REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. E005 OF 2022

ANTI-DOPING AGENCY OF KENYA…… APPLICANT

VERSUS

ELAHETIA JOTHAM KARANI…… ATHLETE

DECISION

Hearing: 16th March 2023 (Online)

Panel:

J. Njeri Onyango FCIArb – Panel Chair
Edmond Gichuru Kiplagat – Member
Mary N. Kimani – Member

Appearances:

Mr. Bildad Rogoncho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant.
Ms. Caroline Mwanzia, Advocate instructed by KWEW LLP Advocates for the Respondent Athlete

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

Contents

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. Procedural Background

3. Upon reading the Notice to Charge dated 14th 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 15th 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 5th January 2023;
    ii. The panel constituted to hear this matter shall be:
        a. J. Njeri Onyango (Mrs.) – Panel Chair
        b. Mr. Edmond Kiplagat – Member
        c. Ms. Mary N. Kimani – Member
    iii. The matter shall be mentioned on 19th January 2023 to confirm compliance and for further directions.
4. The matter was brought up for mention on 2nd February 2023 where Mr. Rogoncho appeared for the Applicant. The Secretariat stated that the Athlete's Counsel was informed of the matter of having been appointed pro bono Counsel but not of the mention date therefore was not aware of the mention. The Tribunal directed that the matter be listed for mention on 9th February 2023 for further directions.

5. During the mention on 9th February 2023 there were appearances by Mr. Rogoncho for the Applicant and Ms. Mwanzia for the Athlete. Mr. Rogoncho confirmed that he had been served with the Notice of Appointment in the matter but was yet to be served with the Response to the Charge. Ms. Mwanzia requested for seven (7) days to file and serve the Response to Charge which was granted and the Tribunal listed the matter for mention on 16th February 2023 for further directions.
6. On 16th February 2023 with both Counsel present, Mr. Rogoncho confirmed having been served the Response and prayed for seven (7) days to file any further response he may find necessary. The Tribunal listed the matter for mention on 23rd February 2023 for further directions
7. During the mention on 23rd February 2023 Mr. Rogoncho appeared for the Applicant while Ms. Mwanzia was in attendance for the Respondent Athlete. Counsel for the Athlete stated that they had served the Applicant with the Response, Witness Statement and Bundle of Documents and were yet to be served with the further response by the Applicant. Counsel for the Applicant stated that they were ready to proceed for hearing and would not put in a further response. Ms. Mwanzia stated she would call just one witness, that being the Athlete himself. The Tribunal directed the matter be listed for hearing on 9th March 202023 at 2.30pm via Microsoft Teams or such other medium as the Tribunal may direct.
8. The matter was subsequently virtually heard interparties on 16th March 2023.
9. At the mention to confirm compliance with filing of written submissions on 20th April 2023 with both Counsel present, it was confirmed that the

Applicant had filed and served its submissions on 19th April 20223. Counsel for the Athlete requested for 14 days to file and serve the Athlete's submissions. The Tribunal listed the matter to confirm compliance on 11th May 2023.

10. On 11th May 2023 the Tribunal confirmed receipt of submissions from both parties whose Counsel were in attendance. The Tribunal directed the decision be delivered on 8th June 2023.

Hearing on 16th March 2023 – Interparties

11. Mr. Rogoncho Counsel for the Applicant and Ms. Mwanzia for the Athlete were in attendance
12. The charge as articulated by Counsel for the Applicant was presence of diuretics and masking agents in particular furosemide a Specified Substance under S5 of the relevant Prohibited List.
13. Counsel for the Athlete pointed Panel to the Athlete's Witness Statement dated 15/03/2023 in the Athlete's Response documents which was adopted.
14. The Athlete's Identification number was recorded as 37842301, his name appearing as Jotham Karani Elahetia.
15. The Athlete in reply to Mr. Rogoncho in cross examination said he was 27 years old and a trader by profession and was also employed in a gym in Kitale; he said he was an amateur body builder since 2016 and attended inter-gym competitions within Kitale; he desired to be the national Body Building champion. Athlete said he had attended school up to Form Four and had a family with two (2) children.

16. Replying to Mr. Rogoncho the Athlete said he was told of natural body building but there is use of steroids which can cause death so he elected the natural way. Athlete said he had not been trained about doping but as he knew about steroids, he avoided that; he confirmed he was 2nd position in the East Africa Body Building championships.
17. Before the said championships the Athlete said his legs started swelling so he went to get drugs at a chemist named Moschem Pharmacy in Kitale and showed the seller his legs who then gave him Lasix. The swelling he said came suddenly so he also hastened to the chemist shop. At the chemist he was not asked about his work and the person he found behind the counter attended to him as a patient; neither did the Athlete volunteer to the seller that he was a sports person.
18. The Athlete confirmed he had a Facebook account and also was on WhatsApp but that he did not google the drugs he got from the chemist. Athlete confirmed that the winner at the East Africa Body Building competition took home Ksh. 300,000 while he got Ksh. 200,000 for 2nd position. The Athlete confirmed he had not reached the top and was mostly 2nd placed.
19. Asked if he had anything to show that he got the Lasix from the chemist at the time he said he did, the Athlete said he had no prescription, no stamp from chemist either. The Athlete confirmed it was the first time he underwent Doping test and he strictly followed the lead from the DCO who only told him about supplements and that is why he did not write down any medications. The Athlete said he googles about Body Building but had not googled anything about anti-doping; first time was at his testing in Eldoret. Asked if he had anything to show he had swollen legs

Athlete said there was a picture he took with his family as he was getting warm water massage on the legs.

20. The Athlete said he was tested on 9th October 2022 and had taken the tablets that same week – and he had not even finished the dose; he said he was ingesting 1 tab per day and there were many tabs in a packet. He said he did not carry the packet with him when he shifted base to Eldoret so did not use them for 3 days before the competition where his Sample was taken; in any case his legs' swelling had subsided.
21. At reexamination by Athlete's Counsel the Athlete said he went straight to the Chemist and they treated him like any other sick person. Athlete confirmed he had been engaging in body building since 2016 that is about 7 years but had received no doping education from the Applicant's agency; he said he would like to be educated then he would not be in this situation. Athlete said he attained a D plain at Form Four school level.

B. Parties' Submissions

i. The Applicant's Submissions

22. The Applicant adopted and owned its charge documents dated 18th January 2023 and the annexures thereto.
23. The Applicant submitted that the Athlete was a National-Level-Athlete, hence the World Athletics (hereinafter WA) Competition Rules, WA Anti-Doping Regulations, the World Anti-Doping Code (hereinafter WADC) and the Anti-Doping Agency of Kenya Anti-Doping Rules (hereinafter ADAK ADR) applied to him. The Applicant charged him with the Anti-Doping Rule Violation of presence of ***S5. Diuretics*** and ***Masking Agents/hydroclorothiazide and its metabolite 4-amino-6-cloro-1,3-***

benzenedisulphonamide (ACB) contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules.

24. The Applicant submitted that on 9th October 2022an ADAK Doping Control Officer (DCO) collected a urine Sample from the Athlete and assisted by the DCO the Athlete split the Sample into two separate bottles which were given reference numbers **A 7126047** (the 'A Sample') and **B 7126047** (the 'B Sample') according to the prescribed WADA procedure.
25. Both Samples were transported to the World Anti-Doping Agency 'WADA' – accredited Laboratory in Qatar, Qatar Doping Control 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 substance ***S5. Diuretics*** and ***Masking Agents/hydroclorothiazide and its metabolite 4-amino-6-cloro-1,3-benzenedisulphonamide (ACB)*** which are listed as a Diuretic and Masking Agent under S5 of the 2022 WADA prohibited list
26. The findings were 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.
27. The Respondent Athlete denied the charges and responded to the ADRV Notice vide a WhatsApp message dated 17th November 2022 (attached in the Athlete's correspondence) wherein he provided a list of the supplements he was ingesting which served as an explanation as to how the prohibited substance entered his body.

28. The Applicant stated that the Respondent Athlete's AAF was not consistent with any applicable TUE recorded at WA for the substances in question and there was no apparent departure from WA Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused the Adverse Analytical Findings.
29. Further the Athlete did not request a Sample B analysis thus waiving his right to the same under WA Rule 37.5 and confirmed that the results would be the same with those of Sample A in any event.
30. The response and conduct were evaluated by ADAK and it was deemed to constitute an ADRV and referred to the Sports Disputes Tribunal for determination.
31. A charge document was prepared and filed by ADAK Advocates and the Athlete presented a response thereto.
32. The matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules resulting in request for submissions from the parties
33. On legal position it was the Applicant's submission that under Article 3 of the ADAK ADR and WADC, the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.
34. The Applicant submitted that the presumptions at Article 3.2 were applicable and 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…

    f. To cooperate with Anti-Doping organizations investigating Anti-Doping rule violations;

In addition, the Athlete was also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping Rules.

35. It was the Applicant's position that in the Athlete's defence *he made several admissions and a few general denials; in his* ***evidence in chief*** *the Respondent Athlete made the following admissions:*

a) *He admitted to having a swollen knee and seeking medication.*
b) *He admitted to being prescribed with Lasix to address the swelling.*
c) *He admitted to ingesting the Lasix three days before the test was undertaken.*
d) *He admitted to not listing the Lasix in the Doping Control Form.*
e) *The Athlete denied using the Lasix to enhance his sporting performance.*
f) *The Respondent Athlete denied every other allegation made by ADAK.*

36. On proof of the ADRV the Applicant reiterated that the Athlete was charged with presence of Prohibited Substance, a violation of Article 2.1 of ADAK ADR. ***S5. Diuretics*** and ***Masking Agents/hydroclorothiazide and its metabolite 4-amino-6-cloro-1,3-benzenedisulphonamide (ACB)*** *was a Specified Substance and attracts a period of ineligibility of 4 years.*

37. Further Applicant submitted that *"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. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction and therefore the Applicant urged the Tribunal to find that an ADRV had been committed by the Athlete".*

38. On intention relied on Rule 40.3 of the WA Rules stating 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 there was a significant risk that*

the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk".

39. Quoting **CAS 2016/A/4626 World Anti-Doping Agency (WADA) v. Indian National Anti-Doping Agency (NADA) & Mhaskar Meghali,** Applicant noted that para. 2 states that, ***"For an ADRV to be committed non-intentionally, the athlete must prove that, by a balance of probability, he did not know that his conduct constituted an ADRV or that there was no significant risk of an ADRV. According to established case-law of CAS the proof by a balance of probability requires that one explanation is more probable than the other possible explanation. For that purpose, an athlete must provide actual evidence as opposed to mere speculation"***.

40. It was the Applicant's submission that "*the Athlete's explanation for the ADRV has virtually no evidentiary basis to support it, instead it solely relies on the athlete's testimony. The athlete has failed to prove a lack of intention to cheat based on his failure to tender any tangible evidence to demonstrate his non-intention to cheat when ingesting the prohibited substance"*.

41. The Applicant averred that while the Athlete stated that he used Lasix to treat swollen feet, Lasix being a prescription product, the Athlete did not provide any documentation or copy of prescription that he procured the medicine for the sole purpose of treating his swollen feet. It was the Applicant's submission "*that the Athlete didn't prove by a balance of probabilities that Lasix, a masking agent that is commonly used to hide or prevent detection of a banned substance, was in fact prescribed solely for therapeutic purposes by a doctor or a certified medical practitioner and wasn't taken with the intention to conceal that he was cheating"*.

42. The Applicant averred that "*there exists an inherent risk that medication may contain prohibited substances*". Consequently, the Applicant said that "*if indeed the Athlete was unaware of what he was ingesting, his blindness to its contents was more likely to be willful than inadvertent*".

43. The Applicant contended that "*although the Athlete was able to demonstrate how the **furosemide** got into his system, questions still linger as to how the second substance, **hydrochlorothiazide**, got into his system*". Further the Applicants said that, "*although not a prerequisite, the establishment of the source of route of ingestion is an important first step in disproving intent, especially in a case where the athlete hasn't furnished any other conclusive evidence or plausible explanation to show that he had no intention to cheat. The panel in **CAS 2018/A/5583 Joshua Taylor v. World Rugby** the panel stated that, it is for the athlete to establish that the anti-doping rule violation (ADRV) was not intentional…*" Further the Applicant submitted that, "*the athlete failed to discharge his burden by a balance of probabilities. The Respondent fell short of the established threshold through his failure to adduce concrete evidence or provide a plausible explanation for how the second prohibited substance entered his system*".

44. Concluding regarding intention the Applicant stated "*under ADAK ADR, an offence has therefore been committed as soon as it has been established that a prohibited substance was present in the athlete's tissue or fluids. There is thus a legal presumption that the athlete is responsible for the mere presence of a prohibited substance. The burden of proof resting on the Agency is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids. If the Agency is successful in proving this requirement, there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such an offence*".

45. Submitting on origin, the Applicant stated that *"the origin of the prohibited substance* ***S5. Diuretics*** *and* ***Masking Agents/hydroclorothiazide and its metabolite 4-amino-6-cloro-1,3-benzenedisulphonamide (ACB)*** *has not been established"* as the Athlete *"did not provide any receipt or prescription from the pharmacy to support his claim"*.

46. In regard to Fault/Negligence the Applicant relying on para. 2 in ***CAS 2017/A/5015 International Ski Federation (FIS) v. Therese Johaug & Norwegian Olympic and Paralympic Committee & Confederation of Sports (NIF)*** and ***CAS 2017/A/5110 Therese Johaug v. NIF,*** contended that *"the Respondent is charged with responsibility to be knowledgeable of and comply with 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 23.1.3 of ADAK ADR"*. The Applicant further stated that *"the duty to care to avoid doping is personal and always remains with the Respondent, and the athlete cannot shift his responsibilities to anyone else"*.

47. The Applicant also contended that, *"the athlete's lack of knowledge and education doesn't discharge him from his personal duty to exercise the utmost caution. The Respondent admitted to failing to undertake an investigation into the composition of the medication that was prescribed to him"*. The Applicant averred *"that undertaking an investigation into the ingredients of the medication required no medical knowledge."* Relying on CAS 2019/A/6482 Gabriel da Silva v. Federation Internationale de Natation (FINA) para. 2 it was the Applicant's submission that *"… The level of care and investigation required from an athlete who is a custodian of the WADA Code and ADAK Rules is high, and at a bare minimum, the athlete ought to have undertaken an investigation of the substances he was ingesting,* the Applicant surmising that *"the Athlete was*

negligent… left many stones unturned, and this is exhibited by his failure to check the Prohibited List. Moreover, the existence of the Prohibited Substance could have been easily discovered by the Respondent through a fairly simple internet search and cross-checking the ingredients with the Prohibited List". The Applicant placed "*onus on the Respondent to ensure that he upholds high standards which are bestowed upon him by virtue of being an experienced athlete*" concluding by stating that "*the Respondent was negligent and his level of fault was high to his failure to exercise the utmost duty of care*".

48. Submitting on knowledge, the Applicant "*contended 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 specimens, and that an ADRV occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimens, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault*".

49. It was the Applicant's averment that "*the Athlete had been participating in bodybuilding competitions for 7 years, and it is evident that he has had the exposure to the campaign against doping in sports, moreover the athlete has received anti-doping education from ADAK on 8th October 2022 at the Eldoret Rupa Mall*", submitting that "*[…] Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product*".

50. Submitting regarding sanctions, the Applicant stated "*For an ADRV under 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".

51. Further the Applicant said *"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) first 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".*

52. The Applicant then quoted ***CAS 2021/A/8056 Olga Pestova v. Russian Anti-Doping Agency (RUSADA)*** where the panel provided the threshold for reduction of a sanction, stating *"According to the applicable regulations, in order for the standard sanction for a violation involving a specified substance and a non-intentional ADRV 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".*

53. The Applicant submitted that the Athlete *"hasn't met the threshold for sanction reduction. The athlete was unable to establish the route of ingestion for the second substance hydrochlorothiazide"* stating *"[…] although the respondent*

*was able to establish the source of the **furosemide**, questions linger as why he could not produce any evidence in support to this and why he wouldn't mitigate his case further by explaining the source of the **hydrochlorothiazide**. […] the leash cannot be loosened simply because he proved the source of one substance; instead he must discharge his full burden to warrant sanction reduction"*. Thereto, the Applicant said, *"we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by ADAK rules and the WADAC to warrant sanction reduction"*.

54. The Applicant concluded by urging the Panel to consider the sanction provided for in *Article 10.3.3* of ADAK Rules and sanction the athlete to 4 years' ineligibility stating:

A. *The ADRV has been established as against the athlete.*
B. *The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint themselves with anti-doping policies.*
C. *The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was because of his negligent acts.*
D. *The maximum sanction of 4 years' ineligibility ought to be imposed as no plausible explanation has been advanced for the AAF.*

ii. Athlete's Submissions

55. The Respondent Athlete submitted that *"despite him establishing where the substance had emanated from, the Claimant states that he failed to establish origin and therefore intended to dope"*. Relying on ***CAS 2017/A/5016 & CAS 2017/A/5036*** which held that *"where an athlete cannot prove source, it leaves the narrowest corridor through which such athlete must pass to discharge the*

burden which lies upon him", the Athlete contended that he *"went further went ahead and substantially assisted both the Claimant and the Tribunal by establishing the source of the substance and admitting to the violation prescribed under Article 2.1 of the WADA Code and the Anti-Doping Rules"*.

56. Revisiting the matter of his swollen knees the Applicant stated, *"[…] he had previously explained that he had swollen knees even out-of-competition hence this was not the first time experiencing the swollen knees"*, the Athlete's submission further stating, *"concerned about his competence in competition with swollen knees, he decided to visit a pharmacy where the pharmacist gave him Lasix to relieve the pain. The Respondent further produced as part of his documents the particular pharmacy and its location"*.

57. The Athlete *"admitted that the masking agent found in his urine must have originated from the Lasix drug which he purchased from the pharmacy"* and he also *"admitted that he had never undergone training prior to the testing by ADAK officials and was therefore not aware of any responsibilities vested on him"*. He added *"not having undergone proper training* (he) *did not know that he was required to check on the internet the contents of the drug before ingesting. Even so, the Respondent's primary intention was to reduce the swelling on his knees in order to properly participate in the competitions"*.

58. Quoting ***CAS 2020/A/7579 WADA v. SA, S.I.A. & Shayna JACK*** the Athlete said panel there stated the following regarding establishment of origin, *"although the evidence of the exact source of the ADRV would be helpful to the athlete's case, its lack is not fatal. The athlete provided detailed accounts of conduct and evidence of possibilities of contamination that are able to satisfy the evidentiary burden"*. On insistence by Applicant that the Athlete *"failed to establish the origin of hydrochlorothiazide which is said to be the second substance found in the Respondent's urine […] Respondent however maintains that he was*

able to establish the origin of the prohibited substances said to have been found present in his system. The purchase of over-the-counter drug Lasix was to the Respondent's best knowledge and belief the sole origin of the prohibited substances", said the Athlete, relying on ***CAS 2020/A/7579 WADA v. SA, S.I.A. & Shayna JACK*** again *"[…] One should not look at discrete aspects of a case in a vacuum or require perfection from an athlete"*.

59. The Athlete averred that *"he has established the origin of the prohibited substance to the comfortable satisfaction of the Tribunal and thus the question of intention which shall be tackled next should be so frugal as to be withdrawn"*.

60. Submitting on intention to dope the Athlete stated that *"the establishment of origin almost always dispels the aspect of intention to cheat"* and quoted ***CAS 2017/A/4962 WADA v. COMITATO PERMANENTE Anti-Doping San Marino NADO & Karim Gharbi*** which stated, *"an athlete must adduce concrete evidence to demonstrate that a particular product the athlete ingested contained the substance in question as a preliminary to prove that it was unintentional or without fault/negligence"*.

61. It was the Athlete's assertion that *"furthermore, the Respondent Athlete in cross-examination was completely straightforward, genuine and honest, a factor that must not be overlooked by the Tribunal"*. The Athlete argued that he *"never tested positive before for a prohibited substance neither has he ever been placed under the Claimant's Registered Testing Pool of athletes. The Respondent is an athlete with aspirations of becoming a great bodybuilder in coming competitions and the presence of the prohibited substances was inadvertent and innocent"*.

62. Placing reliance on ***CAS 2016/A/4716 Cole Henning v. SAIDS*** the Athlete said it held that *"when an ADRV is in respect of a specified substance, the burden rests with the Anti-Doping Organization to establish that the violation*

was intentional. Identification of the substance consumed by the athlete as the cause of the ADRV is a prerequisite to negate the intentional element of the Anti-Doping organization applicable rules, without which identification of the intention to cheat may be assumed". The Athlete argued that while he *"provided evidence of the place he had purchased the drug from and even went ahead to acknowledge the same to be the probable source of the positive outcome, whereas the Claimant refuted his evidence, the Claimant has not provided the Tribunal with counter evidence of his (Respondent's) intentional ingestion of the prohibited substance. The Claimant has instead provided speculations of "what could be" "what could have been done" and "what has not been done"*.

63. Contending in this particular case *"there exists no intent to cheat"*, the Athlete said *"it was common phrase that hindsight is 20/20. Athletes are only able to defend themselves against the Claimant by tracing back their steps; exactly what the Respondent herein did"*.

64. Concerning the claim by the Applicant that *"the Athlete had failed to establish the origin of the second substance hydrochlorothiazide hence the proof to dope"* the Athlete responded that *"He (Respondent) proffered evidence of lack of intention to dope and acknowledged the primary source of the prohibited substances. Any further evidence of intention to cheat ought to have been brought forth by the Claimant but that was not tabled"* and quoted Shayna JACK to buttress his argument, *"to establish intentionality should involve efforts to find the probable source of the prohibited substance that are both proportionate to an athlete's means and likely to lead to probative evidence. It's unrealistic and unreasonable to expect athletes to pursue any avenue which might possibly render a result at their own cost"*. The Athlete surmised that *"he affirmed that he has proven that the presence of the prohibited substance was not vested on intentional conduct but rather, inadvertent"*.

65. In regards to Fault/Negligence the Athlete *"defined No fault to mean that an athlete has fully complied with the duty of care"* adding he *"provided plausible explanation as to how the prohibited substance found its way into his system"* and also he *"established that his actions were devoid of intention to dope. The test taken by the Claimant's DCO on 9th October 2022 was the first test that the Respondent Athlete had undergone throughout his career in bodybuilding"*.

66. It was the Athlete's submission that *"Whereas the Claimant produced a list of documents wherein the Respondent is alleged to have attended an anti-doping education and awareness training the day before the scheduled competitions, it still beats logic that the Claimants claim that the Respondent has undergone education and should have exercised extra care"*. The Athlete added that *"[…] he had ingested the substance about four days prior to the scheduled competitions on 9th October 2022. On 8th October 2022, the Respondent is alleged to have attended his first training workshop, a day prior to the competitions. As at this time, the Respondent had already ingested the medicine, and the swelling had gone down allowing him to participate in the competitions"*.

67. Further the Athlete submitted, *"the alleged training meant to educate the Respondent on roles and responsibilities of an athlete was <u>too little too late</u> as the Respondent had a competition the very next day and could not in any way foresee a positive result in the test, which would multiply into the present suit where the Claimant alleges that the Respondent was trained and should have taken extra caution before ingesting Lasix"*.

68. The Athlete concluded that *"[…] the alleged training of 8th October 2022 <u>albeit after the fact</u> can be said to be a good start for the Respondent to promote clean sport in the future"*.

69. On whether the Athlete was entitled to a reduction of the period of ineligibility, it was his submission that *"Article 10.6.1.1 of WADA Code 2021*

states: "Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault".

70. The Athlete prayed that "*the Tribunal makes a finding he (Respondent) did not intend to cheat but that the substance inadvertently found its way in his system*" and "*being his first ever recorded positive result, the Respondent prayed for a reduction of the period of ineligibility to a reprimand*". He further stated that, *"Whereas the Claimant prayed for a 4-year period of ineligibility imposed on the Respondent, the Respondent prays for a reduction –based on the dictate of Article 10.6.1.1 of the WADA Code – possibly to a maximum of six (6) months considering the Respondent is currently serving his provisional suspension which began on 8th December 2022"*.

C. JURISDICTION

71. 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.
72. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

D. APPLICABLE RULES

73. 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?

74. The Applicant's prosecution is based on the charge of ***Presence of a prohibited substance S5. Diuretics*** and ***Masking Agents/hydroclorothiazide and its metabolite 4-amino-6-cloro-1,3-benzenedisulphonamide (ACB)*** as outlined at paragraph 10 of its charge document dated 18th January 2023.

75. Article 2.1 of the ADAK ADR and, similarly Article 2.1 of the Code provide the charge to be determined as follows:

'2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample'

76. Uncontested Facts:

a. The Athlete did not request for a Sample B analysis thus waiving his right to the same under WA Rule 37 and confirmed that the results would be the same with those of Sample A in any event;

b. In his Response to the charge document, the Athlete admitted he took Lasix which was found in his urine Sample collected by the Applicant's Agency on 9th October 2022;

c. The Athlete admitted to not listing the Lasix in the Doping Control Form.

77. That the Athlete committed the charged anti-doping rule violation is not in contention as the Athlete admitted ingestion of a proscribed substance

and as observed by the Applicant in its submissions 'where use and presence of a prohibited substance has been demonstrated' – in the undisputed Test Report of the Athlete's urine Sample from the Accredited Laboratory tabled (unnumbered attachment in charge document) by the Applicant – 'it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated to establish an ADRV'.

78. Therefrom it is this Panel's finding that the Applicant had established the Athlete's ADRV to its comfortable satisfaction.

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

79. For 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, […] shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:*

Pursuant to WADC's & ADAK ADR Article 10.2.1 *The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years* ***where:***

> *10.2.1.2 The anti-doping rule violation* ***involves a Specified Substance or a Specified Method and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional****,* which is the operative article in this case.

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of Ineligibility shall be two (2) years.

80. Further, WADC's & ADAK ADR's Article 10.2.3 provides:

> *10.2.3 As used in Article 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in*

an anti-doping rule violation and manifestly disregarded that risk.59 *An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.*

59 [Comment to Article 10.2.3: Article 10.2.3 provides a special definition of "intentional" which is to be applied solely for purposes of Article 10.2.]

81. 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 (Our Emphasis).

82. Consequently, in determining whether there was intention to commit the violation, there are two aspects to be reviewed ***if*** the ADO/Applicant establishes ***that the anti-doping rule violation was intentional*** in this case: (Our Emphasis)

a. Whether the Athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV; and
b. Whether he manifestly disregarded the risk.

83. This Panel noted that in his submissions, relying on ***CAS 2016/A/4716 Cole Henning v. SAIDS***, "*[…] when an ADRV is in respect of a specified substance, the burden rests with the Anti-Doping Organization to establish that the violation was intentional…* ", the Athlete's contested the Applicant's claim that it was his (Athlete's) burden to establish that the violation was intentional.

84. We opine that, having established that the Athlete committed the anti-doping rule violation involving a Specified Substance, the conjunctive present at WADC's Article *10.2.1.2* placed the onus squarely on the Applicant to ***establish that the anti-doping rule violation was intentional.***

85. Nevertheless, in its submissions the Applicant continually clothed the Athlete with a burden that by Article 10.2.1.2 was a legal requirement that rested on itself. The Applicant for example posited that "*the athlete failed to discharge his burden by a balance of probabilities*" and the Applicant while submitting specifically on intention proceeded to state in its para.14 that, "*[…]* ***The burden of proof resting on the Agency is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids****. If the Agency is successful in proving this requirement, there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such an offence*" (Our Emphasis). It is true in the first limb of this matter that proof of 'Presence/Use' establishes an ADRV regardless of intention. That notwithstanding, progressing to the matter of establishing intentionality, WADC's Article 10.2.1.2 specifically addresses where the burden to establish intention rests in relation to Specified Substances/Methods, therefore the Agency does not have the leeway to limit its burden in the present case.

86. We also note that Counsel for the Applicant referred to and placed some importance on the ***CAS 2016/A/4626 WADA v. NADA & Meghali*** and it is important to distinguish that case from the Athlete's present case for the following reason: the Prohibited Substance involved in Meghali was a **non** - Specified Substance whose applicable requirement was the different WADC's Article 10.2.1.1. The panel in Meghali when summarizing issues for its determination noted at para.44 that, '*Methandione is not a Specified Substance. Thus, the length of the period of ineligibility to be imposed on the athlete depends on whether she (Meghali) established that the ADRV was "not intentional"*' (Our Emphasis).

87. Further, on the Applicant's submission '*[…] Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction…',* this Panel points the Applicant to WADC's Articles 10.2.1.1. & 10.2.1.2 which are the 'burden shifters' and specifically Article 10.2.1.2 which assigns the burden in respect to the period of Ineligibility for the violation of Article 2.1 in this matter.

88. On the matter of establishment of intention in WADC's Article 10.2.1.2, this Panel aligns itself with the panel in ***CAS 2016/A/4716 Cole Henning v. SAIDS*** para. 53. '*In the event, that the Sole Arbitrator is comfortably satisfied that an ADRV has occurred, as admitted by the Appellant, it rests upon the Respondent to discharge the burden of proving intention on the part of the Appellant, as provided for in Articles 10.2.1.2 and 10.3 of the SAIDS Rules, in order for the Sole Arbitrator to determine which sanctions or other results should follow, the ADRV being in respect of a Specified Substance*' (Our Emphasis).

89. Further, in regard to WADC's Article 3.1 we lean on ***CAS 2016/A/4716 Cole Henning v. SAIDS*** para. 47 *'[…]. Although the WADA Code is silent on the*

precise standard of proof which the Respondent must provide to establish that a violation was intentional, the practice is that the standard required by CAS Panels would be the same "comfortable satisfaction" standard that Anti-Doping Organisations (hereinafter referred as "ADOs") are held to establish in an ADRV, especially since "comfortable satisfaction" has been recognised in CAS awards as the general standard applicable in disciplinary matters.', and *para. 48. 'The CAS practice in disciplinary matters also points to a general acceptance of the comfortable satisfaction standard on the prosecuting sports organisation. That said, comfortable satisfaction is a variable standard, described in the WADA Code as "greater than a mere balance of probability but less than proof beyond a reasonable doubt"'.*

90. We note with concern that the Applicant's misstep at the outset, that is, of it unjustifiably miss-assigning the burden of establishing intentionality for the ADRV committed by the Athlete, technically rendered the/any rebuttal by the Respondent Athlete a convoluted mission.

91. In the circumstances, it is our considered opinion that the Applicant having erroneously self-limited its legitimate Code burden and thereby seriously limited itself in discharge of its burden, the Applicant was not able to establish to the comfortable satisfaction of this Panel that the Athlete's anti-doping rule violation was intentional. Arising therefrom, WADC's ADAK ADR's Article 10.2.2 was applicable in this case.

iii. **No Fault/Negligence & No Significant Fault/Negligence – Origin – Knowledge**

92. WADC's Article 10.5 Elimination of the Period of Ineligibility where there is No Fault or Negligence provided:

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.65

*65 [Comment to Article 10.5: This Article and Article 10.6.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They **will only apply in exceptional circumstances**, for example, where an Athlete could prove that, despite **all due care**, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances:*(Our Emphasis)

a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.6 based on No Significant Fault or Negligence.] (Our Emphasis)

93. It was the Applicant's contention that the Athlete was personally Code bound to ensure that no prohibited substance entered his body, WADC's Article '*2.2.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used'* while the

Athlete argued that he had fully complied with the duty of care. Looking at the Comment in WADC's Article 10.5 (b) and examining the Athlete's pleadings, we are not persuaded that the Athlete fully complied with his duty of care considering ignorance was not a tool at his disposal within the Code dictates. Anti-Doping Rules are considered cross-cutting sports rules in the same way bodybuilding rules are of importance for bodybuilders around the sports world and strict observance is a key commandment of the WADC/ADAK ADR. In the very same way the Athlete had trained himself during his 7year sports career utilizing the Bodybuilding literature available, without exception, the WADA Code Article 21.1 ***Roles and Responsibilities of Athletes*** *21.1.1 'To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code',* required him to glean out at least the basic requirements regarding anti-doping on the relevant website(s) if necessary. By not making himself Code-knowledgeable, all due care or what is called 'utmost caution' in CAS parlance cannot be said to have been exercised by the Athlete therefore this Panel finds that **No Fault/Negligence** does not appertain in his case.

94. WADC's Article 10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence provides:

> *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.*
>
> > *10.6.1.1 Specified Substances or Specified Methods*
> >
> > *Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Athlete or other Person can establish No Significant Fault or*

Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

95. Further, as defined in the WADC 2021, No Significant Fault or Negligence is:

> *The Athlete or other Person's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1,* ***the Athlete must also establish how the Prohibited Substance entered the Athlete's system*** (Our Emphasis).

96. It is obvious that in canvassing for No Significant Fault or Negligence, origin/establishing how the Prohibited Substance got into the Athlete's system is mandatory as per the definition in WADC 2021.

97. Submitting on origin, it was the Applicant's contention that although the Athlete was able to establish the source of the furosemide, the Applicant queried why the Athlete would not mitigate his case further by explaining the source of the hydrochlorothiazide. Quoting ***CAS 2020/A/7579 WADA v. SA, S.I.A. & Shayna JACK***, it was the Athlete's response that, *"[…] One should not look at discrete aspects of a case in a vacuum or require perfection from an athlete"* and also that '*it is unrealistic and unreasonable to expect athletes to pursue any avenue which might render a result at their own cost*'.

98. The Panel notes that the Test Report and Notification indicate the Athlete was notified of the two AAFs at the same time therefore, they were to be treated as a single doping violation, (both being Specified Substances)

pursuant to WADC's Article 10.2.1.2 for purpose of determination of the sanction. See ***CAS 2012/A/2959 WADA v. Ali Nilforushan & FEI*** para. 8.4 *'The parties agree that Mr. Nilforusha's three AAFs are to be considered a single violation and that Mr. Nilforushan's sanction is to be based on the violation that carries the most severe sanction i.e. Phentermine, which is not a specified substance. Accordingly, Article 10.4 ADRHA (lack of intention to enhance performance in relation to specified substances) is of no application'*. That said, reduction of sanction on account of No Significant Fault or Negligence in this case is governed by WADC's Article 10.6.1.1 *Specified Substances or Specified Methods.* The Panel also takes cognisance of the fact that in the definition of No Significant Fault or Negligence the Athlete **must also** establish how the Prohibited Substance entered the Athlete's system.

99. When viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, in a scenario of a pleading for No Significant Fault or Negligence by the Athlete, where there is the inescapable requirement to establish how the Prohibited Substances entered the Athlete's system, it is our view that the route of ingestion of both Specified Substances whose presence was admitted required to be established by the Athlete so that he could benefit from the maximum six (6) month reduction he prayed for.

100. Further Article 10.7 provides:

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

101. On Knowledge the Applicant upheld the principle of strict liability saying ignorance is no excuse. The Athlete on the other hand termed the training given by the Agency as '*too little too late*' though he did appreciate that it was a good start for him to promote clean sport in the future.

102. This Panel notes that the evidence attached by the Applicant to show training was done indicates that the education was done the day prior to the competition and subsequent testing and we agree with the Athlete that it was 'after the fact'.

103. WADA's International Standard for Education (ISE) 2021 Article 7.2.1 provides: '*Each National Anti-Doping Organization shall be the authority on Education as it relates to clean sport within their respective country. National Anti-Doping Organizations should support the principle that an Athlete's first experience with anti-doping should be through Education rather than Doping Control*' (Our Emphasis).

104. Some of the core competencies the Applicant ought to be delivering to its stakeholders, one of whom is the Athlete, is enumerated under ISE's Article 3.3 Anti-Doping Education: '*Delivering training on anti-doping topics to build competencies in clean sport behaviors and make informed decisions*' and *5.2 • Use of medications and Therapeutic Use Exemptions.*

105. Experiencing his first Doping Education essentially at Doping Control in a career spanning 7 years may be a good start as the Athlete observes, *better late than never* but it should paint for the Applicant the glaring gaps that continue to exist for those sportspeople like the Athlete who practice their sports from the remoter regions of the Republic and may be challenged in accessing quality/usable clean sport anti-doping information from genuine doping authorities. In ***CAS 2010/A/2107 Flavia Oliveira v. USADA***, *CAS considered that the athlete's lack of any formal anti-doping training was a relevant factor under Article 10.4 WADC (reduction for specified substance where substance not intended to enhance performance) when assessing her failure carefully to check the label of a product she took for therapeutic purposes'.*

106. It is noted by the Panel that this was the Athlete's first violation and his level of formal educational attainment was basic.

F. SANCTIONS

107. The Applicant "*urged the panel to consider the sanction provided for in **Article 10.3.3** of the ADAK Rules and sanction the athlete to 4 years' ineligibility*", whereas the Athlete prayed "*for a reduction of period of ineligibility to a maximum of six (6) months*". We wish to note that Article 10.3.3 is essentially for violations of Article 2.7 or 2.8 and is not relevant to this case.

108. 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.73*
>
> *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

109. 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. There was no contestation that the Athlete was respecting his provisional suspension.

G. DECISION

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

a. The applicable period of ineligibility of two (2) years is hereby upheld.

b. The period of ineligibility shall be from the date of the Athlete's Provisional Suspension which began on **8th December 2022** for a period of two (2) years. (8th December, 2022 to 8th December, 2024).

c. Disqualification of any and/or all of the Athlete's competitive results from **9th 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 __ 8th _____day of _____June_____2023

_____

Mrs. J Njeri Onyango, FCIArb, Chairperson

_____ _____

Mr. E. Gichuru Kiplagat, Member **Ms. Mary N. Kimani, Member**