

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. E007 OF 2022

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

-versus-

OLUOCH BRANDON ABEDNEGO..... RESPONDENT

DECISION

Hearing: 18/05/2023

Panel:	Mr. Gichuru Kiplagat	Panel Chairperson
	Mr. Peter Ochieng	Member
	Mr. Maria Kimani	Member

Appearances: Mr. Bildad 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 18/01/2023.
4. The Applicant brought charges against the Respondent that on 09/10/2022 an ADAK Doping Control Officer collected a urine sample from the Respondent and gave it code numbers A 7126049 ("A" sample) and B 7126049 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The "A" sample was subsequently analysed at the WADA accredited laboratory in Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance **S.1 Anabolic Androgenic Steroids (AAS)/Metandienone metabolites 6 β -hydroxy-metandienone,17 α -methyl-5 β -androstane-3 α ,17 β -diol,17 β -methyl-5 β -androst-1-ene-3 α ,17 α -diol (Epimetendiol),17 β -hydroxymethyl,17 α -methyl-18-nor-androst-1,4,13-trien-3-one(LTM),17,17-dimethyl-18-nor-5 β -androst-1,13-dien-3 α -ol.in** which is listed as an Anabolic Androgen under S1 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 dated 17/11/2022 to which the Respondent made written submissions vide his email dated 08/12/2022.

7. The Respondent denied the charges stating that he did not at any point take anything that has the prohibited substance as he had carefully looked at all the supplements and medication he was taking at the time and none had the prohibited substance in its ingredients or contents.
8. 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.
9. The Applicant further states that the Respondent's AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded for the substances in question and there is no apparent departure from the WADA International Standards.
10. Moreover, the Applicant states that the Respondent has a personal duty to ensure what whatever enters his body is not prohibited.
11. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substance Anabolic Androgenic Steroids (AAS)/Metandienone metabolites 6 β -hydroxy-metandienone,17 α -methyl-5 β -androsterone-3 α ,17 β -diol,17 β -methyl-5 β -androsterone-1-ene-3 α ,17 α -diol (Epimetendiol),17 β -hydroxymethyl,17 α -methyl-18-nor-androst-1,4,13-trien-3-one(LTM),17,17-dimethyl-18-nor-5 β -androsterone-1,13-dien-3 α -ol.in

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 31B(a) and 32 of the Anti-Doping Act.

The Response

14. The Respondent denied the charges and stated in his e-mail dated 08/12/2022 that he did not at any point take anything that has the stated substance as he had carefully looked at all the supplements and medication he was taking at the time and none had the prohibited substance in its ingredients or contents.

15. The Respondent did not file any further document.

Hearing

16. The matter came up for mention on various dates and a final mention was slated for 18/05/2023.

17. Initially, the Respondent was represented by J. Oyombe of J. Oyombe & Co. Advocates who despite several attempts was unable to trace the Respondent so as to secure instructions to act for him. The counsel subsequently put in an application dated 27/03/2023 to cease acting. The Tribunal allowed the motion on 18/05/2023.

18. On the same day the 18th day of May, 2023 the Tribunal made a further order that the matter would proceed by way of written submissions having given the Respondent innumerable opportunities to appear before it to defend himself. The Respondent elected not to appear on all these occasions.
19. The Applicant filed written submissions dated 12/06/2023. When the matter came up for mention on 15/06/2023 it was fixed for delivery of the decision for 20/07/2023.

Decision

20. The panel has looked at all documents and taken into account the written submissions by the Applicant and the e-mail by the Respondent. These are our findings.
21. The prohibited substance **Anabolic Androgenic Steroids (AAS)/Metandienone metabolites 6 β -hydroxy-metandienone, 17 α -methyl-5 β -androstane-3 α , 17 β -diol, 17 β -methyl-5 β -androst-1-ene-3 α , 17 α -diol (Epimetendiol), 17 β -hydroxymethyl, 17 α -methyl-18-nor-androst-1,4,13-trien-3-one (LTM), 17,17-dimethyl-18-nor-5 β -androst-1,13-dien-3 α -ol.in** which is prohibited under S1 of the 2022 WADA prohibited list is a non-specified substance. This prohibited substance is alleged to have been found in the Respondent's urine samples. The substance 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. 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...”

25. In this case the presence of a prohibited substance has been established in the Respondent’s A sample. The burden of proof shifts to the Athlete to prove that he did not use the prohibited substance intentionally this being a non-specified substance as outlined by 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.

26. To determine whether the Respondent 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.”

27. The Respondent in his email of 08/12/2022 denied the charges and

only stated that he keenly went through all the supplements and medication that he was using but he did not offer any plausible explanation as to the source of the prohibited substance. For example, the Athlete could have attached treatment or medical notes that could possibly explain why he was taking medication that had the prohibited substance. Therefore, we find to our comfortable satisfaction that the Athlete has not been able to establish origin and as such make a finding that he intentionally used the prohibited substance to gain competitive advantage in the sporting event that is the subject of this case. The cavalier manner in which he has handled these proceedings despite being given a *pro bono* counsel cannot also escape our reprimand.

28. We will not proceed to make a determination on the question of “no fault or negligence” having reached the aforementioned conclusions on intention and origin as per the provisions of WADC Article 10.2.1.

CONCLUSION

29. 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 20/07/2023 pursuant to Article 10.2.1.1 of the WADC;
- b. 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;

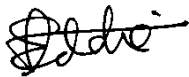
- c. Automatic publication of sanction;
- d. Each party to bear its on costs;
- e. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.

30. 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 ____ 20th ____ day of ____ July____, 2023.

Signed:

Gichuru Kiplagat



Panel Chairperson, Sports Disputes Tribunal

Signed:

Peter Ochieng



Member, Sports Disputes Tribunal

Signed:
Maria Kimani



Member, Sports Disputes Tribunal