

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING APPEAL NO. 8A OF 2022

ANTI-DOPING AGENCY OF KENYA (ADAK)..... APPELLANT

-versus-

PHENUS KIPLETING..... RESPONDENT

DECISION

Panel

John M. Ohaga, SC
J Njeri Onyango (Mrs)
E. Gichuru Kiplagat

Chairperson
Member
Member

Counsel appearing

Mr. Bildad Rongocho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant.

Dr. Maurice Ajwang, Advocate for the Respondent

A. PARTIES

1. The Appellant is the Anti-Doping Agency (hereinafter 'ADAK'), a state corporation established under section 5 of the Anti-Doping Act No. 5 of 2016 represented by Bildad Rogoncho
2. The Respondent is a male adult of presumed sound mind, a National Level Athlete who is represented by the firm of Agan & Associates Advocates (herein after 'the Respondent's Advocate')

B. FACTUAL BACKGROUND

I. Factual Background

3. 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.
4. Both samples were transported to the South African Doping Control Laboratory- Bloemfontein, an Anti-Doping Laboratory ("WADA") -accredited Laboratory in South Africa. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories.
5. The analysis of the A Sample returned an Adverse Analytical finding ("AAF") for presence of a prohibited substance 19-Norandrosterone which is listed as a specified substance listed an endogenous AAS under S. 1.1B of the 2021 WADA Prohibited List.
6. The findings were communicated to the Respondent by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory 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.
7. The said letter also informed the Respondent of his right to request for the analysis of the B Sample and other avenues for sanction reduction including Elimination of the Period of Ineligibility where there is No fault or Negligence, Reduction of the Period of ineligibility based on No Significant Fault or Negligence, Substantial

Assistance in Discovering or Establishing Code Violations, Results Management Agreements and Case Resolution Agreements. The Respondent was given until 20th April 2021 to respond and request for a hearing if need be.

8. The Respondent accepted the charges and responded to the ADRV Notice vide WhatsApp forwarding medical support documents as an explanation
9. The Applicant charged the Athlete with the offence of presence of a prohibited substance 19-Norandrosterone in the Athlete's sample through the Notice to Charge dated 18th May 2021.
10. The presence of a prohibited substance or its metabolites or markers in the athlete's sample or the use of a prohibited substance constitute an anti-doping rule violation under Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2 (b) of the IAAF rules.

II. Proceedings during the trial before the Sports Dispute Tribunal

11. The matter was canvassed through written submissions. ADAK filed its written submissions dated 28th October 2021 through its Advocate Mr. Rogoncho while the Respondent also put in his written submissions on 21st October 2021 through its Advocate Mr. Ajwang'.
12. The Sports Dispute Tribunal issued its decision on 16th December 2021 through the Panel presiding over the matter consisting of Mrs. Elynah Shiveka, Mr. Peter Ochieng and Mr. Allan Mola, where it imposed on the Athlete a period of ineligibility for Two (2) years from the date of the mandatory provisional suspension which was 31st March 2021.

C. APPEAL BEFORE THE SPORTS DISPUTES TRIBUNAL

13. The Appellant being discontented with the whole decision filed a Notice of Appeal to the Tribunal dated 13th May 2022.
14. Upon reading the Notice to Appeal, the Tribunal issued directions on 17th May 2021 that the Appellant file and serve the notice, the Appeal Brief and all relevant documents on the Respondent and the Respondent to file and serve a response within 14 days of receipt of the Notice of Appeal.
15. The Tribunal also allocated a panel to hear the Appeal constituting of:

- a. John M. Ohaga -Chairman
- b. J Njeri Onyango (Mrs) -Member
- c. E Gichuru Kiplagat -Member

D. PARTIES PLEADINGS AND SUBMISSIONS

I. Appellant's submissions

16. The Appellant raised two grounds of Appeal in their Appeal Brief, to wit:

- a. *The Tribunal erred in sanctioning the athlete to a two year period of ineligibility*
- b. *The Tribunal erred in making a finding that the athlete had proved a lack of intention through his testimony and demeanor.*

17. The Appellant made submissions in respect of the Anti-doping Rule violation, determining of the sanction and establishment of the origin.

18. As to the Anti-Doping Rule Violation, this is the Appellants case:

- a. Pursuant to art. 2.1 ADAK ADR, it is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any Prohibited Substance, or its Metabolites or Markers found to be present in their Samples. The presence of a prohibited substance or its Metabolites or Makers constitutes an Anti-Doping rule violation ("ADR").
- b. The athlete underwent an in-competition doping control on 13th February 2021. The analysis of sample A revealed the presence of 19-Norandrosterone.
- c. 19-Norandrosterone is a Non-Specified Substance and is listed as an *Anabolic Androgenic Steroid* under S1.1A *Exogenous AAS* of WADA's 2021 Prohibited List.
- d. The athlete does not dispute the analytical results of his sample conducted but the Anti-Doping Laboratory in South Africa but rather admitted the AAF and the charges brought against her by ADAK.
- e. In light of the above, the athlete has committed an Anti-Doping Rule Violation under Article 2.1 of the ADAK ADR.

19. As to determining the sanction, the Appellant submits that:

- a. According to Article 10.2.1.1 ADAK ADR the period of ineligibility shall be four years where the ADRV does not involve a specified substance, unless the athlete can establish that the ADR was not intentional.
- b. The athlete bears the burden of establishing that the violation was not intentional (within the above meaning). To bolster this point, the Appellant relied on various decisions by the CAS holding that he/she must necessarily establish how the substance entered his/her body.
- c. Notwithstanding the above, ADAK is aware of a very limited number of CAS awards which found that in “extremely rare” cases, an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance (CAS 2016/A/4534 Villanueva v. FINA; CAS 2016/A/4676 Ademi v. UEFA; CAS 2016/A/4919 WADA v. WSF & Iqbal). The Villanueva award refers to the “narrowest of corridors” in order to stress just how rare it will be for an athlete to be able to rebut intentionality without establishing the origin of the prohibited substance. The panel in the Iqbal case went so far as to hold that “in all but the rarest cases the issue is academic”; CAS 2016/A/4919 WADA v. WSF & Iqbal, para 66.
- d. ADAK accepts in principle that such exceptional cases may exist. However, ADAK agrees with the CAS case law cited above that the circumstances would have to be truly exceptional; in particular but without limitation, a lack of intention cannot be inferred from *e.g.* **protestations of innocence (however credible)** and/or the lack of a demonstrable sporting incentive to dope.
- e. In this case and for the reasons set out below, the **Athlete has not established the origin of the 19-Norandrosterone** in his system. ADAK submits that the academic debate (regarding whether there may be limited circumstances in which intention may be rebutted without origin being established) is moot as there are clearly no exceptional circumstances on the facts of this case.

20. As to the Establishment of Origin, the Appellant submits in two limbs, on the applicable jurisprudence and the athlete’s explanation:

I. Applicable jurisprudence

- a. With respect to establishing the origin of the prohibited substance, it is not sufficient for an athlete merely to make protestations of innocence and to suggest that the prohibited substance must have entered his or her body inadvertently. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete took contained the substance in question.
- b. As set out by the panel in CAS 2014/A/3820 WADA v. Damar Robinson & JADCO case: *“In order to establish the origin of a prohibited substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation”* (emphasis added by the panel).
- c. Under the WAD the term “intentional” requires “that the Athlete...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 or result in an Anti-Doping Rule Violation and manifestly disregarded that risk.
- d. It is, therefore, unfathomable that the Hearing Panel, could assess this limb without confirming the origin of the prohibited substance.
- e. In cases of a positive finding, the athlete’s intent is presumed, and it is the athlete’s burden to prove, by a balance of probability, that he or she did not act intentionally, i.e., that he or she did not engage in a 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 or result in an Anti-Doping Rule Violation and manifestly disregarded that risk.

II. The Athlete’s explanation

- a. In the present case, the Athlete did not dispute the presence of the prohibited substance found in his body.
- b. He went as far as to fail to prove the origin of the substance found in his system. The substance in question is a **non-Specified** substance. It goes without saying that the Panel in the first instance hearing should have been extremely strict with the requirement to establish origin.

- c. It is not contested that the athlete herein has not established origin. It is impossible to ascertain the innocence of the athlete where such basic requirements have not been met.
 - d. In view of the CAS case law regarding the strict nature of the duty on athletes to establish the origin of the prohibited substance in their system, it is clear that the Athlete has manifestly not satisfied his burden.
 - e. Therefore, and in view of the foregoing, the Athlete has failed to meet his burden to demonstrate that the violation was not intentional.
21. In sum, the Appellant was of the view that the Respondent did not discharge his burden of establishing the origin and his lack of intention and should be sanctioned with a period of ineligibility of four years.
22. They sought reliefs that the appeal be admissible, the decision by the Tribunal in the matter of *ADAK v. Phenus Kipleting* (Anti-Doping case no. 5/2021) be set aside, that Phenus Kipleting has committed an Anti-Doping Rule Violation and consequently, the Athlete should be sanctioned with a four-year period of ineligibility starting on the date on which the Appeal Panel decision is delivered, that all competitive results obtained by Phenus Kipleting from and including 6th June 2021 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes) and costs of the Appeal.

II. Respondent's submission

23. The Respondent made his submissions through the Reply to Appeal Brief dated 31st August 2022. The Athlete did not deny the finding that there was presence of 19-Norandrosterone in his sample. However, he denied intentionally using the prohibited/ banned substance.
24. Through his witness statement dated 23rd October 2021, he explained that due to an ankle injury, he purchased a pain killer from a chemist for purposes of treating the said injury and not intentionally for enhancing performance and gaining unfair advantage of other competitors.
25. Further that this was his first ever major competition organized by Athletics Kenya or any other organization and his first ever anti-doping test. That the progressive rationale and objective for punishment is to rehabilitate.

26. The Respondent submitted that he had been honest and provided information in good faith as detailed in his witness statement dated 23rd September 2021. The Respondent cooperated and admitted the use of the aforementioned pain killer in the Anti-Doping Control form and had already suffered suspension for about one and a half years and had painfully learnt his lesson.
27. He is of the opinion that a first violation warrants a minimum reprimand and no period of ineligibility and at maximum one year of ineligibility. He relied on the case of *Re: Ashley Johnson* to buttress this point.

I. Burden of proof

- a. The Respondent submitted that pursuant to Rule 33 (1) (2) proof of Doping of IAAF COMPETITION RULES 2016-2017 the burden of proof lies with he/she who alleges. Additionally, 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.*
- b. The Respondent relied on the case of *Republic v. Subordinate Court of the first-Class Magistrate at City Hall, Nairobi and another, ex-parte Yougindar Pall Sennik and another Retread Limited [2002] 1 EA 330 (Nyamu J)* which established 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. He also relied on *Kioko v Republic [1983] KLR 157 (Madan, Kneller and Hancox JJA)* that the law does not require the accused to prove his innocence.

II. Standard of proof

- a. Article 32 (2) of the IAAF COMPETITION RULES 2016-2017 states that *“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. The Respondent relied on the case of *Mwakima and three others v. Republic* [1989] KLR 530 (Bosire J)

No fault/Significant fault, no negligence/significant negligence

28. The Respondent submits that he demonstrated conclusively no fault/significant fault, no negligence/significant negligence and absence of intention to use a prohibited substance. That 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.
29. That 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.

Presumptions

30. The presumption made by the Petitioner in this case is that if a prohibited substance is taken it must be intentional is rebuttable. Presumptions cannot substitute the requirement of the prosecution to discharge its burden of proof and its standard of proof. A rebuttable presumption cannot be the basis of determining culpability.
31. The Respondent submitted that 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 Kenyan Constitution 2010 *vide* Article 50 (2), must be adhered to and not derogated from on account of statutory provisions *inter alia* strict liability.
32. The respondent humbly requests the panel to rule that the appeal is inadmissible, that the decision made on 16th December 2021 be upheld, that Phinus Kipleting's 2-year ineligibility runs from the date on which the provisional suspension was made, that litigation must at some point come to an end, that the Honourable Panel should allow the athlete pursue his athletics career which is his only source of

livelihood and gainful employment and the Costs of the Appeal be borne by the Appellant.

E. ISSUES FOR DETERMINATION & ANALYSIS

33. The issues for determination before the Tribunal include:

- a. *Whether this Honourable Panel has jurisdiction to determine this matter?*
- b. *Whether the Tribunal erred in sanctioning the Athlete to a two years period of ineligibility?*
- c. *Whether the tribunal erred in making a finding that the Athlete had proved a lack of intention through his testimony and demeanor?*

Whether this Honourable Panel has jurisdiction to determine this matter?

34. The jurisdiction of this Tribunal has not been contested by either party. However, it is trite that the same is determined in the first instance before delving into the substantive issues raised by parties as is the now settled principle established by Nyarangi J in the famous “Lilian S” case.

35. Tribunal assumes jurisdiction over the Appeal pursuant to Section 31 (1), (a) and (b) and (4) and Article 13.2.2 of the Anti-Doping Rules, 2016.

Section 31 (1) and (4) of the Anti-Doping Act No. 5 of 2016 which states as follows:

31. Jurisdiction of Sports Tribunal

- (1) The Tribunal shall have jurisdiction to hear and determine cases on—
 - (a) anti-doping rule violations on national and lower-level athletes and athlete support personnel;
 - (b) anti-doping rule violations on other persons subject to the Anti-Doping Rules

...

(2) ...

(3) ...

- (4) Appeal level disputes involving national and lower-level athletes, athlete support personnel, sports federations, sports organisations, professional athletes and other persons subject to the Anti-Doping Rules shall be resolved by the Tribunal—

- (a) which shall consist of a panel of three members appointed by the Chairperson of the Tribunal; and
- (b) after the panel members have signed a no conflict of interest declaration in form provided by the Agency.

36. Article 13.2.2 of the Anti-Doping Rules, 2016 states that:

*13.2.2 Appeals Involving Other Athletes or Other Persons.
In cases where Article 13.2.1 is not applicable, the decision may be appealed to the ADAK's Appeal Panel (Sports Tribunal). The appeal process shall be carried out in accordance with the International Standard for Results Management.*

37. The Panel is rightly constituted of three members appointed by the Chairman of the Sports Dispute Tribunal *vide* directions dated 17th May 2022 and who have signed a no conflict of interest declaration form.

38. In the foregoing, the Tribunal correctly assumes jurisdiction in this appeal.

Whether the Tribunal erred in sanctioning the Athlete to a two years period of ineligibility?

39. This being the first Appeal, this Tribunal is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand as was the position in **Selle & Another v Associated Motorboat Co. Ltd & Others [1968] EA 123**.

40. In the first order issued by the hearing Tribunal in its decision of 16th December 2021, the Tribunal held that:

"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"

41. Section 46 (6) of the Anti-Doping Act provides that an Athlete or a person subject to the Anti-Doping Rules who commits a violation contrary to the Anti-Doping Rules shall be subject to the requisite sanctions as set out in the Anti-Doping Rules.

42. The Appellant charged the Respondent herein with an Anti-Doping Rule Violation of presence of a prohibited substance 19-Norandrosterone contrary to the provisions of Article 2.1 of ADAK.
43. It is a well-established evidentiary principle that he who alleges must prove. Thus, at the hearing panel, ADAK bore the responsibility to establish to the comfortable satisfaction proof that the Respondent violated an Anti-Doping Rule. Once the same is established, the burden shifts to the Respondent to prove the case to the contrary on a balance of probabilities
44. ADAK established the presence of the prohibited substance in the Athlete's body under Article 2.1.2 when the analysis of sample A revealed the presence of 19-Norandrosterone.
45. By the mere fact of the finding which was not contested by the Athlete, there was a legal presumption that the Athlete is responsible for the offence of Anti-Doping violation under Article 2.1.2 of the Anti-Doping Rules and the burden thus shifted to the athlete to prove that there was no intent/significant fault/negligence or knowledge.
46. Under Article 10.2.1.1 the sanction for ineligibility for presence of a prohibited non-specified substance shall be Four (4) years unless the Athlete or any other person can establish that the Anti-Doping Rule violation was not intentional.
47. Having stated the legal principle with regards to sanctions and period of ineligibility, we shall proceed to determine the question of intent/Significant fault/ negligence or knowledge which will determine whether the Athlete was liable for the four year maximum period or the minimum of two years as held by the Tribunal.

Whether the tribunal erred in making a finding that the Athlete had proved a lack of intention through his testimony and demeanor?

48. Based on the provision in 10.2.1.1, the burden of proving non-intentional use and consequently how the prohibited substance entered into his/her body lays with the Athlete. The standard for this burden is on "a balance of probability" which entails the burden of convincing the panel that the circumstances relied on by the athlete are more probable than not.
49. Article 10.2.3 states that:

“As used in Article 10.2, the term intentional is meant 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. An Anti-Doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An Anti-Doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.”

50. In the present case, the Respondent through his Affidavit of 23rd September 2021 averred that he had taken painkillers for his long recurring ankle pains but was not aware of the content of the painkiller. He further stated that he did not take the painkillers with an intention to cheat.

51. In **Arbitration CAS 2006/A/1067 International Rugby Board (IRB) v. Jason Keyter**, award of 13 October 2006, it was held that:

“The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore, finds that the Respondent’s explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test.”

52. Additionally, in **Arbitration CAS 2017/A/4962 World Anti-Doping Agency (WADA) v. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi**, award of 3 August 2017 quoted by the Appellant, it was held that:

“51. To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.

52. Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence."

53. Similarly, in the case before the Tribunal, it is manifest that the Athlete did not provide any evidence to corroborate his statement that the ingestion of the prohibited substance was not intentional thus he failed to meet the requisite standard on a balance of probability contrary to the findings by the hearing Tribunal in paragraph 76 of its judgment.

54. Further, the Respondent as an Athlete has a duty to personally manage and make certain that any medication being administered is permitted under the Anti-Doping rules pursuant to Article 2.1.1 of the Anti-Doping Rules.

55. In **Arbitration CAS 2008/A/1488 P. v. International Tennis Federation (ITF), award of 22 August 2008** it was established that:

20. Indeed, as was evidenced during the hearing, the player appeared truly ignorant of all the readily available resources at her disposal. While this is truly regrettable, the Panel finds that a player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent these very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

21. It is therefore the conclusion of this Panel that the decision of the ITF's Independent Anti-Doping Tribunal's was in the circumstances, the correct one, and is upheld by this Panel. The Panel accepts the Tribunal's determination that there existed no circumstances in this case that would warrant the elimination or the reduction of the presumptive two year period of ineligibility and upholds the Tribunal's decision and reasons in awarding the sanction.

56. While we acknowledge that there are instances where the Athlete may not be aware of what enters their body, it is our view that this is not one of those instances.

57. The Athlete pleaded ignorance of the content of the painkillers that he took for his ankle pain which in itself is not sufficient to debunk the burden and duty of care imposed on him.

58. Yet again, the Athlete bears the burden of proof to prove on a balance of probabilities that he took reasonable care to ensure the medication ingested did not contain any prohibited substance. The Respondent simply stated in his evidence that the pain killer taken was for his ankle pain and not intended to cheat. However, he did not provide persuasive evidence to show that he took such medication upon exercise of reasonable care.

59. Article 10.5 of Anti-Doping Rules and WADC provide that the period of ineligibility may be eliminated entirely where the Athlete proves that there was no fault or negligence.

60. In interpreting Article 10.5 the Tribunal in **CAS 2006/A/1067 International Rugby Board (IRB) v. Jason Keyter**, pointed to the fact that;

“... No Significant Fault or Negligence requires a Panel..., to take into account the totality of the circumstances and, having done so, to conclude that the athlete’s fault or negligence was not significant in relationship to the anti-doping rule violation...”

61. In the case of **CAS 2012/A/2701 World Anti-Doping Agency (WADA) v. International Waterski and Wakeboard Federation (IWWF) & Aaron Rathy**, the panel made the following statement (par. 5.5.16 and 5.5.17):

“Generally speaking, if an athlete ingests a product failing to inquire or ascertain whether the product contains a prohibited substance, such athlete’s conduct constitutes a significant fault or negligence, which excludes any reduction of the applicable period of ineligibility.”

62. Did the athlete check the description of the medication or inquire from the doctor or pharmacist of the contents thereof? There is no evidence on record to indicate such attempts by the Athlete bearing in mind he has the burden to prove that the ingestion of the prohibited substance was not with his knowledge/ recklessness.

63. Being a National level Athlete, the Athlete is expected to be cognizant of the duty and standard of care imposed on him by the Anti-Doping Rules.

64. Having stated so and from the evidence provided by the Athlete, we find that his conduct is not in line with the responsibilities of a diligent Athlete and cannot be considered as prudent actions.

65. We now return to the issue as to whether the period of ineligibility of two years imposed by the Tribunal is erroneous.

66. From the foregoing, the period of ineligibility for the offence of Anti-Doping violation is Four (4) Years subject to reduction where the Athlete or any person can prove that the violation was not intentional/ no fault or negligence of the Athlete (the sanction is eliminated) or No significant fault or negligence of the Athlete (reduced to two years).

67. In the present case, the Athlete failed to discharge his burden of proof that the ingestion of the prohibited substance was not intentional/due to his fault/negligence or significant fault/negligence and we find that the Tribunal erred in imposing a two year period of ineligibility as opposed to four years under Article 10.2.1 of the Anti-Doping Rule and WADC.

F. CONCLUSION

68. In the instance, the following orders do issue:

- i. The decision dated 16th December 2021 is set aside in its entirety;
- ii. The period of ineligibility (non-participation in both local and international events) for the Athlete is set at four (4) years commencing from the date on which the provisional suspension was made;
- iii. Each party shall bear its own costs.

It is s ordered.

Dated this ____ 17th _____ day of ___*October*_____, _____ 2022.

John M. Ohaga

John M Ohaga SC, CArb, Chairperson

In the presence of:

- Mrs. J Njeri Onyango, FCI Arb, Member;
- E Gichuru Kiplagat, Member