

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 01 OF 2022

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

VERSUS

GLORIA KITE CHEBIWOTT..... RESPONDENT

DECISION

Panel:

Mrs. Elynah Sifuna-Shiveka - Chairperson
Mr. Gichuru Kiplagat - Member
Mr. Allan Mola Owinyi - Member

Appearances:

Mr. Bildad Rogoncho, Advocate instructed by Anti-Doping Agency of Kenya for the Applicant
The Athlete represented herself

Abbreviations: _____

ADAK – Anti Doping Agency of Kenya
ADAK ADR- Anti-Doping Rules
ADRV – Anti-Doping Rule Violation
WADA - World Anti-Doping Agency
WADC – World Anti-Doping Code
DCO- Doping Control Officer
WA – World Athletics
SDT – Sports Disputes Tribunal
ISTI- International Standard for Testing and Investigation

Introduction

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 as amended.
2. The Athlete is a female adult of presumed sound mind, a National level Athlete, more specifically, a middle distance runner, (hereinafter referred to as **the Athlete**).

Preliminaries

3. Upon reading the Notice to Charge dated 15th of August, 2022 presented to the Tribunal on 15th August, 2022 by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal on 29th August, 2022 ordered as follows:
 - i. The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, this direction No.1, and all relevant documents on the Athlete by 16th September, 2022
 - ii. The panel constituted to hear this matter shall be:
 - a. Mrs. Elynah Sifuna-Shiveka
 - b. Mr. Gabriel Ouko;
 - c. Mr. Allan Mola Owinyi.
 - iii. The matter shall be mentioned on 22nd September, 2022 to confirm compliance and for further directions.
4. The matter came up for mention on 29th September, 2022 as was directed by the Tribunal. ADAK was represented by Mr Rogoncho while there was no appearance for the athlete. However, Mr. Rogoncho informed the Tribunal that the Athlete had requested for the matter to be heard in Eldoret during the Tribunal circuit. The tribunal directed the matter to be mentioned on 19th October, 2022 to establish the possibility of the matter being heard in Eldoret.

5. On 19th of October, 2022 the matter came up for a further mention. Mr. Rogoncho appeared for the Applicant and the Respondent was present on the Teams platform. Mr. Rogoncho stated that the matter is among those that will be heard in Eldoret court circuit. The Tribunal directed that the matter be further mentioned on 3rd November, 2022 to confirm Eldoret court circuit.
6. The matter came up for mention on 3rd November 2022. Mr. Rogoncho confirmed that the matter will be heard in Eldoret during the Court circuit and the athlete had been notified and had confirmed attendance. The Tribunal directed that the matter will be heard on 8th November, 2022 in Eldoret.

Hearing

7. The hearing was heard *inter-partes* on 8th November, 2022 at the Eldoret Law courts.
8. Mr. Bildad Rogoncho represented the Applicant and the Athlete represented herself.
9. Gloria Kite Chebiwott stated that she was born on 10th January, 1998 in Moiben, Uasin Gichu County. She is not married but has a son who is years old. She is a 4th form school leaver. She currently lives in Iten where she trains. She started running while in high school in 2015 to date.
10. The Athlete respondent submitted that she started running international races in 2016 when she was selected in the Africa Junior cross country team to Cameroon where she was placed 2nd. Later in the same year she ran in the Africa junior championships track and field that were held in Tanzania and finished again in the 2nd position in the 1500 metres. She has traversed the world running in different races in countries such as Belgium, Italy, Switzerland, Spain, Qatar, the Netherlands, Morocco and USA among others. She stated that she usually runs the 1500m up to 10,000m and sometimes she is a pacer. She disclosed that she ran her first Half marathon in Riyadh, Saudi Arabia where she finished 2nd. She also revealed that she took part in the Athletics Kenya national trials in June, 2022 in the 5000m and despite

finishing in the 7th position she got a slot to represent the country in the World Athletics championships staged in Oregon USA where she finished 10th overall.

11. She stated that in the majority of the races she has participated in she has always been tested and the procedures have been ok.
12. When asked whether she has attended any of the many organized ADAK workshop she responded in the negative.
13. Gloria informed the panel that she is managed by Gianni De Madonna from Italy and coached by Joseph Cheromei.
14. When asked if she knew why she was before the Tribunal she answered in the affirmative that it was in regard to the test that was done sometimes in May, 2022.
15. She told the Tribunal that towards the end of April, 2022 she developed chest pains and went to seek treatment in the Kapsowar Health centre. However, she failed to disclose that she was an athlete.
22. The hearing ended with Mr. Rogoncho for the Applicant requesting to put in his written submissions by 24th November, 2022. The athlete did not wish to make any further submissions and requested that we go by her viva voce pleadings.

The Applicant's Submissions

23. The Anti-Doping Agency of Kenya proceeded to adopt and own the charge documents dated 25th September, 2022 and the annexures thereto as an integral part of its submissions.
24. The Athlete herein is charged with an Anti-Doping Rule Violation of Presence of a prohibited substance known as ***SI.1. Anabolic Androgenic Steroids (AAS)/Androsterone, Adioms, Pregnanediol, 11-ketoetiocholanolone, Etiocholanolone (Etio), testosterone, 5a-androstanediol and epitestosterone*** contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).

25. The athlete noted that is a National Level Athlete and therefore the result management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2016 to constitute a hearing panel which the athlete was comfortable with.

26. The matter was set down for hearing and the athlete represented herself.

Athlete's Submissions

26. The athlete chose not to make any further submissions but rely on her viva voce submissions.

Background/Facts

27. The Respondent is a female Athlete hence the WA competition rules, WA Anti-Doping Regulations, the WADC and the ADAK ADR apply to her.

28. The Applicant further notes that on 14th May, 2022, an ADAK Doping Control Officer (DCO) collected a urine sample from the Athlete. Assisted by the DCO, she split the Sample into two separate bottles, which were given reference numbers **A 7022718** (the "A Sample") and **B 7022718** (the "B Sample") in accordance with the prescribed WADA procedures.

29. Both Samples were transported to the World Anti-Doping Agency ("WADA") - accredited Laboratory in Qatar, Qatar Doping Control Laboratory (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") presence of a prohibited substance ***SI.1. Anabolic Androgenic Steroids (AAS)/Androsterone, Adioms, Pregnanediol, 11-ketoetiocholanolone, Etiocholanolone (Etio), testosterone, 5a-androstanediol and epitestosterone*** which is listed as an exogenous Anabolic Androgenic Steroids (AAS) under S1.1 of the 2022 WADA prohibited list.

30. The findings were communicated to the Respondent athlete by Sarah I. Shibusse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 12th August, 2022. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 2nd September, 2022.

31. The Respondent denied the charges and stated vide WhatsApp that she wasn't feeling well and sought treatment from a doctor and was subsequently

prescribed with several medications. She attached the doctor's medical notes in her defence.

32. The respondent athlete's AAF was not consistent with any applicable Therapeutic Use Exemption (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.
33. The respondent did not request a sample B analysis thus waiving her 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.
34. The Doping control process was carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations¹.
35. The response and conduct of the respondent were evaluated by ADAK and it was deemed to constitute an ADRV and referred to the Sports Disputes Tribunal for determination.
36. A charge document was prepared and filed by ADAK's Advocates, and the Athlete presented a response thereto.
37. The matter went through a hearing process before a panel of Sports Disputes Tribunal in the manner prescribed by the rules and the matter is pending determination resulting to request for submissions by the parties.

Legal Position

38. 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.

Presumptions

39. It is 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 tribunal of competent jurisdiction which is not a subject of pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.*
- e) *The hearing panel in a hearing.*

Roles and Responsibilities of the Athlete

40. 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 and Anti-Doping Rule Violation within the previous 10 years,*
- f) *To cooperate with Anti-doping organizations investigating Anti-doping rule violations.*

41. The athlete herein is also under duty to uphold the spirit of sports 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.”*

Anti-Doping Agency of Kenya Position

42. 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 prosecution.

43. In her defence, the respondent made the following admissions;

- a) She admitted ingesting the prohibited substance which she indicated in the Doping Control Form,
- b) She admitted to not confirming and crosschecking the ingredients of medication before ingesting,
- c) She admitted to not informing the doctor that she was an athlete before receiving treatment
- d) The respondent admitted to being aware of sample collection rules,
- e) The respondent denied that she negligently or intentionally consumed any prohibited substance with the intentions of enhancing her performance

Proof of Anti-Doping Rule Violation

44. The Athlete is charged with presence of a Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. ***S1.1. Anabolic Androgenic Steroids (AAS)/Androsterone, Adiol, Pregnanediol, 11-ketoetiocholanolone, Etiocholanolone (Etio), testosterone, 5 α -androstanediol and epitestosterone*** is a Non- Specified Substance and attracts a period of ineligibility of 4 years.

45. ADAK submitted that where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated in order to establish an ADRV.
46. Similarly, ADAK noted that in Article 10.2.1 of WADA Code the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him or her to a reduction of sanction.
47. The Applicant therefore urged the Tribunal to find that an ADRV has been committed by the Respondent herein.

Origin

48. From the explanation given by the athlete, she provided that the prohibited substance *SI.1. Anabolic Androgenic Steroids (AAS)/Androsterone, Adiol, Pregnandiol, 11-ketoetiocholanolone, Etiocholanolone (Etio), testosterone, 5 α -androstanediol and epitestosterone* entered her body through medicine prescribed to her after a doctor's visit where she was prescribed B complex tablets. An investigation into the medication provided supported this claim as the medication mentioned was found to contain the prohibited substance.
49. In that regard, we do submit that the origin of the prohibited substance has been established.

Intention

50. 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.'
51. According to established case-law in **CAS 2017/A/4962 World Anti-Doping Agency (WADA) v. Comitato Permanente Anti-Doping San Marino NADO (CPA) & Karim Gharbi**, the panel asserted that, **"It is the athlete that bears the burden of proof of establishing that the anti-doping rule violation was unintentional and thus to establish how the relevant forbidden substance entered into his/her body."**
52. The establishment of the source of the prohibited substance in the Respondent's sample is not a prerequisite to prove the absence of intent, however proving source of prohibited substance provides the applicant and panel with explanation to which they base their conclusion regarding the Respondent's intention when ingesting the prohibited substance. The respondent's inability and reluctance to support her claims without concrete and persuasive evidence leaves questions regarding her intention.

53. In **CAS 2017/0/4978 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Ivan Shablyuyev**, the panel provided that, **“An athlete must establish how the prohibited substance entered his/her system in order to discharge the burden of establishing the lack of intention. To establish the origin of the prohibited substance, it is not sufficient for an athlete to merely protest his/her innocence and suggest that the substance must have entered his/her body inadvertently from a supplement, medicine, or other product. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete has taken contained the substance in question. For example, details about the date of intake, the location and route of intake, or any other details about the ingestion are necessary.**
54. The Respondent has been afforded the opportunity to disprove her intent by demonstrating how the prohibited substance entered her body. Her innocence cannot be inferred; rather, it must be supported by concrete evidence, which she hasn't provided.
55. The Respondent has failed to identify any steps she took in discharging her duty to avoid the presence of a prohibited substance in her sample. It's the Applicant's submission that her level of fault was high.
56. Thus, 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.

Fault/Negligence

57. 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.
58. 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.

59. In **CAS (OCEANIA Registry) A2/2015 Australian Sports Anti-Doping Authority (ASADA), on behalf of Cycling Australia v. Joene Park** the panel stated that Article 2.2 of the WADA Code provides that **“it is each Athlete’s personal duty to ensure that no Prohibited Method is used and that it is not necessary that intent, fault, negligence or knowing use on the Athlete’s part be demonstrated. Further, the success or failure of the attempted use took place.”** The relevant minimum standard is the exercise of relevant caution and the Respondent exercised none.
60. The Respondent bears personal duty of care in ensuring compliance with the anti-doping regulations. The standard of care expected from an athlete of her caliber and experience is high. The respondent has failed to highlight the steps she undertook to ensure that she discharged her personal duty to ensure that no prohibited substance entered her body.
61. It’s the Applicant’s submission that the Respondent was negligent due to her failure to exercise caution to the greatest possible extent and her conduct doesn’t warrant a finding of no fault and negligence.

Knowledge

62. 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 or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.
63. Further, the Applicant contends that the Athlete has had a long career in athletics, she has competed on both the national and international stage and it’s evident that she has had exposure to the campaign against doping in sports.
64. The Applicant holds that an athlete competing at international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances.

65. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in 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.

Sanctions

66. For an ADRV under Article 2.1, Article 10.2.1.2 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV doesn't involve 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.

67. 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.

68. 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 ADR rules and the WADA code to warrant sanction reduction

69. In the circumstances, the Respondent has failed to establish the origin of the prohibited substance and as thus cannot and should not benefit from any reduction.

70. In **CAS 2016/A/4845 Fabien Whitfield v. Federation Internationale de Volleyball (FIVB)**, the panel provided the threshold for the reduction of a sanction for non-Specified Substances, and it stated that **'If an athlete's anti-doping rule violation (ADRV) does not involve a Specified Substance, Art. 10.2.1.1 of FIVB Medical & Anti-doping Regulations (MADR) provides**

that his/her period of Ineligibility shall be four years unless s/he can establish it was not “intentional”. To reduce the standard sanction for his/her ADRV from four years to two years pursuant to Article 10.2.2 FIVB MADR, the athlete must prove the source of the prohibited substances in his/her system, which is a threshold requirement necessary to establish that his/her ADRV was not intentional. Based on CAS (and national anti-doping tribunal) jurisprudence and the provisions of the FIVB MADR, to obtain any reduction of his presumptive four-year suspension under Article 10.2.1 for testing positive for a non-specified substance pursuant to Articles 10.2,2, 10.4, or 10.5, the athlete is required to prove by a balance of probability the source of the prohibited substances in his/her system’.

71. In the circumstances, there is no scope for application of Articles 10.2.2, 10.4 and 10.5 of the WADA Code due to the Respondent’s failure to adduce evidence in support of the origin of the prohibited substance. The failure to meet the set threshold thus means that the athlete should bear the full responsibility for her actions.
72. In **CAS 2018/A/5695 Bernadette Coston v. South African Institute for Drug-Free Sport (SAIDS)**, panel asserted that, **“If it has not been established that the athlete intended to cheat, the sanction should drop to two years of ineligibility, unless the athlete can establish “no fault’ or ‘significant fault”. The athlete carries this burden on the balance of probabilities, as per Article 3.1 of the SAIDS Anti-Doping Rules. To qualify for any reduction, the athlete must establish the source of the substance. Particularly in cases involving contamination scenarios, explanations based solely on the word of the accused and his/her entourage, must be approached with caution. It would otherwise be too easy for athletes to cast blame on a family member, partner, friend, etc. who is not subject to any anti-doping rules or consequences. Moreover, if no scientific evidence was adduced to explain the reported concentration of the substance in the athlete’s system, it must be considered that the athlete did not establish the source of the substance and cannot qualify for a reduction based on No Fault or No Significant Fault”.**
73. It’s the Applicant’s submission that the failure of the athlete to demonstrate how the prohibited substance got in her system excludes any elimination of the sanction. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on her part as required by the ADAK ADR and the WADC to warrant reduction.

Conclusion

74. 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 in order to establish an anti-doping rule violation by the analysis of the athlete's sample which confirms the presence of the prohibited substance.

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

- a) The ADRV has been established as against the athlete.
- b) The failure by the athlete to establish no intention to commit an ADRV.
- c) Failure by the athlete to take caution by not being cautious of the medication she ingested.
- d) The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint themselves with Anti-Doping policies.

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

77. ADAK implores us to sanction the Athlete as provided for in Article 10.2.1.2 of the ADAK Rules and sanction the athlete to 4 years' ineligibility.

78. 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.

Jurisdiction

79. 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.

80. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

Applicable Rules

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

the tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations 2021, the Sports Act, the WADA Code 2022, and International Standards established under it, the UNESCO Convention Against Doping in Sports amongst other legal resources, when making its determination.

Merits

Did the Athlete commit the charged anti-doping rule violation?

82. The Applicant's prosecution is based on the charge of *SI.1. Anabolic Androgenic Steroids (AAS)/Androsterone, Adiols, Pregnanediol, 11-ketoetiocholanolone, Etiocholanolone (Etio), testosterone, 5a-androstanediol and epitestosterone* in the athlete's sample as outline in the Charge Document.

83. Article 2.1 of the ADAK ADR and, similarly Article 2.1 of the Code provide the charge to be determined as follows:

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

84. The Tribunal shall conduct its analysis of the merits on the premise that the B Sample was waived by the Athlete.

85. The Tribunal notes that there's no dispute between the Athlete and the Applicant about the following matters:

(a) A urine Sample was collected on 14th May, 2022 by the Applicant;

(b) The Athlete received the ADRV Notice dated 12th August 2022 from the Applicant.

(c) That a prohibited substance *SI.1. Anabolic Androgenic Steroids (AAS)/Androsterone, Adiols, Pregnanediol, 11-ketoetiocholanolone, Etiocholanolone (Etio), testosterone, 5a-androstanediol and*

epitestosterone was present in the Athlete's body and thus resulting in an AAF;

(e) The Athlete had been tested severally since 2016 in the various events she has participated in.

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

(a) The Athlete denied negligently or intentionally consuming the prohibited substance;

(b) That she did not educate himself on anti-doping programs and policies;

(c) The Athlete failed to concretely establish origin of the prohibited substance in the sample taken.

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 against the Respondent, 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 her 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. From the testimony that was received from the athlete she stated that she was sick and went to seek treatment and the doctor prescribed her medication which she believed would have caused the ADRV. Following investigations by the Applicant, it was indeed confirmed that the medication the athlete was given contained the prohibited substance found in her sample. This proved and established the origin of the banned substance.

Was the violation committed by the athlete intentional?

91. 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.

92. 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.

93. Similarly, the WADA Code under Article 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.

94. 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 she manifestly disregarded the risk.

95. The athlete during the hearing said she was sick and went to a health centre where

she was given medication by the doctor. She had sent the prescription to the Applicant. The Applicant verified that indeed the medication she got from the health centre which she ingested contained the prohibited substance found in her system thus the reason for the ADRV. Accordingly, the panel finds that the athlete

didn't know that the action she took constituted an ADRV and that rules out the disregarding of the risk.

96. We find that the athlete has established origin as her explanation has to our comfortable satisfaction provided support as to how the prohibited substance entered her body as that was through medication she obtained from her doctor. This is also consistent with the written submissions by the applicant dated 22/11/2022. Article 10.2.1.1 provides that:

“While it is theoretically possible for an athlete or other person to establish that the ADRV was not intentional without showing how the prohibited substance entered one’s system, it is highly unlikely that under a doping case in Article 2.1 an athlete will be successful in providing that the athlete acted unintentionally without providing the source of the prohibited substance.”

97. We therefore find that the Respondent has to our comfortable satisfaction established that there was no intention on her part to cheat.

98. Be that as it may, we find that despite seeking treatment for her illness the athlete ought to have sought for Therapeutic Use Exemption (TUE) under Article 4.4 of the Code. There is no evidence that the athlete sought such exemption.

99. With respect to the question of “no significant fault” this Tribunal has in the past relied on the case of **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** where the critical components used to assess the degree of fault on the part of an Athlete were established thus as: the Athlete’s professional experience; his age; the perceived and actual degree of risk; whether the athlete suffers from any

impairment; the disclosure of medication; the admission of the ADRV in a timely manner; any other relevant factors and specific circumstances that can explain the athlete's conduct. The relevant legal provision is WADA Code Article 10.5.1.1.

100. Moreover, when considering degree of fault on the part of an athlete the Tribunal has always applied these factors:

The athlete's experience, whether the athlete is a minor, the degree of risk that should have been perceived by the athlete; the level of risk, whether the athlete suffers from any impairment, any other relevant factors and specific circumstances that can explain the athlete's conduct.

101. We also rely on CAS decisions of **CAS 2013/A/3327 Marin Cilic**

v.International Tennis Federation & CAS 2013/A3335 International Tennis Federation

Tennis Federation presented to us by the Respondent where the court said:

"an athlete's youth and/or experience: language or environmental problems encountered by the athlete, the extent of anti-doping education received by the athlete, any personal impairments such as those suffered by an athlete who has taken a certain product for a long period of time without incident,..... an athlete who is suffering from a high degree of stress and an athlete whose level of awareness has been reduced by a careless but understandable mistake."

Decision

103. Consequently and the discussion on merits of this case, the Tribunal Imposes the following consequences:

- a) The period of ineligibility (non-participation in both local and international events) for the Respondent Athlete shall be for two (2)

years from the date of mandatory provisional suspension that is with effect from 12th August, 2022 pursuant to Article 10.2.2 of the WADC;

- b) The disqualification of results in the event during which the ADRV occurred and in competitions after sample collections or commission of the ADRV with all resulting consequences including forfeiture of any medal, points and prizes pursuant to Articles 9 and 10 of the WADC;
- c) Each party shall bear its own costs;
- d) The right of appeal is provided for under Article 13 of the ADAK ADR and the WADA Code.

Dated at Nairobi this 21st day of December 2022

Signed:

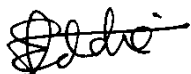
Mrs. Elynah Sifuna-Shiveka



Deputy Chairperson, Sports Disputes Tribunal

Signed:

Gichuru Kiplagat



Member, Sports Disputes Tribunal

Signed:
Allan Mola

A handwritten signature in blue ink, appearing to read 'AM', with a long horizontal flourish extending to the right.

Member, Sports Disputes Tribunal