. Subsequently, the DCO asked the Athlete to fill a supplementary report form indicating his refusal to provide a sample and express his reasons.
10. The Athlete complied and indicated in the supplementary report form Number 2695 the frustrations that he was facing regarding the testing procedures and further stated that he did not have sufficient education or awareness about the testing practices.
11. Accordingly, the DCO also filled the Supplementary Report Form Number 2694 detailing the circumstances that led to the failure to comply from the athlete.
12. The Applicant, consequently, issued the Athlete with a notice of potential failure to comply through a letter dated 18th August 2021 which outlined the facts giving rise to a potential failure to comply. It further provided the consequences applicable to the Athlete should an adverse finding be held against him which were indicated to be in line with Article 10.2 of the ADAK Anti-Doping Rules (hereinafter referred to as **ADAK ADR**) to include:

a. Disqualification of results in the event during which the ADRV occurred and in-competition after sample collection or omission of the DRV with all resulting consequences including forfeiture of any medals, points, and prizes.
b. A period of ineligibility of four (4) years unless the Athlete can establish the violation was not intentional, in which case the period of ineligibility shall be two (2) years.
c. Automatic publication of the sanction.

13. Furthermore, the letter indicated that the Athlete would be provisionally suspended from 6th September 2021 from 5.00 pm from any competition prior to the final decision being reached according to ADAK ADR Article 7.4.1.
14. The letter instructed the athlete to provide to the Applicant a written explanation for the '**Adverse Analytical Finding'** by 6th September 2021.
15. The Athlete, though this fact is disputed, diligently sent an explanation on 23rd August 2021 providing an explanation for his failure to comply. In the letter, he indicated that despite his efforts to write to the Applicant complaining of the way the tests were being undertaken, he did not receive any response. He also noted that he had attended a meeting with the Applicant's officials at their offices in Parklands, who explained the entire process and he came out with an understanding of how he had been included in the RTP.
16. He noted, however, that should the matter proceed to a hearing, he would require a *pro-bono* lawyer to represent him.

17. The Applicant, in fervent execution of its duty, found the explanation to be insufficient and proffered a notice of charge against the Athlete dated 30th August 2021 to this Tribunal. The notice of charge was presented before the Tribunal on 21st September 2021 by Mr. Bildad Rongocho, advocate for the Applicant.
18. The Tribunal directed that the Applicant serve on the Athlete the notice of charge, Notice of the ADRV, the Doping Control Form, Directions from the Tribunal and all other relevant documents by 20th October 1021.
19. The Applicant confirmed filing and service of the Charge documents to the Athlete on 21st October 2021.
20. Mr. Omwebu, advocate for the Athlete, was appointed as pro-bono counsel, according to the Athlete's request, and entered appearance through his notice of appointment dated 25th November 2021.
21. He was granted 21 days to file his response to the charge, list of documents and list of witnesses, which he confirmed to the Tribunal on 9th December 2021 to have done when the matter came up for mention to confirm compliance with the directions.
22. The matter, after several adjournments, came up for hearing on 3rd March 2022. Mr. Rongocho requested for consolidation with SDTADK No. 11 of 2021 since it involved the same party despite constituting a different violation.
23. The Tribunal directed that both matters would be heard in a consolidated manner and directions would be issued on submissions to the parties.

24. Upon full hearing of the evidence, the Tribunal directed that parties make separate submissions for SDTADK No. 9 of 2021 and SDTADK No. 11 of 2021, noting to specify ingredients proving or disproving each violation from the evidence given in open court.
25. To this extent, parties were required to file submissions regarding each matter separately outlining arguments for each violation.
26. The Tribunal also directed that the decisions for the two matters would be issued separately.

B. HEARING

27. The hearing proceeded *viva voce*.
28. Mr. Rongocho, advocate for the Applicant called three (3) witnesses:
    a. Ms. Mary Nyokabi.
    b. Mr. Fredrick Makale.
    c. Ms. Veronicah Osogo.
29. Mr. Omwebu for the Athlete called two (2) witnesses:
    a. The Athlete.
    b. Mr. Robert Masanga.

C. PARTIES' SUBMISSIONS

i. The Applicant's Submissions

30. The Applicant's case is premised on the Charge document dated 19th October 2021, which the Applicant wished to adopt and own, together with the annexures thereto, as an integral part of its submissions.

31. Accordingly, the Applicant submitted that the Athlete was a national level athlete and therefore was under the auspices of the Applicant's results management authority.
32. It is the Applicant's averment that the Athlete was charged with an ADRV for Evading, Refusing or Failing to submit to sample collection in contravention of the ADAK ADR.
33. The Applicant further avers in its submissions that it is under an obligation under Article 3 of the ADAK ADR and the World Anti-Doping Code Rules (hereinafter referred to as '**the Code'**) to prove the ADRV to the comfortable satisfaction of the hearing panel constituted by this Tribunal.
34. The Applicant, under Paragraph 17, submitted that it had met its burden of proof and indicated, in support of its assertion therein, that the Athlete had made various admissions and denials, for which it listed as follows:
    a. He admitted to being approached and requested to provide a urine sample.
    b. He admitted to being tested on several occasions since 2016.
    c. He admitted to his lack of interest to familiarize himself with the anti-doping rules and regulations nor to attend any of the Anti-doping workshop.
    d. He admitted to having refused to provide his sample since the DCO was female.
    e. He admitted to walking away from the venue without complying with the request of a sample collection.

35. Consequently, the Applicant submitted that having proved that the Athlete was in violation of the ADAK ADR Article 2.3, the Athlete was liable to receive a sanction constituting a 4-year period of ineligibility to participate in any competition.
36. Furthermore, the Applicant submitted that the burden of proof had shifted to the Athlete to demonstrate no fault, negligence, or intention to entitle a reduction of the sanction.
37. The Applicant in its submissions thereafter endeavored to argue each limb of the mitigating factors. It argued that to disprove intention, the Athlete must show that he lacked knowledge that the conduct constituted an ADRV or that he was unaware there was no significant risk of an ADRV to be proved on a balance of probabilities.
38. The Applicant referred to established case law in *CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO) at para 77*, wherein the Tribunal stated that proof by a balance of probabilities requires that one explanation is more probable than the other possible explanation. This requires that the athlete provide actual evidence as opposed to mere speculation.
39. In that regard, the Applicant provided that the Athlete had, in his written correspondence to it, admitted to walking away from the Doping Control Station without placing due regard to the consequence of his action. This proved his intention to evade, refuse or fail to submit to a sample collection.

40. On the limb of negligence/ fault, the Applicant submitted that it is the Athlete's duty under Article 22.1.1 and 22.1.3 of the ADAK ADR to be knowledgeable of and comply with the rules.
41. It further submitted that the Athlete has a personal duty to always be available for sample collection and cooperate with the anti-doping organization investigating the ADRV according to Article 22.1.2 and 22.1.6 of the ADAK ADR.
42. Consequently, the Applicant argued that the Athlete portrayed gross negligence by his lack of knowledge and intentionally refusing to provide a sample for testing.
43. Conclusively, the Applicant submitted that the hearing panel of this Tribunal should consider the following while determining the sanction of the Athlete:
    a. The ADRV has been established against the Athlete.
    b. The Athlete has failed to establish no intention to commit the ADRV.
    c. The Athlete failed to take caution by failing to submit to a sample collection upon notification.
    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 the Anti-Doping procedures.
    e. A maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the ADRV of evading, refusing, or failing to submit sample collection.

ii. Athlete's Submissions

44. The Athlete, represented by Mr. Omwebu, outlined his case via the response to the charge, in which he denied the charge completely.
45. In his submissions, the Athlete stated that he has never been averse to the authority of the Applicant, indicating that he had always submitted to the doping control processes of the Applicant including random testing on various dates while in training and at his residence.
46. In his argument, he indicated that he was not aware, prior to 10th March 2021 that he had been included in the Applicant's Registered Testing Pool. To this extent, the Athlete challenged his inclusion to the RTP and denied the Applicant's authority to subject him to tests based on his inclusion in it.
47. It was the Athlete's assertion that due to the lack of notification of his inclusion to the RTP by the Applicant, he was under the impression, at all material times, that he was only subject to the regular and less stringent doping control processes applicable to all other athletes.
48. The Athlete submitted that despite the Applicant's testing authority over him, he relents that the anti-doping process purported to be carried out by the DCO, Veronica Osogo, was lacking in certain conditions precedent resultantly refusing to acquiesce to it.
49. To this extent, the Athlete argued that his inclusion to the RTP was contested and a preliminary matter requiring resolution prior to the testing. This, then, raised a legitimate grievance justifying his refusal to subject himself to the process. This was the basis of the complaint raised in the Supplementary Report Form Number 2695.

50. To this extent, he provided that the refusal to submit to the sample collection was therefore not intentional, nor on account of any fault or negligence of the Athlete.
51. Furthermore, the Athlete submitted that the Applicant, despite contentiously including him to the RTP, had failed to provide education and training as required by Article 18 of the Code.
52. The provision, the Athlete contends, is meant to enable anti-doping organizations to provide accurate information and prevent unintentional anti-doping rule violations and other breaches of the Code.
53. Additionally, the Athlete denied having sent the Applicant a letter dated 23rd August 2021, providing an explanation of his failure to comply and placed the Applicant to strict proof thereof.
54. The Athlete averred to his defense and submitted that:
    a. Any proof of notice of inclusion to the Applicant's Registered Testing Pool as the Applicant may prove to have been issued to the Athlete was such that it was done without full disclosure of the contents of the testing regime and deficient of the requirements of Article 5.5.2 of the Anti-Doping Regulations, 2020, Articles 27, 28, 35(1) (b) & 47 (2) of the Constitution of Kenya.
    b. Any proof of receipt of acknowledgement of the inclusion into the Applicant's RTP by the Athlete, as the Applicant may prove to exist, was obtained deceitfully without any disclosure of the contents of the documents and without due, prior, or proper notice to the Athlete of

his inclusion into the Applicant's RTP and/or the consequences of defaulting.

c. The testing sought to be conducted by the Applicant's Doping Control Officers on 10th March 2021, was not in conformity with the provisions of the International Standard for Testing and Investigations.
d. The Athlete's complaint submitted through the Supplementary Report Form on March 10, 2021 had been preceded by another formal complaint to the Applicant wherein the Athlete sought justification for the numerous and targeted doping control processes directed at him by the Applicant and failure by the Applicant to respond to the Athlete's Complaints and purporting to test him under its RTP amounts to an infringement of the Athlete's right to equitable and fair testing programs implemented in a manner that ensures that the tests are conducted in compliance with all the applicable Codes, Regulations and International Standards;
e. The Athlete was not under the Applicant's Registered Testing Pool as at the date of 10th March 2021 hence any doping control processes sought to be undertaken by the Applicant would only have been under any other regime other than under its RTP.
f. The creation of the Athlete's profile, entry of whereabouts information or update of the same on his behalf that may exist on the Anti-Doping Administration & Management System (ADAMS) Database Management System for all times material to the Charge

herein, was undertaken by the Applicant without the Athlete's involvement and/or concurrence.

55. The Athlete premised his submissions on four issues:
    a. ADAK's statutory duty to notify athletes, in writing, of their inclusion in its RTP.
    b. The consequential duty of ADAK to educate athletes under Article 18 of the World Anti-Doping Code.
    c. DCOs obligation to conduct a proper and compliant doping control process.
    d. Duties of ADAK in investigating a Possible Failure to comply or ADRV and ADAK's responsibility to an athlete.
56. On the preliminary issue, the Athlete submitted that Section 25 (3) of the Anti-Doping Act of 2016 and Article 5.5.2 of the ADAK ADR provided, in mandatory terms, that the Applicant was mandated to issue a notification to the Athlete of his inclusion to the RTP. He further provided that the Code under Article 5.5, and Article 5.6 of the WADA International Standard for Testing and Investigations (hereinafter referred to as **WADA ISTI**) provided that the notification of inclusion shall be provided to the Athlete before their inclusion to the RTP.
57. To that extent, the Athlete noted that the Applicant, in its pleadings and witnesses' testimonies, had not proved that the letter of notice of inclusion dated 20th November 2018 was indeed issued to the Athlete, despite the Applicant's averment that the Athlete had acknowledged receipt on 21st February 2019.

58. Consequently, the Athlete analyzed the Applicant's witnesses' testimonies, to which he concluded that the testimonies provided by the witnesses did not prove, on a balance of probabilities that the Applicant had satisfactorily notified the Athlete of his inclusion to the RTP.
59. To this extent, the Athlete averred in his submissions that the notice of 20th November 2018 was served on the Athlete without full disclosure of its contents, falling short of the requirements under Article 5.5.2 of the ADR and Articles 27, 28, 35(1) (b) & 47 (2) of the Constitution of Kenya.
60. The Athlete further averred that the proof of receipt of acknowledgement of the notice of inclusion into the Applicant's RTP portended by the Applicant had not satisfied the burden of proof and was in any case obtained deceitfully.
61. The Athlete further submitted that the contents of the impugned notice of inclusion was defective in its structure as it fell short of the statutory requirements.
62. On the second issue, the Athlete submitted that the Code under Article 18.1 and 18.2, as read together with the ADAK ADR under Article 17 outlined that the Applicant had the obligation to plan and implement education programs for athletes and other stakeholders. Furthermore, Article 7 of the Athletes' Anti-Doping Rights Act further provides for the right of an athlete to anti-doping education and information form anti-doping organizations.

63. To this extent, the Athlete submitted that the assertions by the Applicant and its witnesses that the Athlete had attended a training at its office were unsubstantiated.
64. Consequently, the Athlete argued that the lack of provision of education by the Applicant withdrew from it the authority to subject the athlete to a doping control process based on his inclusion to the RTP.
65. On the third issue, the Athlete averred that the doping control process allegedly sought to be conducted by the Applicant's Doping Control Officer was not in conformity with the provisions of the WADA ISTI. More precisely, the Athlete averred that the doping control process was not in conformity with the provisions of Article 6.3.2 and 7.1 of the WADA ISTI which required establishment of a Doping Control Station.
66. The provisions of Article 6.1 of the WADA ISTI Template Doping Control Officer Manual of 2021 were not adhered to, specifically regarding the presence of a chaperone who would observe the Athlete during the Doping Control Process. Furthermore, Article 11 of the Athletes' Anti-Doping Rights Act entitled the Athlete to various rights during the doping control process which were contravened or under threat of contravention should the Athlete have acquiesced to the process. These rights were in relation to the Athlete's privacy and dignity.
67. On the fourth issue, the Athlete contended that the Applicant failed in its mandate provided under Annex A.31 of the WADA ISTI, in which the Authority is required to notify the athlete of a possible failure to comply.

68. The Athlete denied having received a 'Notice of Charge' and Mandatory Provisional Suspension (which in this case, we presume to refer to the notice of failure to comply) dated 18th August 2021 from the Applicant. He further denied having sent the letter dated 23rd August 2021 to which he asserted that the Applicant was unable to provide evidence proving the occurrence of the pleaded events.

69. In conclusion, the Athlete submitted that the Tribunal find that the charge against him fails in various degrees, that is:

a. It is fatally defective regarding the procedures effected prior to the inclusion of the Athlete to the Applicant's RTP, and more specifically:

i. That the Athlete never received a notice of inclusion dated 20th November 2018, which was acknowledged by the Athlete on 19th February 2019.

ii. That the acknowledgement dated 19th February 2019 was obtained deceitfully and in any case the contents of the notice of inclusion were not disclosed to the Athlete.

iii. That the notice of inclusion, as provided by the Applicant limited the period of inclusion of the Athlete to one (1) year, that is from 1st December 2018 to 31st November 2019.

iv. That the purported doping control process sought to be conducted by Veronicah Osogo on 10th March 2021 was deficient of the procedural requirements provided by the ADR, the Code, and the WADA ISTI.

b. That the Athlete, therefore, considering the defects of his inclusion to the RTP did not intentionally and/or negligently fail to provide a sample for testing.

c. That Costs be awarded to the Athlete

D. JURISDICTION

70. The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following laws:
    a. Sports Act, No. 25 of 2013 under section 58.
    b. Anti-Doping Act, No. 5 of 2016 under section 31(a) and (b).
    c. Anti-Doping Rules under Article 8.
71. It is noted that the Athlete, in his submissions under paragraph 78, has referred to the Applicant's '*Result Management Panel*' established under section 31A of the Anti-Doping Act of 2016 having jurisdiction to hear this matter in the first instance. The Applicant concurrently in his charge document, at paragraph 9, has referred to the '*Results Management Panel*' having jurisdiction under Section 31B (a) of the Anti-Doping Act to hear and determine the matter.
72. The Tribunal notes that these are non-existent sections of the Act and rejects the averments of the Athlete and the Applicant therein.
73. Furthermore, under Article 8.1 of WADA ISTI, the Applicant, being the Results Management Authority, does have the power to confer jurisdiction to an operationally independent hearing panel to hear and determine the ADRV. Nonetheless, in the context of the Kenyan jurisdiction, this power has been directly conferred to the Sports Disputes Tribunal according to Section 31 of the Anti-Doping Act.
74. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

E. APPLICABLE RULES

75. Section 31 (2) of the Anti-Doping Act provides that:

> **the tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations, the Sports Act, the WADA Code, and International Standards established under it, the UNESCO Convention Against Doping in Sports amongst other legal resources, when making its determination.**

F. MERITS

i. Did the Athlete commit the charged anti-doping violation?

76. The Applicant's prosecution is based on the charge of evading, refusing, or failing to submit to sample collection as outline at paragraph 8 of its charge.

77. The Tribunal notes, however, that the Charge has not set out the provisions of the anti-doping rules relating to the charges asserted in accordance with Article 7.1 of the International Standard of Results Management (herein referred to as the **ISRM**).

78. We note that the anti-doping rules are imposed within a strict liability regime. It was laid down in *CAS 94/129 USA Shooting & Q. / Union Internationale de Tir (UIT)* (1995) that:

> *'The fight against doping is arduous, and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves.'*

79. The Tribunal further relates with the finding in *CAS 2014/A/3487 Veronica Campbell-Brown v Jamaica Athletics Administrative Association & IAAF* that to justify imposing a regime of strict liability against the athletes for breaches of anti-doping rules, testing bodies should

similarly be held to an equivalent standard of strict compliance with *mandatory* international standards.

80. Resultantly, the Tribunal is of the view that, to develop the law and practice regarding sports disputes in Kenya, the prosecuting body should be held to as high a standard of compliance with the mandatory international standards as the violating athletes are held to a high standard of liability.

81. Despite this, it is noteworthy that Article 3.2.3 of the Code provides that a departure from the international standard shall not invalidate evidence of a violation. Moreso, it is noted that the requirement to provide provisions of the charge is not couched in mandatory terms and would not invalidate the proceedings unless it imposes on the Athlete a serious miscarriage of justice or an offence to the principles of natural justice.

82. The infraction, we note, is technical, in the charge itself, and does not affect the rights and obligations of the parties. Furthermore, the Athlete has not raised this as an issue of concern in its pleading. The Panel therefore shall allow the technical error on the charge and determine the violation on its merit.

83. Nevertheless, the Tribunal is adamant that the procedures, rules, and standards established under the ADAK ADR, the Code and various International Standards should be adhered to by the parties in any proceedings of this nature before the Tribunal. It is only a matter of good practice.

84. Article 2.3 of the ADAK ADR and, similarly Article 2.3 of the Code provides the charge to be determined as follows:

'Evading Sample collection; or refusing or failing to submit to Sample collection without compelling justification after notification by a duly authorized Person.'

85. The Tribunal shall conduct its analysis of the merits by noting that there is no dispute between the Athlete and the Applicant about the following matters:

a. The Applicant intended to conduct a mandatory sample collection for the purpose of conducting a test on the Athlete on 10th March 2021 at Marist International University.

b. The DCO, Veronica Osogo, met the Athlete on the day and at the location and informed him of the requirement to provide a urine sample.

c. The Athlete refused to provide a sample to the DCO and further provided his reasoning in Supplementary Report Form Number 2695.

d. The Applicant sent a notice of failure to comply to the Athlete dated 18th August 2021.

86. The Tribunal further notes that the following facts are in dispute:

a. The Athlete denies ever being in receipt of the notification of inclusion to the RTP dated 20th November 2018.

b. The Athlete denies having acknowledged receipt of the notification of inclusion through an acknowledgement of receipt dated 21st February 2019.

c. The Athlete denies having responded to the Applicant's notice of failure to comply dated 18th August 2021 with a letter dated 23rd August 2021.

87. Article 3 of the ADAK ADR provides that the Applicant shall have the burden of establishing the anti-doping rule violation. The standard of proof employed by the Applicant herein shall be to the comfortable satisfaction of the Panel.

88. If it is determined that the Applicant has satisfactorily proved the charge as against the Applicant, the burden of proof shall shift to the Athlete to satisfy the Tribunal on a balance of probabilities that the violation did not occur because of his intention, fault, or negligence.

89. Article 3.2 of the ADAK ADR and the Code provides that facts related to the anti-doping rule violations may be established by any reliable means, including admissions, the credible testimony of third persons, and reliable documentary evidence.

90. Article 3.2.3 of the ADAK ADR and the Code provides that the departures from any other International Standard or other anti-doping rule or policy shall not invalidate analytical findings or other evidence of an anti-doping rule violation and shall not constitute a defense to an anti-doping rule violation.

91. Commentary number 22 on Article 3.2.3 of the Code does provide that a departure from an international standard or other rule unrelated to sample collection, Adverse passport finding, athlete notification relating to whereabouts failure or sample B opening, such as international standard for education or the Athlete's Anti-doping

Rights Act is not a defense in an anti-doping rule violation proceeding and is not relevant on the issue whether the athlete committed an ADRV.

92. It is therefore clear from the rules provided that where there is a departure from the rules or international standards by the Applicant herein regarding Athlete notification with respect to a failure to comply, such a departure cannot form part of the Athlete's defense nor is it relevant to the determination of whether the Athlete committed the violation.

93. Since there is no *mens rea* requirement for anti-doping violations, a finding that an athlete's action entailed an evasion, refusal, or failure to submit to sample collection is *ipso facto* a finding that the athlete has committed an anti-doping violation.

94. Concurrently, the fact that the Athlete was never notified of his inclusion to the RTP must be analyzed with anxious scrutiny maintaining that such a fact does not hold any probative value to the determination of the violation.

95. Furthermore, the Athlete has raised various concerns, in his statement of defense and submissions, about the procedural correctness of the sample collection process purported to be conducted by the DCO. Predominantly, he indicates under Part C of his submissions, *'DCOs Obligations to Conduct A Proper & Compliant Doping Control Process'* that:

    a. The DCO had not set up an up-to-standard doping control station that adhered to the ISTI.

b. The Chaperone, who was to monitor the Athlete in the period of notification and witness the urine sample collection was not dutiful and remained in the vehicle the entire time.

c. Consequently, due to the Chaperone's incompetence, the Athlete submitted that verification and collection of the urine ample would be witnessed by the DCO, a female officer, as against the rules outlined in the ISTI.

96. Reference to our statements in paragraph 92, 93 and 94 is made regarding the outlined issues. Whether there is merit in the Athlete's concerns is irrelevant to the determination of the charge. Furthermore, the Tribunal is of the view that the defense put up by the Athlete places the cart before the horse. The facts cannot simply be proved to the satisfaction of the Tribunal. In our mind, and on a preliminary review of the matter, the sample collection process did not occur and therefore, evidence cannot be tendered on what could have happened.

97. The Applicant has tendered documentary evidence regarding the date in question, 10th March 202, in which the Athlete was approached by a DCO by the name Veronica Osogo to carry out a sample collection.

98. The Tribunal notes that the Athlete has not disputed the authenticity or relevance of this document, and the Tribunal holds it to be credible documentary evidence.

99. The document is a Supplementary Report Form Number 2695 in which the athlete wrote, in verbatim:

> *' I as Whyvonne Isuza will not be taking part in this testing practice. Reason being I already filed a complaint about the testing procedures*

but yet to receive response. I don't have enough educations or rather awareness about testing practices done to me. I also feel the testing is not done fairly going by the information on your website all the athletes are required to be taking part in testing but is not the case here hence not being fair to the few taking part'

100. Further to this, a supplementary report form number 2694 filled by the DCO indicated that the Athlete refused to provide a sample, despite being advised by his physiotherapist to proceed with collection of the sample.

101. It was also admitted by the Athlete that he had refused to acquiesce to the authority of the Applicant's DCO in his Statement under paragraph 4 in which he stated:

'…the doping process purported to be undertaken by the Applicant's DCO on 10th March 2021 was under authority and /or premises that are contested and lacking in certain condition precedent hence my objection to acquiesce to such authority… was out of genuine and legitimate grievance…'

102. Resultantly, the Tribunal is comfortably satisfied that the Athlete did commit the anti-doping violation which he is charged with. More precisely, the Tribunal finds that the athlete refused to submit to sample collection to the DCO.

G. SANCTIONS

103. The Applicant prays in his charge, under paragraph 5, that the Athlete, should he be found to have committed a violation, be sanction to the maximum period provided of 4 years.

104. The ADAK ADR provides under Article 10.3 that the period for ineligibility for Anti-Doping rule violations other than as provided in Article 10.2, unless Articles 10.6 or 10.7 apply, shall be as follows:

Art. 10.3.1. For violations of Article 2.3 or 2.5, the period of Ineligibility shall be four (4) years except in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the Anti-Doping rule violation was not intentional, the period of Ineligibility shall be two (2) years.

105. Article 10.5 provides that:

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

106. Article 10.6.2 further provides:

If an Athlete or other Person establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.7, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable.

107. Consequently, it is incumbent on the Tribunal to analyze whether the Athlete has met any of the provisions essential for mitigating the available sanction.

108. The Tribunal has found that the Athlete refused to submit to the sample collection. Accordingly, reference is made to commentary number 11 of

the Code which notes that a violation of '*failing*' to submit to sample collection may be based on either intentional or negligent conduct of the Athlete while *'evading'* and *'refusing'* sample collection contemplates intentional conduct by the Athlete.

109. Therefore, regarding any mitigation that may be found to apply, it is this Tribunal's view that only a lack of intentionality, as proved by the Athlete, may mitigate the sanction.

i. Was the violation committed by the Athlete intentional?

110. Article 3.1 of the ADAK ADR and the Code shifts the burden to the Athlete to prove, on a balance of probabilities that the violation committed was not intentional.

111. Article 10.2.3 of the Code provides that 'intentional' should be construed as to:

> *Identify those Athletes or other Persons 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.*

112. In a similar vein, the WADA Anti-Doping Organizations Reference Guide under section 10.1 provides that:

> *'Intentional' means an athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk that the conduct might constitute an ADRV, and manifestly disregarded the risk.*

113. Consequently, in determining whether there was intention to commit the violation, there are two aspects to be reviewed:

a. Whether the athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV; and
b. Whether they manifestly disregarded the risk.

114. The Athlete admits in his statement, under paragraph 1, that he was aware of the authority of the Applicant to conduct tests on athletes and players. He further asserts that he has never been averse or defiant to the Applicant's authority and has more than once submitted to doping control processes prior to 10th March 2021.

115. The Athlete's submission, under paragraph 2, avers to the fact that the athlete by and large is a football icon who has played for several top-flight clubs in Kenya and has been fielded in the national team, Harambee Stars. He further asserts that he is in the twilight of his career and is desirous to retire in two years when he attains the age of 30. Suffice to say, the Athlete has considerable experience as an athlete.

116. The ADAK ADR under Article 20 provides that the Athlete has a responsibility to be:
a. *Under Article 20.1, knowledgeable of and to comply with the Anti-Doping Rules.*
b. *Under Article 20.2, always available for sample collection.*

117. In a decision of this Tribunal *SDTADK Appeal No. 10 of 2019 ADAK v Henry Kosgei*, the Tribunal noted that the Athlete's ignorance of the anti-doping rules was not an adequate shield, despite him being notified of the doping program for the very first time.

118. It was further indicated in *CAS 2008/A/1488 P v International Tennis Federation* that:

'…a player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.'

119. Concurrently, we find that the Athlete, owing to his long and illustrious career and his interaction with doping control processes prior to 10th March 2021, knew that his action would constitute an ADRV or would risk the violation of an Anti-Doping Rule.

120. On whether he manifestly disregarded the risk, the Supplementary Report Form Number 2694 filled by the DCO indicated that the Athlete's physiotherapist encouraged him to submit to the sample collection, but the Athlete refused. Furthermore, the Athlete outlined his reasons for refusing to subject to the sample collection in Supplementary Form Number 2695.

121. This, in our view, is a manifest disregard of the risks entailed in his action. To this extent, therefore, it is our view that the Athlete intended to commit the violation and falls short of his burden of proof.

ii. Credit for time served under the provisional suspension

122. This finding notwithstanding, Article 10.13.2 provides that credit may be awarded for a provisional period of suspension served by the Athlete as against the period of ineligibility they are sanctioned for.

123. Consequently, from the Applicant's notice of the failure to comply issued on 18th August 2021, the Athlete was to be provisionally suspended from 6th September 2021 from all competitions, events or

other activities authorized, convened or organized by any other WADA compliant body

124. In *CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Comission (JADCO),* the Tribunal intimated that an athlete can only receive credit for the period of the provisional suspension insofar as that provisional suspension was 'respected'.

125. Considering, it is this Tribunal's presumption, with no evidence to the contrary, that the Athlete has respected the provisional suspension that began on 6th September 2021 at 5.00 pm and, shall, thereby be eligible for a credit on the sanction ultimately issued by the Tribunal.

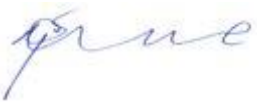
H. DECISION

126. Consequent to the discussion on merits of this case, the Tribunal finds:

a. The applicable period of ineligibility of four (4) years is hereby upheld.
b. The credit for provisional suspension served since 6th September 2021 from 5.00 pm is upheld.
c. The period of ineligibility shall be from 6th September, 2021 at 5.00 pm to 5th September, 2025 at 5.00 pm.
d. Each party shall bear its own costs.
e. The right of appeal is provided for under Article 13 of the ADAK ADR and the Code.

Dated at Nairobi this __*15th*_____day of _____*September*_____2022

John M Ohaga SC, CArb, Chairperson



Mrs. J Njeri Onyango, FCIArb, Member **Ms. Mary N. Kimani, Member**