

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 6 OF 2022

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

-versus-

ESTHER CHESANG KAKURI..... RESPONDENT

DECISION

Hearing: Proceeded by way of written submissions

Panel:	Gichuru Kiplagat	Panel Chairperson
	Mr. Peter Ochieng	Member
	Mr. Gabriel Ouko	Member

Appearances: Mr.Rongocho for Applicant

Respondent represented by Frankline Cheluget

Advocate from TripleOKlaw LLP

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 30th May, 2022.
4. The Applicant brought charges against the Respondent that on 20/02/2022 while participating in the Kimama Road Race in Kenya an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7021972 ("A" sample) and B 7021972 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. Both samples were subsequently analysed at the WADA accredited laboratory in South Africa and an Adverse Analytical Finding revealed the presence of prohibited substance *glucocorticoids/triamcinolone acetonide and its metabolite 6B-OH-triamcinolone acetonide* which is listed under S9 of the 2022 WADA prohibited list.
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 21/04/2022. 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 11th May 2022.

7. The Respondent denied the charges vide WhatsApp and in her communication stated that in January 2022 she visited a hospital to get treatment for her legs and was prescribed medication and capsules. She further provided a photo of the medicine that was prescribed to her but she did not attach any medical prescription notes, receipts or provide the name of the hospital she visited.
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 S9
glucocorticoids/triamcinolone acetonide and its metabolite 6B-
OH-triamcinolone acetonide*

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) 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 15/08/2022 and denied the charges. She stated that in January 2022 she suffered pains in both her feet.
15. She then went to a local hospital where she was given pain medication to deal with her ailment. While she was prescribed for two types of medicines she only remembers one of those prescriptions by the name of Celebrex.
16. She states that Celecoxib sold under the brand name Celebrex among others is a COX-2 inhibitor and nonsteroidal anti-inflammatory drug. It is used to treat the pain and inflammation in osteoarthritis, acute pain in adults, rheumatoid arthritis, ankylosing spondylitis, painful menstruation and juvenile rheumatoid arthritis.
17. She states that she acted in good faith by taking a prescribed medicine and complied with the suspension from taking part in any competition. She notes that the ingestion of the prohibited substance

was for medical use and not to enhance her performance. She therefore states that she neither had any intention on her part to cheat nor no negligence or significant fault can be placed on her. She also acknowledged that the Tribunal had jurisdiction.

Hearing

18. The hearing proceeded by way of written submission. Both parties filed written submissions and relied on their pleadings. The Applicant relied on written submissions dated 15/08/2022 while the Respondent relied on her written submissions dated 20/01/23.

Decision

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

20. *Glucocorticoids/triamcinolone acetonide and its metabolite 6B-OH-triamcinolone acetonide* which is listed under S9 of the 2022 WADA prohibited list is alleged to have been found in the Respondent's urine sample. This is a specified substance and is prohibited in-competition only as per WADA Prohibited List of 2022.

21. 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"

22. 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).

23. 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 waives analysis of the B sample and the B sample is not analyzed..."

24. 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.

25. 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.

26. The prohibited substance is a specified substance. The burden is on the Applicant to show us that the use of the prohibited substance by the Respondent was intentional under WADC Article 10.2.1.2. The Respondent stated that she went to a local hospital where she was given pain medication to deal with her ailment. While she was prescribed for two types of medicines she only remembers one of those prescriptions by the name of Celebrex. The Respondent did not attach any prescription or treatment charts. She neither disclosed the names of the doctor (s) who treated her nor the hospital or health facility that attended to her.

27. 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 as 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 would have provided the names of the doctors or health facilities that attended to her for the Applicant to verify or countercheck and confirm. We similarly make a finding that the Respondent used the prohibited substance with the intention to cheat having failed to meet the “origin” test.

28. Comment number 58 of the WADC to Article 10.2.1.1 speaks to this subject and it fits our application in this 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.” (Emphasis Ours).

29. In CAS 2017/O/5218 IAAF v. Russian Athletic Federation & Vasilii Koptykin 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...” (Emphasis Ours)

30. We reject the assertion by the Respondent that the prohibited substance in question which is banned during in-competition only could not have occasioned the AAF as the Respondent used it while out of competition. The Respondent never provided any exculpatory

evidence is support of this. If that be the case, how then would anybody explain the AAF in the Respondent's sample in the Kimama Road Race of 20/02/2022?

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

Conclusion

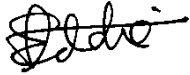
32. In the circumstances, the Tribunal imposes the following consequences:

- 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 11/05/2022 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.
33. 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 ___ 23rd ___ day of ___ February ___,
2023.**

Signed:

Mr. Gichuru Kiplagat



Panel Chairperson, Sports Disputes Tribunal

Signed:

Mr. Peter Ochieng



Member, Sports Disputes Tribunal

Signed:

Mr. Gabriel Ouko



Member, Sports Disputes Tribunal