

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 11 OF 2022

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

-versus-

ALICE APROT NAWOWUMA..... RESPONDENT

RULING

Hearing: 24th November, 2022

Panel:	Mrs. Elynah Shiveka	Chairperson
	Mr. Gabriel Ouko	Member
	Mr. Allan Owinyi	Member

Appearances: Mr. Rogoncho for Applicant

Respondent represented by Mr. Obegi Maranga

Advocate from WANN Law Advocates

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 document against the Respondent by the Applicant dated 12th August, 2022.
4. The Applicant brought charges against the Respondent that on **28th May 2022**, an ADAK Doping Control Officer ("DCO") collected a urine Sample from you. Assisted by the DCO, you split the Sample into two separate bottles, which were given reference numbers A **7022920** (the "A Sample") and B **7022920** (the "B Sample") in accordance with the Prescribed WADA procedures.
5. Both Samples were transported to the World Anti-Doping Agency ("WADA") - accredited Laboratory in Qatar, Anti-Doping Lab Qatar (the "Laboratory"). The Laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for presence of a prohibited substance Letrozole Metabolite Bis-(4-Cyanophenyl) Methanol.
6. 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 24/06/2022. In the communication the athlete was informed of her right to have her B sample analysed including avenues for reduction of sanctions. She

was also offered an opportunity to provide an explanation for the same by 14th July 2022.

7. The Respondent accepted the charges vide WhatsApp text dated 14th July 2022 and, in her communication, she stated that she had a problem with breast milk production and decided to visit a pharmacy in her training camp in Nairobi, she stated that she informed the pharmacist that she was an athlete, and she is not to be administered or prescribed any medication that contained any prohibited substance. She stated that the pharmacist assured her that the prescribed medication did not contain any prohibited substance and she proceeded with ingesting the prescribed medication. She further attached a doctor's prescription note in her defense and forwarded the same response vide email on 16th July 2022.
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 Letrozole Metabolite
Bis-(4- Cyanophenyl) Methanol 1.**

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 10.2.1.2.
- 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) Automatic publication of sanction.
- e) 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 filed a statement of defence dated 5/10/2022 and denied the charges. She stated that on 28 May 2022 at training camp the Respondent experienced sharp breast pains and immediately rushed to the nearest pharmacy where she explained to the pharmacist that she was an athlete and she is not to be administered or prescribed any medication that contain any prohibited substance;

15. The Pharmacist assured the Respondent that the prescribed medication did not contain any prohibited substance and she proceeded to ingest the prescribed medication;
16. While still in training camp, the officials of the Applicant came to the camp and indicated that they will be conducting tests and requested urine samples from her. She was also required to fill a doping control form which she ultimately filled and indicated that she had taken the medicines cited herein above;
17. The Respondent also indicated to the officials of the Plaintiff that the medication was taken after a prescription by the pharmacist after she had visited the pharmacy near the Rio Hotel training camp;
18. At the said Pharmacy she was only given medication to manage the breast pains and breast milk production.
19. From the foregoing, it is evident that the Respondent all along acted in good faith by taking the prescribed medicine in order to manage the lingering breast pains due to production of breast milk.
20. The Respondent was called by the Applicant on 24th June 2022 and informed that the results from the WADA laboratory had returned adverse analytical findings, and told to provide an explanation for the same by 14th July 2022 to explain how the medication had entered her body;
21. On 14th July 2022, she proceeded to write a WhatsApp text dated 14th July 2022 explaining how the medication entered her body. She reiterated the contents of the WhatsApp text in an email dated 16th July 2022;

Hearing

22. Alice Aprong stated that she lived in Kapseret and worked with the Kenya Prisons Service. She confirmed that she wished her written statement to be admitted as well as documents that supported her case in the bundle of documents.
23. She stated that she did not take the banned substances knowingly nor intentionally and wished to be forgiven. She stated that she had breast pains and used medicine that she had been given at the pharmacy. She stated that she was now not in pain and could suckle.
24. When questioned by Mr. Rogoncho for the applicant on what medication she took at the pharmacy, she stated that she did not know. She claimed that she was in pain and did not bother to check. She stated that it was in English and she could not read it. She claimed to have informed the pharmacy that she was an athlete. When asked if she googled to check it, she stated that she didn't. When challenged that the medicine that she claimed to have bought was not the same in substance to what was found she stated that she could not explain the anomaly.
25. On cross examination by her advocate she stated that she did not look at the name of the medicine at the pharmacy. When asked what level of education she had achieved, she stated Standard 8 - primary school.
26. When asked if she informed the pharmacy that she was an athlete, she answered to the affirmative. Further when asked by advocate if it was normal for her to get medicine from the pharmacy, she stated it was not normal, that she usually goes to a doctor, but that on this occasion she was in too much pain.
27. She also stated that after being called by ADAK on the ADRV she informed them of what she had taken and took a picture of the same and sent to them. She also confirmed to be aware she is supposed to check on any medicine she took and whether it was legal or not.

Decision

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

29. **Letrozole Metabolite Bis-(4-Cyanophenyl) Methanol** is listed under S4 of WADA's 2022 Prohibited List and is alleged to have been found in the Respondent's urine samples. This is specified substance and is prohibited as per WADA Prohibited List of 2022.

30. We have always said that Athletes bear the ultimate responsibility to ensure that they understand the environment within which they operate and what doping is all about. These dictates are well captured in the Code. 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"

31. Article 2.1 WADC indeed 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).

32. Article 2.1.2 WADC defines what sufficient proof of an anti-doping rule violation under 2.1 above 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....."

33. 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.
34. 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.
35. The prohibited substance is a specified substance. The burden is on the Applicant to show us that the use of the prohibited substance was intentional as prescribed by WADC Article 10.2.1.2. The Respondent stated that she went to a local pharmacy where she was given pain medication to deal with her breast pains. She stated that she did not check the names of the medicines that she was given for the pain as she could not read as they were in English but also because she was in too much pain. The Respondent did not attach any prescription or treatment charts. She neither disclosed the names of the pharmacist who gave her the medication nor the pharmacy itself. She, however, did give a prescription of medicine that had been given to her previously at Sandai Health Services on 17 March 2022 but none of these were found to have any of the substances resulting in the ADRV upon their review.
36. We find that the athlete has failed to establish origin as her explanation to our comfortable satisfaction has failed to provide support as to how the prohibited substance entered her body. Without providing any material evidence for our scrutiny we are unable to make any other finding. Indeed, even where the Respondent could not trace her treatment documents, she at the very least could have provided the names of the pharmacist or pharmacy that attended to her for the Applicant to verify. The prescription that she gave as proof of her

ailment was also shown not to have any benefit in proving where the substances could have originated from. We similarly make a finding that the Respondent had every intention to cheat having failed to meet the “origin” test.

37. Comment number 58 of the WADC to Article 10.2.1.1 breaks down these variables and how it applies to our current context. It 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.”

38. In CAS 2017/O/5218 IAAF v. Russian Athletic Federation & Vasily Koheykin a case relied upon by the Applicant the court stated that:

“...Establishing the origin of the prohibited substance requires substantiated, supported and corroborated evidence by the athlete. It is not sufficient for the athlete merely to make protestations of innocence or hypothesis.... Rather the Athlete must provide concrete, persuasive and actual evidence as opposed to mere speculation to demonstrate that a particular supplement, medication or other product that s/he took contained the prohibited substance.” (Emphasis Ours)

39. We therefore find that the Applicant has to our comfortable satisfaction discharged this burden by establishing intention on the part of the Respondent.

CONCLUSION

40. 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 4 years from the date of mandatory provisional suspension that is 14/07/2022 pursuant to Article 10.2.1.2 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. Automatic publication of sanction.
- d. Each party to bear its own costs;
- e. 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.

41. 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 ___ 2nd ___ day of ___ March___,
2023.

Signed:

Mrs. Elynah Shiveka



Deputy Chairperson, Sports Disputes Tribunal

Signed:

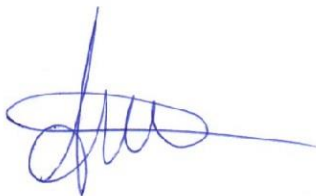
Mr. Gabriel Ouko



Member, Sports Disputes Tribunal

Signed:

Mr. Allan Mola



Member, Sports Disputes Tribunal