

REPUBLIC OF KENYA



**THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

**ANTI-DOPING CASE NO. E002 CONSOLIDATED WITH E015
OF 2022**

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

-versus-

STELLAH BARSOSIO..... RESPONDENT

RULING

Hearing: 8th November, 2022

Panel: Mrs. Elynah Sifuna-Shiveka Chairperson
Mr. Peter Ochieng Member
Mr. Gichuru Kiplagat Member
Mr. Allan Mola Member

Appearances: Mr. Rogoncho for Applicant

Respondent represented herself

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a female athlete competing in national events and international events.

Background and the Applicant's Case

3. The proceedings have been commenced by way of filing a charge documents against the Respondent by the Applicant dated 26th September, 2022 and 25th October, 2022.
4. The Applicant brought charges against the Respondent that on 11/06/2022 an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7022701 ("A" sample) and B 7022701 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The Applicant also brought charges against the Respondent that on 06/07/2022 an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7022047 ("A" sample) and B 7022047 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
6. Both "A" samples were subsequently analysed at the WADA accredited laboratory in Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance *hormone and metabolic modulators/trimetazidine* which is listed as a glucocorticoids under S4 of the 2022 WADA prohibited list. The findings were communicated to the Respondent by Sarah Shibutse, Chief Executive Officer of ADAK through Notices of Charge and mandatory provisional

suspension vide letters dated 28/07/2022 and 05/09/2022 to which the Respondent made written submissions vide letter dated 15/08/2022.

7. The Respondent denied the charges stating that she was unwell and sought medication where the doctor prescribed the medication with the prohibited substance.
8. The Applicant states that the Respondent's explanation is not satisfactory and that she did not request a sample B analysis hence waiving her right to the same.
9. The Applicant further states that the Respondent's AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at IAAF for the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards.
10. Moreover, the Applicant states that the Respondent has a personal duty to ensure what whatever enters her body is not prohibited.
11. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substance S4 Hormone and Metabolic Modulators/Trimetazidine.

12. The Applicant prays for:
 - a) The athlete be sanctioned to a four-year period of ineligibility as provided by the ADAK Anti-Doping Rules ,Article 10.2.2.
 - b) In the alternative and if ADAK can prove that the ADRV was intentional then the athlete be sanctioned to a four year period of ineligibility as provided by the ADAK Anti-Doping Rules, Article 10.2.2.1.2.

- c) Disqualifications of results in the event during which the ADRV occurred and in competitions after sample collection or commission of ADRV with all resulting consequences including forfeiture of any medal, points and prizes.
 - d) Costs of the suit, Article 10.12.1
- 13.The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act.

The Response

- 14.The Respondent denied the charges and stated in her letter dated 15/08/2022 stating that she was sick and went to hospital for medication on 1st and 8th June 2022 and that she was diagnosed with some problems in her chest and leg and she attached her medication prescription.
- 15.The Respondent attached medical prescription dated 08/06/2022 from Chebarbar Medical Clinic.She also attached a medical report by a Clinical Officer called Evans Limo dated 13/08/2022 showing that she indeed that she was at the facility and was diagnosed with muscles spasm and soft tissue injury and they administered the following drugs:
- a) Biofreeze Gel Bd.
 - b) Palmocef 500 mg.
 - c) Yescort 6mg.
- 16.The Respondent also attached a prescription from Sinendet Health Options Limited for her treatment dated 01/06/22The facility did a medical report dated 13/08/2022 stating that the Respondent went to

the facility with severe chest pains,cough and chest tightness and she was prescribed for the following medication:

- a) Pulmocef 500mg.
- b) Cetlevo (Montelukast/Levocettrizene) OD.
- c) Powergesic M.R 1 Tablet BD.

Hearing

17.SDTADK No.E002 of 2022 and SDTADK No.15 of 2022 were consolidated on 08/11/2022 when the matter came up for hearing in Eldoret.

18.At the hearing of the case on 08/11/2022 both parties relied on the documents filed in the Tribunal which included the charge documents and the response to charge plus the supporting documents mentioned above.

19.The matter came up on 24/11/2022 to confirm whether written submissions had been filed and served.The Applicant confirmed the same and the matter was listed for delivery of the decision for 21/12/2022.

Decision

20.The panel has looked at all documents and taken into account both oral and written submissions by the parties. We observe as follows.

21.*Hormone and Metabolic Modulators/Trimetazidine* which is prohibited under S4 of the 2022 WADA prohibited list is alleged to have been found in the Respondent's urine samples. This is a non-specified substance and is prohibited at all times as per WADA Prohibited List of 2022.

22.Article 2 of the WADC states that:

“Athletes or other persons shall be responsible for knowing what constitutes an anti-Doping rule violation and the substances and methods which have been included on the prohibited list”

23. Additionally Article 2.1 WADC provides that:

“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 sample.

Accordingly, it is not necessary that intent, fault negligence or knowing on the athlete’s part be demonstrated in order to establish an anti-doping rule violation under WADC Article 2.1 (emphasis ours).

24. Deductively, as provided in Article 2.1.2 WADC sufficient proof of an anti-doping rule violation under 2.1 is:

“presence of a prohibited substance or its metabolites or markers in the athlete’s A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or.....”

25. In the instant case the presence of a prohibited substance has been established in the Athlete’s A sample and has not been denied by the athlete.

26. Article 2.1 of the WADA code establishes “strict liability” upon the athlete. Once presence is established as in this case the onus is upon the athlete to render an explanation and to dispel the presumption of guilt on her part. Such explanation must however be assessed while bearing in mind sections of Article 2.1.1 of WADC as set out above and emphasized.

27. The prohibited substance is a non-specified substance. The burden is on the athlete to show us that the use of the prohibited substance was not intentional as prescribed by WADC Article 10.2.1.1. It is worth

noting that the athlete did declare the medication she was using as prescribed by her doctors in the doping control forms.

28. 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 23/11/2022. Comment number 58 of the WADC to 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.”

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

30. 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.

31. 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 on the Doping Control Form; 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.

32. 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.

33. We also rely on CAS decisions of **CAS 2013/A/3327 Marin Cilic v. International Tennis Federation & CAS 2013/A3335 International 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."

34.The athlete is an elite international athlete and fairly well exposed. We applaud her for her disclosure of the medication she was using at the material time in her Doping Control Form. Her knowledge of anti-doping is rudimentary as per our assessment of anti-doping education she has received. This is the case with most athletes who appear before us yet some are not even exposed to any such training. We implore the Applicant to scale up its athlete anti-doping training programs so as to reach a wider athletic community noting how Kenya remains in the Category A WADA Watch List and the need to win the anti-doping war with a measure of success.

CONCLUSION

35.In the circumstances, the Tribunal imposes the following consequences:

- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 2 years from the date of mandatory provisional suspension that is 17/08/2022 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 to bear its own costs;
- d. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.

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

**Dated and delivered at Nairobi this _____ 21st _____ day of _____
December_____, 2022.**

Signed:

Mrs. Elynah Sifuna-Shiveka



Deputy Chairperson, Sports Disputes Tribunal

Signed:

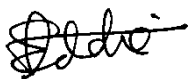
Mr. Peter Ochieng



Member, Sports Disputes Tribunal

Signed:

Mr. Gichuru Kiplagat



Member, Sports Disputes Tribunal

Signed:
Mr. Allan Mola

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Member, Sports Disputes Tribunal