

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. E004 CONSOLIDATED WITH E005
OF 2022

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

-versus-

TEDDY OTIEGO OSOK..... RESPONDENT

DECISION

Hearing: 16/03/2023

Panel: Mrs. Elynah S. Shiveka - Chairperson
Mr. Peter Ochieng - Member
Mr. Gichuru Kiplagat - Member

Appearances: Mr. Rogoncho for Applicant
Respondent represented himself

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 male athlete competing in national 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 21/04/2022.
4. The Applicant brought charges against the Respondent that on 12/01/2022 an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7021752 ("A" sample) and B 7021752 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. Both "A" samples were subsequently analysed at the WADA accredited laboratory in South Africa and an Adverse Analytical Finding revealed the presence of prohibited substance **boldenone and its metabolites 5B-andropost-1-17B-ol-3-one (boldenone M1) epi-boldenone (17a-boldenone)** which is listed as an exogenous Anabolic Androgen under S1 of the 2022 WADA prohibited list.
6. On 27/01/22 an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7022214 ("A" sample) and B 7022214 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
7. Both "A" samples were subsequently analysed at the WADA accredited laboratory in South Africa and an Adverse Analytical Finding revealed the presence of prohibited substance **boldenone and its metabolites 5B-andropost-1-17B-ol-3-one (boldenone M1) epi-**

boldenone (17a-boldenone) which is listed as an exogenous Anabolic Androgen under S1 of the 2022 WADA prohibited list.

8. The findings were communicated to the Respondent by Sarah Shibutse, Chief Executive Officer of ADAK through Notices of Charge and mandatory provisional suspension dated 01/03/2022 to which the Respondent made written submissions vide letter dated 15/03/2022.
9. The Respondent denied the charges stating that he got a knee injury on 19/12/2022 and was treated by the team doctor. He further stated that he has not been actively participating in any football matches due to his injury. He attached the team doctor's medical notes in his defence.
10. The Applicant states that the Respondent's explanation is not satisfactory and that he did not request a sample B analysis hence waiving his right to the same.
11. The Applicant further states that the Respondent's AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at FIFA for the substances in question and there is no apparent departure from the FIFA Anti-Doping Regulations or from WADA International Standards.
12. Moreover, the Applicant states that the Respondent has a personal duty to ensure what whatever enters her body is not prohibited.
13. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substance boldenone and its metabolites 5B-andropost-1-17B-ol-3-one (boldenone M1) epiboldenone (17a-boldenone)

14. 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) Costs of the suit, Article 10.12.1

15. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55, 58 and 59 of the Sports Act and sections 31B(a) and 32 of the Anti-Doping Act.

The Response

16. The Respondent denied the charges and stated in his e-mail dated 15/03/2022 stating that he was injured on 19/12/2021 and went to hospital for treatment. He stated that he has never used any prohibited substance and that he has proof from the doctor.

17. The Respondent attached medical notes from Tusker Football Club showing the treatment, management and medication he received on 19/12/2021 and 06/03/2022. He also attached an MRI report of his right knee from Sonar Imaging Centre.

18. The medication he was given was indicated as follows:

a) Diclofenac 75 mg.

Hearing

19. The matter came up for mention and hearing from various dates. Furthermore, the two cases ADAK Case No.4 of 2022 and ADAK Case No.5 of 2022 were consolidated as they related to the same Athlete and the courses of action arose within two weeks of each other.

20. Initially, the Respondent was represented by Sharleen Okwara Oyiera Advocate who abandoned the matter and the Respondent sought the services of the firm of Litoro and Omwebu Advocates who came on record vide a notice of change dated 25/07/2023.
21. However, the new counsel or law firm put in an application dated 23/03/2023 to cease acting. The Tribunal acceded to the motion on 02/03/2023.
22. The Tribunal on 16/03/2023 made an order that the matter would start *de novo* and the Applicant's submissions dated 22/11/2022 were readmitted into the Tribunal's record. The Tribunal thereafter fixed the matter for delivery of the decision for 20/04/2023. However, on 20/04/2023 the decision was rescheduled for 11/05/2023.

Decision

23. The panel has looked at all documents and taken into written submissions by the Applicant and the Tribunal's records. We make the following findings.
24. **Boldenone and its metabolites 5B-andropost-1-17B-ol-3-one (boldenone M1) epi-boldenone (17a-boldenone)** which is prohibited under S1 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.
25. 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”*
26. 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).

27. Article 2.1.2 WADC requires sufficient proof of an anti-doping rule violation. It defines it under 2.1 as:

“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.....”

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

29. 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 his 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.

30. 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 per WADC Article 10.2.1.1.A case that involves a non-specified substance is presumed intentional unless the athlete can establish that it was not intentional.

31. To determine whether the athlete had the intention to cheat one has to establish origin. 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."

32. The athlete on both occasions that is on 12/01/2022 and 27/01/2022 when his sample was collected did not declare in his Doping Control Form any medication he was using. Secondly, in his email to ADAK of 15/03/2022 he states that he had a knee injury on 12/12/2022. However, from the doctor's note we can only see that the athlete was prescribed for a drug called **diclofenac** to manage the injury. The composition of diclofenac from available literature does not disclose the prohibited substance **boldenone** as being part of its ingredients. Diclofenac is made up of copolyvidone, microcrystalline cellulose, colloidal anhydrous silica, lactose, maize starch, magnesium stearate, crospovidone.¹ The Athlete has not been able to establish origin and his explanations are not plausible.

33. We therefore find that the Respondent has not discharged his burden of proof to dispel the assertions that he never intended to enhance his sport performance. We find to our comfortable satisfaction that there was intention on the part of the Athlete to cheat.

¹ See <https://www.medicines.org.uk/emc/files/pil.2660.pdf>

34. We will now down our tools at this point in time and not belabour on the question of “no fault or negligence” having made the above findings on intention and origin as per the dictates of WADC Article 10.2.1.

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 4 years from the date of the mandatory provisional suspension that is 21/03/2022 pursuant to Article 10.2.2 of the WADC;
- b. Each party to bear its own costs;
- c. 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 ___ 11th ___ day of ___ May___, 2023.

Signed:

Mrs. Elynah Sifuna-Shiveka



Chairperson, Sports Disputes Tribunal

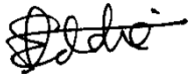
Signed:

Mr. Peter Ochieng

Member, Sports Disputes Tribunal

Signed:

Mr. Gichuru Kiplagat



Member, Sports Disputes Tribunal