

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
DOPING CASE NO. E006 OF 2022

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

VERSUS

WESONGA JOSEPH WASIKE ..... ATHLETE

**DECISION**

**Panel:**

Mrs. Elynah S. Shiveka – Panel Chair  
Mr. Gabriel Ouko – Member  
Mr. Allan Owinyi – Member

**Appearances:**

Mr. Bildad Rogoncho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant.

**Abbreviations:**

ADAK – Anti Doping Agency of Kenya  
ADAK ADR- Anti-Doping Rules 2016  
WADA Code- World Anti-Doping Agency Code  
DCO- Doping Control Officer  
ADAMS- Anti-Doping Administration and Management System.  
ISRM- International Standard for Results Management  
ISTI- International Standard for Testing and Investigations

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## **A. Introduction**

### **i. Parties**

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter referred to as **ADAK**), a state corporation established under section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Athlete is a male adult of presumed sound mind, a National Level Athlete, body builder, (hereinafter referred to as **the Athlete**).

### **ii. Factual Background**

3. Upon reading the Notice to Charge dated 14<sup>th</sup> December 2022 presented to the Tribunal on same date by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in the order dated 15<sup>th</sup> December 2022, as follows:
  - i. The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, this direction No. 1 and all relevant documents on the Athlete by 5<sup>th</sup> January 2023;
  - ii. The panel constituted to hear this matter shall be:
    - a. Elynah Sifuna (Mrs.) - Panel Chair
    - b. Mr. Gabriel Ouko - Member
    - c. Mr. Allan Owinyi- Member
  - iii. The matter shall be mentioned on 19<sup>th</sup> January 2023 to confirm compliance and for further directions.
4. The matter came up for mention on 2<sup>nd</sup> February 2023 where Mr. Rogoncho appeared for the Applicant. The Athlete was not present. Mr. Rogoncho informed the Tribunal that the athlete had requested for a pro-bono counsel. The tribunal secretariat was instructed to obtain a counsel for the athlete within two weeks.
5. The matter was mentioned on 9<sup>th</sup> February 2023. The secretariat informed the Tribunal that Mr. Kivindyó had been appointed as the pro-bono counsel. There was no appearance by Mr. Kivindyó. The Chairman requested that

the secretariat inform Mr. Kivindyo of the next mention on 16<sup>th</sup> February 2023.

6. During the mention on 16<sup>th</sup> February 2023 Mr. Cheluget holding brief for Mr. Kivindyo notified the Tribunal that they had put in a notice of appointment and requested for 14 days to put in a Response. Mr. Rogoncho confirmed receiving the notice and had no objection to the 14 days requested.
7. On 16 March 2023 the matter came up for mention to confirm compliance. Mr. Kivindyo requested for an additional 7 days to file and serve his response. Mr. Rogoncho had no objection.
8. On 30<sup>th</sup> March 2023 Mr. Rogoncho for the Applicant was in attendance while there was no appearance for the Respondent Athlete. Mr. Rogoncho informed the Tribunal that Mr. Kivindyo was yet to file the defence. The tribunal gave the Respondent the last opportunity to file his defence and submissions.
9. The matter came up for mention on 20<sup>th</sup> April 2023. Mr. Rogoncho informed the Tribunal that Mr. Kivindyo was to file an application to cease acting. He was requested to serve him with a mention Notice for the following week since he was not available to confirm the same.
10. On 27 April the matter came up for mention. The Chairman asked Mr Kivindyo the reason for his ceasing to act and he stated that after the initial contact with the Athlete he has since disappeared. Mr. Rogoncho did not oppose the application to cease acting. Mr. Rogoncho made an application pursuant to Rule 3.2.5 of the ADAK anti-doping rules, and that he be allowed to file his written submissions to close the matter owing to the facts as the Athlete is not desirous of participating in the proceedings. Mr. Rogoncho was given leave to file his written submissions within 14 days.
11. At the mention of 11 May 2023 Mr. Rogoncho confirmed that he had filed his submissions and the ruling was set for 15 June 2023 at 2.30pm.

## **B. Parties' Submissions**

### **i. The Applicant's Submissions**

12. The Applicant adopted and owned its charge documents dated 18<sup>th</sup> January 2023 and the annexures thereto.
13. The Applicant submitted that the Athlete was National Level Athlete and therefore the Result Management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2016 to constitute a hearing panel which the Respondent was comfortable with.
14. Further the Applicant said that the hearing did not proceed as the Mr. Kivindyo Advocate withdrew his representation and the tribunal directed the matter to proceed by written submissions on any sanction or penalty which might be imposed.
15. The Applicant submitted that on 8th October 2022, an ADAK Doping Control Officer ("DCO") collected a urine sample from the respondent. Assisted by the DCO, the Athlete split the Sample into two separate bottles, which were given reference numbers A 7126054 (the "A Sample") and B 7126054 (the "B Sample") in accordance with the Prescribed WADA procedures.
16. Both samples were transported to the World Anti-Doping Agency ("WADA") - accredited Laboratory in Doha, Qatar Doping Control Laboratory - Qatar an Anti-Doping Laboratory ("WADA") - accredited Laboratory in Qatar, (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for presence of a prohibited substances S1.1 Anabolic Androgenic Steroids (AAS)/trenbolone and its metabolite 17 $\alpha$ -hydroxyestr-4,9,11-trien- 3-one (Epitrenbolone) and S4. Hormone and

Metabolic Modulators/letrozole metabolite Bis-(4-cyanophenyl) methanol which are listed as Anabolic Androgenic Steroid under S1 of WADA's 2022 Prohibited List and as a Hormone and Metabolic Modulator under S4 of WADA's 2022 Prohibited List.

17. The finding of an ADRV was communicated to the Athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 17th November 2022. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 8th December 2022.
18. The Respondent denied the charges and responded to the ADRV Notice via WhatsApp. In his communication he attached photos of the supplements he was taking which served as an explanation of how the prohibited substance got into his system.
19. The Respondent athlete's AAF was not consistent with any applicable TUE recorded at the IFBB for the substances in question and there was no apparent departure from the IFBB Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused the adverse analytical findings.
20. The Respondent did not request for a sample B analysis thus waiving his right to the same under IFBB rule 37.5 and confirmed that the results would be the same as those of Sample A in any event.
21. The response and conduct of the Respondent were evaluated by ADAK and it was deemed to constitute an Anti-Doping rule violation and referred to the Sports Disputes Tribunal for determination.
22. It was the Applicant's submission that under Article 3 the ADAK ADR and WADC the rules provide that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

23. The applicant stated further that it is provided at Article 3.2 that facts relating to Anti-Doping rule violation may be established by any reliable means including admissions and the methods of establishing facts and sets out the presumptions, which include:
- a. Analytical methods or decision limits ...
  - b. WADA accredited Laboratories and other Laboratories approved by WADA are presumed to have conducted sample analysis and custodial procedures in accordance with the international standards for laboratories.
  - c. Departures from any other International Standards or other Anti-Doping rule or policy set forth in the code or these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other Anti-Doping rule violation shall not invalidate such evidence or results.
  - d. The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.
  - e. The hearing panel in a hearing ....
24. The Applicant submitted that under Article 22.1 the Athlete had the following Roles and Responsibilities;
- a. To be knowledgeable of and comply with the anti- doping rules,
  - b. To be available for Sample collection always,
  - c. To take responsibility, in the context of Anti-Doping, for what they ingest and use,
  - d. To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to

make sure that any medical treatment received does not violate these Anti-Doping rules,

- e. To disclose to his or her international federation and to the agency any decision by a non-signatory finding that he or she committed and Anti-Doping rule violation within the previous 10 years,
  - f. To cooperate with Anti-Doping organizations investigating Anti-Doping rule violations.
25. The applicant submitted that Respondent herein is charged with an Anti-Doping Rule Violation of presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/trenbolone and its metabolite 17 $\alpha$ -hydroxyestr-4,9,11-trien-3-one (Epitrenbolone) and S4. Hormone and Metabolic Modulators/letrozole metabolite Bis-(4-cyanophenyl) methanol contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).
26. Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an ADRV.
27. Similarly, Article 10.2.1 the burden of proof shifts to the Respondent to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction.
28. **On intention** it was the submission of the Applicant that Rule 40.3 of the IFBB Rules sets out that the term intentional is meant to "identify those athletes who cheat. The term, therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an Anti-Doping rule violation or knew that there was a significant risk that the conduct might constitute an Anti-Doping rule violation and manifestly disregarded that risk."
29. Further, according to the established case-law of **CAS 2019/A/6213 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC)**



& Czech Swimming Federation (CSF) & Kateřina Kašková the panel in paragraph 2 asserted that:

**“The athlete bears the burden of establishing that the violation was not intentional. Lack of intention cannot be inferred from protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete’s clean record. The submissions, documents and evidence on behalf of the athlete must be persuasive that the occurrence of the circumstances which the athlete relies on is more probable than their non- occurrence. It is not sufficient to suggest that the prohibited substance must have entered his/her body inadvertently from some supplements or other product. Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete, or that the specified product claimed to be taken, contained the substance in question. Absent any proof of purchase, information as to the specific type of supplement used, by whom it is produced, etc. and absent any disclosure of the food supplement on the doping control form, there is no element substantiating the athlete’s contention that s/he did use that product or that it was contaminated”.**

30. According to the Applicant CAS jurisprudence and praxis dictates that the Respondent bears the responsibility of disproving his lack of intention to dope by a balance of probabilities. The Respondent is required to adduce concrete evidence explaining how the prohibited substance entered his system. The Respondent in this matter, however, didn’t provide an alternative explanation supported with cogent evidence of how the prohibited substance entered his system.
31. It’s the Applicants submission that an athlete cannot simply plead his lack of intention to dope instead he must produce convincing explanations to

prove by a balance of probabilities that he did not engage in conduct which he constituted an ADRV and manifestly disregarded that risk.

32. The Applicants avers that the Respondent was duly notified of the procedural steps and his rights in accordance with ADAK rules and the WADA code. Moreover, the Respondent was afforded a platform to provide specific, objective, and persuasive evidence with a view to disproving his lack of intention to dope. However, he failed to provide an alternative plausible explanation disproving his intent when he ingested the prohibited substance.
33. The Applicant states that the Respondent's intention cannot be inferred; instead, he must adduce concrete evidence that seeks to absolve him of these charges. It's the Applicant's submission that the Respondent didn't discharge his burden by a balance of probabilities, moreover an athlete with clean hands who faces an imminent four-year ban would leave no stone unturned in his quest to prove his innocence and non-intention to dope.
34. On **origin** the Applicant avers the explanation given by the athlete, he provided that the prohibited substances S1.1 Anabolic Androgenic Steroids (AAS)/trenbolone and its metabolite 17 $\alpha$ -hydroxyestr-4,9,11-trien-3-one (Epi-trenbolone) and S4. Hormone and Metabolic Modulators/letrozole metabolite Bis-(4-cyanophenyl) methanol entered his system through the ingestion of various supplements purchased by him. An investigation into the supplements provided that they didn't contain the prohibited substances.
35. In that regard, we do submit that the origin of the prohibited substance has not been established.
36. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-Doping rules and to take responsibility in the context of Anti-Doping for what they ingest and use. The Respondent hence

failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

37. The Applicant submits that the Respondent has a personal duty to ensure that no prohibited substance enters their body;

**2.1.1** 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 metabolites or markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault negligence or knowing Use on the athlete's part be demonstrated to establish an Anti-Doping rule violation under Article 2.1.

38. The Applicant refers to **CAS 2019/A/6482 Gabriel da Silva Santos v. Fédération Internationale de Natation (FINA)**, the panel in paragraph 2 stated that,

**"Panels confronted with a claim by an athlete of No Fault or Negligence must evaluate what this athlete knew or suspected and what s/he could reasonably have known or suspected, even with the exercise of utmost caution. In addition, panels must consider the degree of risk that should have been perceived by an athlete and the level of care and investigation exercised by an athlete in relation to what should have been the perceived level of risk as required by the definition of Fault."**

39. The applicant contends that the Respondent in this case fell short of the no fault or negligence threshold due to his failure to exercise a high level of diligence expected from an athlete to avoid taking a prohibited substance. The Respondent has also failed to show the steps he took to ensure that the prohibited substance wasn't found in his system.
40. The Respondent bears a personal duty of care in ensuring compliance with the Anti-Doping regulations. The standard of care expected from an athlete of his caliber who has participated in national competitions is high. It's the

Applicant's submission that the Respondent was negligent due to his failure to exercise caution to the greatest possible extent and his conduct doesn't warrant a finding of no fault and negligence.

41. The Applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an Anti-Doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.
42. Further, the Applicant contends that the Respondent has had an expansive career in Bodybuilding participating at the national level, and it is evident that he has had exposure to the campaign against doping in sports.
43. The Applicant submits that it cannot be too strongly emphasized that the Respondent is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the Respondent to make reasonable inquiries on an ongoing basis whenever the Respondent uses the product.
44. The Applicant avers that an athlete competing in national competitions and who also knows that he is subject to doping controls because of his participation in the national competitions cannot simply assume as a general rule that the products he ingests are free of prohibited substances.
45. Submitting on sanction, the Applicant stated that *"for an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a non-specified*

*substance “and the agency ... can establish that the (ADRV) was intentional”. If Article 10.2.1 does not apply, the period of ineligibility shall be two years.”*

46. Applicant further submitted that, *“On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension.”*
47. **In CAS 2021/A/8056 Olga Pestova v. Russian Anti-Doping Agency (RUSADA) the panel in paragraph 4 provided the threshold for the reduction of a sanction, and it stated that “According to the applicable regulations, in order for the standard sanction for a violation involving a specified substance and a non-intentional anti-doping rule violation to be reduced on the basis of “No Significant Fault or Negligence”, the athlete must, on a balance of probabilities, firstly establish how the prohibited substance entered his/her system (the so-called “route of ingestion”). This is the “threshold” condition established by the anti-doping rules to allow “access” to a finding of “No Significant Fault or Negligence”. Secondly, s/he must establish the facts and circumstances that are relevant to his/her fault and, on that basis, why the standard sanction should be reduced. A period of ineligibility can be reduced based on “No Significant Fault or Negligence” only in cases where the circumstances justifying a deviation from the duty of exercising the “utmost caution” are truly exceptional, and not in the vast majority of cases.”.**
48. It’s the Applicants submission that in view of CAS jurisprudence regarding the strict nature of the duty of athletes to establish the origin of the prohibited substance in their system, the respondent in this case hasn’t

satisfied this burden moreover he has failed to demonstrate that the violation wasn't intentional and must be sanctioned with a four-year period of ineligibility.

49. The panel in **CAS 2018/A/5620 World Anti-Doping Agency (WADA) v. Hungarian National Anti-Doping Organization (HUNADO) & Darja Dmitrijevna Beklemiscseva** provided that **"Where the intentionality of the commission of the ADRV cannot be demonstrated, in order for the athlete to benefit from a lower sanction than the otherwise two years ineligibility, he or she must establish that he or she bears No Significant Fault or Negligence. It naturally follows that the athlete must also establish how the substance entered his or her body. The standard of proof is the balance of probabilities. This standard requires the athlete to convince the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence.** Proof of how the prohibited substance entered the athlete's sample is a prerequisite for the reduction of a sanction as established by CAS praxis. The respondent failed to adduce concrete evidence to support his claims. The athlete's inability to prove the source of the prohibited substance, coupled with his conduct, cannot be overlooked; consequently, he should face the full wrath of the law.
50. It's the applicant's submission that the Respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.

## **ii. Athlete's Submissions**

51. **The athlete chose not to participate in the proceedings.**

## **C. JURISDICTION**

52. The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following laws:

- a. Sports Act, No. 25 of 2013 under section 58.
  - b. Anti-Doping Act, No. 5 of 2016 under section 31(a) and (b).
  - c. Anti-Doping Rules under Article 8.
53. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

#### **D. APPLICABLE RULES**

54. Section 31 (2) of the Anti-Doping Act provides that:
- the tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations 2021, the Sports Act, the WADA Code 2021, and International Standards established under it, the UNESCO Convention Against Doping in Sports amongst other legal resources, when making its determination:**

#### **E. MERITS**

**i. Did the Athlete commit the charged anti-doping rule violation?**

55. The Applicant's prosecution is based on the charge of:
- Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/trenbolone and its metabolite 17 $\alpha$ -hydroxyestr-4,9,11-trien-3-one (Epi-trenbolone)1.**
- AND**
- Presence of a prohibited substance S4. Hormone and Metabolic Modulators/letrozolemetaboliteBis-(4-cyanophenyl) methanol,**
- as outlined at paragraph 10 of its charge document dated 18<sup>th</sup> January 2023.
56. Article 2.1 of the ADAK ADR and, similarly Article 2.2 of the Code provide the charge to be determined as follows:
57. Other than the WhatsApp communication, there was no further response recorded from or for the Athlete records held at the Tribunal indicate. Did such a named Athlete exist? The Doping Control Form dated 08/10/2022

in the Charge Document presented by the Applicant and adopted indicates the existence of this Athlete.

58. The corroboration of the existence of the Athlete is further confirmed by contact having been made by the pro-bono counsel Mr. Kivindy, but who subsequently ceased to act for the Athlete as he refused to cooperate in the filing of his defense and disappeared.
59. Consequently, the Panel is persuaded that a successful test was physically conducted as recorded in the DCF dated 08/10/2022 which does appear to be a legitimate WADA document. Therefore, we conclude that it was more probable than not that there existed such a person as the Athlete named in this matter.
60. Further, the Respondent Athlete did not request for a Sample B analysis thus waiving his right to the same under IFBB rule 37.5 and in essence accepting the Test Results of his A Sample. As stated by the Applicant *"Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an ADRV"*. Hence we accept that the Applicant has established to this Panel's comfortable satisfaction that the Athlete committed the ADRV as charged.

ii. **Was the violation committed by the Athlete intentional?**

61. On the issue of intention, the substances found in the Athletes body being Non-Specified Substances, CAS case law places responsibility on the Athlete to disprove lack of intention to dope by a balance of probabilities. The Athlete is responsible of adducing evidence of how the prohibited substance got into his system. The Respondent Athlete in this matter, however, didn't provide an alternative explanation supported with concrete evidence of how the prohibited substance entered his system.



62. The evidence that he adduced of what he thought might have led to the ADRV was disproved as not being the source and was thus not the source.
63. The WADA Anti-Doping Organizations Reference Guide under section 10.1 provides that:
- 'Intentional' means an athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk that the conduct might constitute an ADRV, and manifestly disregarded the risk.*
64. Consequently, in determining whether there was intention to commit the violation, there are two aspects to be reviewed:
- a. Whether he manifestly disregarded the risk.
  - b. Whether the Athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV.
65. There being not a shred of controverting evidence from the Athlete, the Panel accepts that the Athlete committed the ADRV intentionally. That said, the Panel does not deem it necessary to assess whether the Athlete may have No Fault or Negligence in committing the ADRV, the rationale being that the threshold of establishing that an ADRV was not committed intentionally is lower than proving that an athlete had No Fault or Negligence in committing the ADRV.
66. Additionally, the Panel finds that the above reasoning applies to No Significant Fault or Negligence.

## F. SANCTIONS

67. It was the Applicant's submission that the Respondent Athlete did not meet the set threshold by ADAK rules and the WADC to warrant sanction reduction. Various, submitting on sanction, the Applicant stated that:

*"for an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance "and the agency ... can establish that the (ADRV) was intentional". If Article 10.2.1 does not apply, the period of ineligibility shall be two years."*

This Panel reminds itself that the substances established in the Athlete's body were non-Specified Substances therefore WADC's and ADAK ADR Article 10.2.1.1 was applicable in this matter.

68. The WADC & ADAK ADR provides under Article 10.2 Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method; The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

*Article 10.2.1 The period of Ineligibility, subject to Article 10.2.4, **shall be four (4) years where:***

***Article 10.2.1.1 - The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.***<sup>58</sup>

*58 [Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly*

*unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]*

69. Article 10.6 provides that:

*10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence 10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6. All reductions under Article 10.6.1 are mutually exclusive and not cumulative*

70. Further Article 10.7 provides:

*10.7 Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault*

71. Suffice it to state here that the Athlete did not meet any of the provisions essential for mitigating the available sanction.

72. Further Code Article 10.10 provides:

*Article 10.10 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation;*

*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.<sup>73</sup>*

*73 [Comment to Article 10.10: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has*

*committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]*

**i. Credit for time served under the provisional suspension**

73. WADC's Article 10.13.2 provides that credit may be awarded for a provisional period of suspension served by the Athlete as against the period of ineligibility they are sanctioned for.

74. The aforementioned notwithstanding, WADC's Article 3.2.5 stipulates:

*The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.*

75. The Panel makes the following specific findings in regard to this matter: -

- a) There had been several attempts to have the athlete appear before the Tribunal which he has refused to accept or attend;
- b) The Tribunal attempted to assist the athlete by providing a pro-bono counsel to assist with the case which the athlete refused to take up despite several attempts to reach him;
- d) Having found as above, the Panel holds that the Athlete intentionally committed the ADRV in question and further wilfully and intentionally absconding the hearing process in terms of WADC's Article 3.2.5.

## G. DECISION

76. Consequent to the discussion on the merits of this case, the Panel finds:

- a. The applicable period of ineligibility of four (4) years is hereby upheld.
- b. The period of ineligibility shall be from the date of this decision for a period of four (4) years starting 29<sup>th</sup> June 2023 to 30 June 2027.
- c. Disqualification of any and/or all of the Athlete's competitive results from 8<sup>th</sup> October 2022.
- d. Each party shall bear its own costs.
- e. The right of appeal is provided for under Article 13 of the ADAK ADR and the WADA Code.

Dated at Nairobi this 29<sup>th</sup> day of June 2023



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**Mrs. Elynah S. Shiveka, Chairperson**



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**Mr. Gabriel Ouko, Member**



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**Mr. Allan Owinyi, Member**