

REPUBLIC OF KENYA



THE JUDICIARY
IN THE SPORTS DISPUTES TRIBUNAL
ANTI DOPING CASE NO EOO4 OF 2022

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

-versus-

MICHAEL KIBET..... ATHLETE

DECISION

Panel : Mrs. Elynah Shiveka - Panel Chair
Mr. Gabriel Ouko - Member
Mr. Allan Mola - Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant;

The Athlete was unrepresented and did not participate in the proceedings.

I. The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a male adult of presumed sound mind and a National Level Athlete (hereinafter '**the Athlete**').

II. Factual Background

3. The Athlete is a national Athlete hence the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
4. On 20th September, 2022, an ADAK Anti-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 numbers **A 7125815** (the “A” Sample) and **B 7125815** (the “B” Sample) respectively.
5. Both Samples were transported to the Qatar Doping Control Laboratory - Qatar 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. The analysis of the A Sample returned an Adverse Analytical Finding (AAF) for the presence of a prohibited substance which is a non-Specified substance listed as *S2 Peptide hormones, growth factors, related substances and mimetics/erythropoietin (EPO)* under S.2 of WADA’s Prohibited List.
6. The finding was communicated to the Respondent Athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 1st November 2022. In the said communication the Athlete was offered an opportunity to provide a written explanation for the AAF by 21st November 2022.
7. The same letter also informed the Athlete of his right to request for the analysis of the B-sample, and other avenues for sanction reduction including elimination of the period of ineligibility where the is No Fault or Negligence, on the basis of No Significant Fault or Negligence, Substantial Assistance in Discovering and establishing Code Violations, Results Management Agreements and Case Resolution Agreements. The Athlete was given until 10th March 2022 to respond and request for a hearing if need be.
8. The Athlete didn’t respond to the charges leveled against him.
9. A Notice to Charge dated 28th November 2022 was filed at the Tribunal by ADAK.

DIRECTIONS

10. The following directions were issued by the Tribunal:

- (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, The Doping Control Form, this Direction No. 1 and all relevant documents on the Respondent by 16th December 2022.
 - (ii) The Panel constituted to hear this matter shall be as follows; Elynah Sifuna Shiveka as Panel Chair, Allan Mola Owinyi, Member and Mr. Gabriel Ouko, Member.
 - (iii) The matter shall be mentioned on 22nd December 2022 to confirm compliance and for further directions.
11. On 22nd December 2022 it was noted that the matter was to be mentioned as scheduled on 22nd December 2022. Mr. Rogoncho for the Applicant stated that the Athlete was a police officer who was aware of the date but was subsequently unavailable to attend. He asked for a further mention date. The matter being mentioned on the 21st December 2021, the Tribunal ordered that the matter be mentioned further on 19th January 2023 via Teams or such other medium as the Tribunal may direct.
12. On 2nd February 2023, Mr. Rogoncho appeared for the Applicant, but there was no appearance by or for the Athlete. After confirming that the Athlete had been served with the ADRV via WhatsApp, Mr. Rogoncho requested for seven days to trace the Athlete. The Tribunal directed Mr. Rogoncho to trace the Athlete within seven days and for the matter to be mentioned on 9th February 2023.
13. On 9th February 2023, Mr. Rogoncho for the Applicant stated that the Athlete had never appeared before the Tribunal despite the matter having been mentioned severally. He added that he had contacted Athletics Kenya who had informed him that the Athlete was in the US and was expected back by the end of March. Mr. Rogoncho further confirmed to the Chairman, upon enquiry that the Athlete was served of the ADRV via email but had not responded. He stated that he would serve him with the charge document once he got back. The matter was fixed for further mention on 9th March 2023.
14. On 16th March 2023 when the matter was mentioned, Mr. Rogoncho stated that the matter was in the Tribunal on 22nd December 2022 when the Athlete did not attend. On the 19th January 2023 and 2nd February 2023, the Athlete was absent. On 9th February 2023 the Athlete communicated to the Applicant confirming that he was in the USA. The matter was adjourned to 9th March 2023 but the Athlete was absent again. He confirmed that the Athlete was no longer in communication with the Applicant and feared that he may be participating in races. Even the date of 16th March 2023 had been communicated to the Athlete via email but he was absent. He asked to be allowed to file submissions pursuant

to Article 8.3.5 of ADAK Anti-Doping Rules. The Tribunal directed Mr. Rogoncho to file submissions within 14 days and serve upon the athlete at his stated address on record together with the mention notice. The matter was fixed for mention on 30th March 2023.

15. On 30th March 2023, the matter was mentioned to confirm filing and service of submissions upon the Respondent. However, due to some technical hitches at The Tribunal registry, the same could not be confirmed. A further mention date of 6th April 2023 was given.
16. On 6th April 2023, the Registry confirmed that they were yet to receive the Applicant's submissions. Mr. Rogoncho asked for a further 7 days to file the submissions. The matter was fixed for mention on 13th April 2023 to confirm filing of submissions.
17. During a mention on 20th April 2023, the Applicant confirmed having filed the submissions and the matter was listed for Judgment on 25th May 2023.

III. Submissions

18. Below is a summary of the main relevant facts and allegations based on the Applicant's written submissions.

A. Applicant's Submissions

19. Mr. Rogoncho, Counsel for the Applicant, informed the Panel that the Agency wished to adopt and own the Charge Document dated **14th December 2022** and the annexures thereto as an integral part of its submissions.
20. He submitted that the Athlete was "*charged with an Anti-Doping Rule Violation of Presence of a prohibited substance **S2 Peptide Hormones, Growth Factors, Related substances and Mimetics/ Erythropoietin (EPO)** in contravention to the provisions of Article 2.1 of the ADAK ADR (herein referred to as ADAK Rules)*".
21. The Athlete being a National level Athlete, the results management authority vested with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in Anti-Doping Act No. 5 of 2015 as amended to constitute a hearing panel which the Athlete was comfortable with.
22. At No. 4 he states "*The matter was set down for hearing. The Respondent however did not participate in the proceedings.*"
23. The above was despite the Athlete being informed of his procedural rights under the ADAK rules and the WADA Code.

24. In his submissions he listed the legal position under Article 3 of ADAK ADR/WADC...the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel. He also listed the Presumptions under Article 3.2 which included that facts relating to an ADRV may be established by any reliable means including admissions. He laid down the roles and responsibilities of the athlete as under WADC's Article 22.1 and also the principals enunciated in preface to the ADR regarding the duties of the athlete.
25. The Applicant also submitted that “[...] *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.”*
26. At No. 19 Counsel for the Applicant restated the Roles and Responsibilities of the Athlete as under Article 22.1 which amongst others includes to...” cooperate with Anti-Doping Organizations investigating Anti-Doping Rule Violations.”
27. The Respondent herein is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides that: - “The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including, • Health • Ethics, fair play, and honesty • Excellence in performance • Character and education • Fun and joy • Dedication and commitment • Respect for the rules and laws • Respect for self and other participants
28. Counsel for the Applicant submitted that the burden of proof expected to be discharged under Article 3 of the Adak Rules had ably been done. He further stated 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 in order to establish an ADRV.*”
29. The Applicant submitted that as under 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. He urged the Tribunal to find that an ADRV had been committed by the Respondent Athlete.

30. On the matter of Intention, the Applicant states that under Rule 40.3 of the WA Rules, 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. “Failure to explain concrete origin of a prohibited substance only means that the Athlete cannot prove the lack of intent. The Athlete did not participate in the proceedings.
31. Quoting **CAS 2019/A/6213 World AntiDoping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková** Counsel for the Applicant asserts that: -

The Athlete bears the responsibility of disproving lack of intention to dope on a balance of probability, adducing concrete evidence explaining how the substance entered his system. He also states that the Athlete was duly notified of the procedural steps and his rights under ADAK rules and the WADA code, to provide specific, objective and persuasive evidence in aiding his case. The Applicant states that in choosing not to participate in these proceedings, the Athlete leaves many questions regarding his intention unanswered.

The Applicant stresses that, under the ADAK ADR, an offence has therefore been committed as soon as it has been established that a prohibited substance was present in the Respondent's tissue or fluids. The Respondent 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. The Agency is successful in proving the presence of the substance, there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such an offence.
32. Under Origin, it's stated that the Respondent didn't participate in the proceedings and so there is no explanation for the presence of the prohibited substance.
33. On the matter of Fault/Negligence it was the Applicant's submission at its para.41 that *“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.”*

34. Concerning knowledge, the Applicant contended that, *“the Athlete has had a long career in Athletics and it is only questionable that he has had no exposure to the crusade against doping in sports.*
35. The Applicant further held *“that an athlete competing at a national and international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances”*
36. While arguing on the sanction the Applicant stated at its para 34 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. 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 performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his degree of culpability with a view of Eliminating or reducing his period of suspension.”*
37. The Applicant relied on the cases of *CAS 2015/A/3945 Sigfus Fossdal v. International Powerlifting Federation (IPF)* and *CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)*, to confirm that for the period of ineligibility to be either eliminated or reduced, the Athlete must establish how the banned substance entered his system. The burden of proof is on the Athlete, on a balance of probability. Further, the origin of the substance must be established, before the Athlete can establish that he bore No fault or Negligence or No Significant Fault or Negligence by a balance of probability.
38. The Applicant avers that the Respondent’s failure to participate in the proceedings and adduce evidence in his defense supporting the topic of intention means that his level of fault was high, and has thus not demonstrated no fault of negligence to warrant sanction reduction.
39. The Applicant concluded by stating that, *“The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.”*

IV. Jurisdiction

40. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013, Sections 31 and 32 of the Anti-Doping Act, No. 5 of 2016 and Article 8 Anti-Doping Rules to hear and determine this case.

V. Applicable Law

41. 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:

42. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

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

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 its *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 in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's A Sample* where the *Athlete* waives analysis of the *B Sample* and the *B Sample* is not analyzed ...

VI. MERITS

43. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

44. The Tribunal will address the issues as follows:

- a. Whether there was an occurrence of an ADRV, the Burden and Standard of proof;*
- b. Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
- c. Reduction based on No Fault/No Negligence/Knowledge;*
- d. The Standard Sanction and what sanction to impose in the circumstance.*

A. The Occurrence of an ADRV, the Burden and Standard of proof.

45. As used in WADC's Article 3.1:

The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

[...]. Where the Code places the burden upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

46. The Athlete did not participate in the proceedings at all. He therefore did not provide any explanation for the occurrence of the ADRV. The Respondent athlete's AAF was not consistent with any applicable TUE recorded at the WA for the substances in question and there is no apparent departure from the WA Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings.

47. The Respondent 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 as those of sample A in any event.

48. Premised on the above the Athlete's B Sample was not tested hence only the A Sample could be considered by the Panel. As such WADC's Articles 2.1/2.1.1 kicked in '[...] ***Athletes are responsible for any Prohibited Substance or its 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 in order to establish an anti-doping rule violation under Article 2.1.***'

49. In absence of a Sample B analysis to contradict the A Sample result, the Panel finds that as per WADC's Article 2.1.2, an ADRV had been committed by the Athlete:

'2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the athlete's A Sample where the athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the athlete's B Sample is

analyzed and the analysis of the *athlete's B Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *athlete's A Sample*; or, where the *athlete's B Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

B. Was the Athlete's ADRV intentional?

50. The burden of proof is on the Athlete to prove that commission of his ADRV was not intentional as under Article 10.2 of the WADC:

'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 reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the athlete or other Person can establish that the anti-doping rule violation was not intentional.

51. The main relevant rule in question in the present case then is Article 10.2.3 of the ADAK ADR, which reads as follows:

As used in Articles 10.2 and 10.3, and Rules 40.3 WA Rules, 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 or result in an anti-doping rule violation and manifestly disregarded that risk. [...]

52. The Tribunal believes intent must be examined to fairly evaluate the case. The Appellant avers that it was the Respondent's responsibility to prove they did not intentionally consume the substance. However, Article 2.1.1 of the Code states that athletes are responsible for any prohibited substances found in their samples, regardless of intent. The provision emphasizes the importance of the

presence of the substance in establishing an anti-doping violation. The anti-doping violation against the Respondent has been proven.

53. We therefore find that the provisions of the WADA and the jurisprudence emanating from the CAS could not be clearer. Intention can be proved on the part of the athlete where it shown through the conduct of the athlete, that they clearly disregarded material risk of anti-doping rule violation.
54. We agree with the applicant's submission that the Respondent has failed to prove a lack of intention to cheat, based on his conduct. In the absence of evidence, the Panel rules that the lack of intention was not established by the Athlete.

C. Reduction Based on No Fault or Negligence/No Significant Fault or Negligence/Knowledge

55. Since it is already concluded above that the Athlete's ADRV was ruled intentional, the Panel does not deem it necessary to assess whether the Athlete may have had No fault or Negligence in committing the anti-doping rule violation.
56. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had no fault or negligence in committing an anti-doping rule violation.
57. Additionally, the Tribunal finds that the above reasoning also applies to "no significant fault or negligence" (Article 10.5 of the ADAK Rules). The Tribunal observes that the comment to Article 10.5.2 of the ADAK Rules takes away any possible doubts in this respect:

"Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation [...] or an element of a particular sanction [...]"

58. In regards to knowledge, the Panel noted that the Athlete had an extensive athletic career and must have been exposed to anti-doping awareness workshops, the Doping Program was not novel to him and even if it were, ignorance of sports doping by adherents of the Code would be not be an adequate shield; as averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF)**: *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules. A player's ignorance or naivety cannot be the basis upon which he or*

she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

D. Sanctions

59. Upon the finding that the athlete intentionally violated the anti-doping rule, we note that the WADA clearly provides that the ineligibility period shall be four (4) years, subject to the provided potential reduction criteria provided under Articles 10.4 (i.e. Elimination of the Period of Ineligibility where there is No Fault or Negligence), 10.5 (i.e. Reduction of the Period of Ineligibility based on No Significant Fault or Negligence) or 10.6 (i.e. Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault).

60. The Tribunal has determined that the athlete intentionally violated the anti-doping rules, so there is no need to further examine whether the athlete was at fault or lacked negligence. The standard for proving intentionality is more stringent than the standard for proving the absence of fault or negligence. This is well captured under Article 3.1 of the Code which provides as follows:

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability [Emphasis Ours].

61. Additionally, the Tribunal finds that the above reasoning also applies to “no significant fault or negligence” (Article 10.5 of the WADA Code). The Tribunal observes that the comment to Article 10.5.2 of the Code takes away any possible doubts in this respect:

Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation [...] or an element of a particular sanction (e.g., Article 10.2.1

62. As such, since the Respondent is found guilty of intentionally violating Article 10.2.1 of the Code, it is impossible to establish that the violation was committed with no significant fault or negligence. This was clearly held in the case of **WADA v. Indian NADA & Dane Pereira CAS 2016/A/4609**: -

The finding that a violation was committed intentionally excludes the possibility to eliminate the period of ineligibility based on no fault or negligence or no significant fault or negligence.

Commencement of Ineligibility Period

63. Article 10.11 of the WADA Code provides as follows: -

Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing of Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

10.11.1 Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of ineligibility, including retroactive Ineligibility, shall be disqualified.

10.9 Timely Admission

Where the Athlete promptly (which, in all events, means before the Athlete competes again) admits, the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period on Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person

accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed

64. We note that the above Article gives some form of flexibility and discretion to the Tribunal to determine this question. The Tribunal acknowledges that the Respondent never challenged that *Presence of a prohibited substance **S2 Peptide Hormones, Growth Factors, Related substances and Mimetics/ Erythropoietin (EPO)** in contravention to the provisions of Article 2.1 of the ADAK ADR* as found in his urine sample as per the charge document.

Credit for time served under the provisional suspension

65. 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.

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.

66. 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 willfully and intentionally absconding the hearing process in terms of WADC's Article 3.2.5.

Conclusion

67. In light of the above, the following Orders commend themselves to Tribunal:

- a. The period of ineligibility for the Respondent shall be four (4) years commencing on 29th June 2023 to 29th June 2027.
- b. The Respondent's results obtained from and including the 1st November 2022 until the date of determination of this matter be disqualified, with all resulting consequences including forfeiture of medals, points and prizes pursuant to Article 10.1 of the WADA Code and the ADAK rules;
- c. Each party shall bear its own costs;
- d. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and Part IV of the Anti-Doping Act, No. 5 of 2016.

Dated at **Nairobi** this 29th day of June 2023

Elynah Shiveka

Elynah Shiveka, Panel Chair

Gabriel Ouko

Gabriel Ouko, Member

Allan Mola

Allan Mola, Member