REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. E023 OF 2023

ANTI-DOPING AGENCY OF KENYA…… APPLICANT

VERSUS

AGNES MUMBUA…… ATHLETE

DECISION

Hearing: 24th August 2023 (Online)-Parties agreed to rely on written submissions

Panel:

J. Njeri Onyango FCIArb – Panel Chair
Gabriel Ouko – Member
Mary N. Kimani – Member

Appearances:

Mr. Bildad Rogoncho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant;
Mr. Kelvin Njuguna Mugwe, Advocate instructed by TripleOkLaw Advocates LLP, 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 female adult of presumed sound mind, a National Level Athlete, athletics, (hereinafter referred to as **the Athlete**).

ii. Procedural Background

1. Upon reading the Notice to Charge dated 31st May 2023 presented to the Tribunal on same date by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in the order dated 12th June 2023, 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 16th June 2023;
    ii. The panel constituted to hear this matter shall be:
        a. J. Njeri Onyango (Mrs.) – Panel Chair
        b. Gabriel Ouko – Member
        c. Mary N. Kimani – Member
    iii. The matter shall be mentioned on 22nd June 2023 to confirm compliance and for further directions.
2. The matter was brought up for mention on 22nd June 2023 where Mr. Rogoncho appeared for the Applicant while the Athlete was self-represented. The Athlete requested for probono counsel whom the Secretariat confirmed would be availed within 14 days.
3. The Tribunal directed that the matter be listed for mention on 13th July 2023 for further directions.

4. During a mention on 13/07/2023 there were appearances by Mr. Rogoncho for the Applicant and Mr. Njuguna for the Athlete. Counsel for the Athlete came on record for the first time and requested more time to file a response. The Tribunal set the case for mention on 03/08/2023 for further directions.
5. On 3rd August 2023 Mr. Rogoncho appeared for the Applicant while Mr. Njuguna represented the Athlete. Mr. Njuguna stated that he had filed a Notice of Appointment and a Statement of Response on the same afternoon. The Chairperson of the Tribunal stated the documents were not yet in the file. Mr. Rogoncho stated he had not been served with the documents to which Mr. Njuguna said he had served Mr. Rogoncho via email. Upon inquiry by the Chairperson, Mr. Njuguna stated that he had spoken to the Athlete and that they were comfortable with a virtual hearing.
6. On 3rd August 2023, the Tribunal directed:
    i. Mr. Njuguna serve his Notice of Appointment and Statement of Response before Close of Business today;
    ii. The Applicant to file supplementary documents as it may deem fit within ten (10) days of service by Respondent Athlete;
    iii. The matter was listed for Hearing on 24th August 2023 at 2.30pm via Microsoft Teams.
7. At the Hearing on 24th August 2023 Mr. Rogoncho appeared for the Applicant while Mr. Njuguna was in attendance for the Respondent Athlete. The parties agreed to dispose of the matter by way of submissions. Mr. Njuguna was to go first and he requested for fourteen (14) days. Mr. Rogoncho required seven (7) days. The Tribunal granted both parties the days requested and ordered the matter be mentioned on 14/09/2023 to confirm compliance

8. During the mention on 14/09/2023 Mr. Kivindyo held brief for Mr. Njuguna for the Athlete while Mr. Rogoncho appeared for the Applicant. The Respondent Athlete was yet to file their submissions as Counsel had not been feeling well. The Tribunal allowed the Athlete seven (7) days and listed the matter for further mention on 21st September 2023.
9. When the matter was mentioned on 21st September 2023 Mr. Rogoncho appeared for the Applicant while Mr. Okiring held brief for Mr. Njuguna for the Athlete. Mr. Rogoncho confirmed service upon him of the Respondent Athlete's submissions. Mr. Rogoncho also confirmed that he had filed and served his written submissions. The Tribunal directed the Panel of the Tribunal render a decision on 12th October 2023.

B. Parties' Submissions

i. The Applicant's Submissions

10. The Applicant adopted and owned its charge documents dated 6th June 2023 and the annexures thereto.
11. 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 her. The Applicant charged him with the Anti-Doping Rule Violation of presence of ***S1.1 Anabolic Androgenic Steroids (AAS)/methasterone and its metabolite 2a,17a-dimethyl-5aandrostane 3a,17β-diol*** contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules.
12. The Applicant submitted that on 27th February 2022 during the Kilimanjaro Marathon in Tanzania, a Tanzanian Olympic Committee 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 4589431** (the 'A Sample') and **B 4589431** (the 'B Sample') according to the prescribed WADA procedure.

13. Both Samples were transported to the World Anti-Doping Agency 'WADA' – accredited Laboratory in South Africa, South African Doping Control Laboratory – Bloemfontein (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 substance ***S1.1 Anabolic Androgenic Steroids (AAS)/methasterone and its metabolite 2a,17a-dimethyl-5aandrostane 3a,17β-diol*** which is listed as an Anabolic Agent under S1.1 of the 2022 WADA prohibited list
14. 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 4th May 2023. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 25th May 2023.
15. The Respondent responded to the ADRV Notice vide an undated letter and stated that at the beginning of the year 2022 she visited a clinic in Machakos and was administered with family planning injection to treat her irregular period condition and painful cramps during her monthly period. She further stated that she ingested various kinds of painkillers on multiple occasions which she purchased from the pharmacy depending on her location and intensity of pain. She further stated that she was unsure whether the prohibited substance found in her sample might have been as a result of the family planning injection or the painkillers she ingested. She

stated that it was her fist time to undergo any doping control process and that it was her first time to interact with doping. She stated that she is not knowledgeable and has never attended any Anti-Doping Education seminar or workshop or sensitization program. (Attached is the undated letter, AM1).

16. 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.
17. Further the Athlete did not request a Sample B analysis thus waiving her 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.
18. 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.
19. A charge document was prepared and filed by ADAK Advocates and the Athlete presented a response thereto.
20. 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.
21. 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.
22. The Applicant submitted that the presumptions at Article 3.2 were applicable:
    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 person establishes that the decision violated principles of natural justice.*

e. *…*

23. The Applicant added 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/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;

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

24. 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. ***S1.1 Anabolic Androgenic Steroids (AAS)/methasterone and its metabolite 2a,17a-dimethyl-5aandrostane 3a,17β-diol*** *was a Non-Specified Substance and attracts a period of ineligibility of 4 years*.

25. 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"*.

26. On intention the Applicant 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"*.

27. The Applicants quoted: *"**CAS 2019/A/6213 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková**"*

where 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".

28. It was the Applicant's submission that *"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 her system."* The Applicant contended that *"The Respondent in this matter, however, didn't provide an alternative explanation supported with cogent evidence of how the prohibited substance entered her system."*
29. Submitting that *"an athlete cannot simply plead her lack of intention to dope instead she must produce convincing explanations to prove by a balance of probabilities that she did not engage in conduct which constituted an ADRV and*

manifestly disregarded that risk.", the Applicant averred that, "*the Respondent was duly notified of the procedural steps and her 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 hers lack of intention to dope.*"

30. Further the Applicant said, "*The Respondent's intention cannot be inferred; instead, she must adduce concrete evidence that seeks to absolve her of these charges. It's the Applicant's submission that the Respondent didn't discharge her 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 her quest to prove her innocence and non-intention to dope. The respondent in this case, has many questions regarding her intention remain unanswered.*"
31. The Applicant surmised 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. There is thus a legal presumption that 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. 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.*"
32. The Applicant argued that the origin of the Prohibited Substance had not been established as, "*The Respondent didn't provide concrete evidence in support of her claims for how the prohibited substance the prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/methasterone and its metabolite 2a,17a-dimethyl-5a-androstane 3a,17β-diol entered her body.*"

33. In regard to Fault/Negligence the Applicant 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"*.

34. The Applicant further stated that *"the athlete has a personal duty to ensure that no prohibited substance enters their body."* The Applicant relied on ***CAS 2017/A/5317 Aleksei Medvedev v. Russian Anti-Doping Agency (RUSADA)*** submitting:

> ***"the panel in paragraph 47 observed that "In assessing an athlete's degree of fault, "the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior" (Definition of Fault set out in Appendix 1 of the WADA Code). CAS jurisprudence is very clear that a finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, the Athlete must have exercised "utmost caution" in avoiding doping. As noted in CAS 2011/A/2518, the Athlete's fault is "measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance". It also emphasized the personal duty of care, citing the basic principle that it is "each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body***".

35. The Applicant stated that, "*It's incumbent upon a person such as the Respondent to leave no stone unturned when it comes to ensuring that no prohibited substances are traced in her sample. The athlete hasn't provided any evidence to indicate that she exercised her duty utmost caution when dealing with the prohibited substance*".

36. Further the Applicant submitted that, *"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 her caliber and experience is high. It's the Applicants submission that the respondent was negligent due to her failure to exercise caution to the greatest possible extent and her conduct doesn't warrant a finding of no fault and negligence."*
37. 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"*.
38. The Applicant held that, *"an athlete competing in national and international competitions and who also knows that she is subject to doping controls because of her participation in the national and/or international competitions cannot simply assume as a general rule that the products she ingests are free of prohibited/specified substances."*, submitting that *"it cannot be too strongly emphasized that the athlete 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 athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product."*
39. Submitting regarding sanctions, the Applicant stated *"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".

40. 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) 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".*
41. The Applicant then quoted *"**CAS anti-doping Division (OG PyeongChang) AD 18/003 World Curling Federation (WCF) v. Aleksandr Krushelnicki)***, where *the sole arbitrator in paragraph 215 stated that, "First, as he has failed to establish source, or "how the Prohibited Substance entered his system" in terms of the definitions of "No Fault or Negligence" or "No Significant Fault or Negligence", he is not entitled to elimination or reduction of the period of ineligibility under Article 10.4 or Article 10.5".*
42. It was the Applicant submission that, *"CAS jurisprudence dictates the establishment of source to warrant sanction reduction and the Respondent hasn't met the threshold. In the circumstances, the Respondent failed to adduce evidence in support of the source of the prohibited substance and thus her intention when inducing the banned substance couldn't be established. She failed to discharge her burden of proof by a balance of probabilities. In consequence, the athlete cannot benefit from any reduction of the mandatory four-year period of ineligibility".*
43. Placing reliance on *"**CAS 2014/A/3559 Alexandra Georgiana Radu v. Romanian National Anti-Doping Agency (RNADA)"*** the Applicant said that the panel in that case *"provided that "Where the substance detected in an athlete's bodily specimen is a non-specified substance, the sole issue to be resolved*

is whether the athlete committed the offence with "no fault" or with "no significant fault or negligence". In any event, in order to benefit from the elimination or from a reduction of the period of ineligibility, an athlete must first establish how the prohibited substance entered into his or her body. This information is crucial in order to assess the athlete's degree of precaution in attempting to prevent the occurrence of an adverse analytical finding".

44. The Applicant reiterated that, "*The Respondent in this case was in contact with a non-Specified substance which are often used to enhance sporting performance. The athlete has failed to establish her intention when in contact with the prohibited substance. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on her part as required by the ADAK rules and the WADAC to warrant sanction reduction.*"
45. The Applicant concluded by submitting that, "*Article (WADA 2.1.1) emphasizes that it is an athlete's personal duty to ensure that no prohibited substance enters his or her body and that 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 by the analysis of the athlete's sample which confirms the presence of the prohibited substance*".
46. The Applicant summed up 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 Respondent herein has failed to give any explanation for her failure to exercise due care in observing the products ingested and used and as such the ADRV was because of her negligent acts.*

C. The maximum sanction of 4 years' ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

ii. Athlete's Submissions

47. It was the Respondent Athlete submission that she filed a Statement of Response dated 3rd August 2023 in which she set out the medication she had taken that resulted in the finding arrived at by the laboratory tests done by the Applicant.
48. The Athlete also submitted that intentional, negligent, fault and whether she should be sanctioned for a period of four years were the issues for determination
49. Counsel for the Athlete reiterated that the Athlete had been taking medication designed to aid her deal with pain she was experiencing during menstrual cycle and knee pains.
50. To address her medical issues, it was submitted that the Athlete had taken Depo-Provera and Diclofenac, the latter duly disclosed to the Applicant on the date of competition. It was the Athlete's argument that she *"merely sought to address a medical issue and this unfortunately led to the anti-doping finding. This confirms that the supposed violation was not intentional, negligent or the Respondent's fault."*
51. Relying on Article 10.2.1.2 of the Code the Athlete stated that the *"[…] Code requires a violation to be demonstrated to be intentional in order for a sanction of 4 years to be applied. In order for a violation to be deemed intentional, the conduct of the athlete must be such that they intended to cheat, had knowledge that the ingestion they were taking would have resulted in the breach of anti-doping rules and they totally disregarded the risk."*

52. The Athlete submitted that the high yet succinct test for proving intention had not been satisfied averring that, *"The chronological history provided by the Respondent demonstrates that there was no intention to cheat and that any drugs she took was purely for medical purposes to cure a problem she was experiencing."*
53. It was the Athlete's submission that *"under Article 3 of the Code, the Applicant bears the burden of demonstrating that the Respondent's action was intentional […]"* The Athlete asserted that *"the evidence put forward by the Applicant and the response of the Respondent point to only one outcome. The anti-doping finding is not a product of an intentional process designed to circumvent the anti-doping rules. The intention has not been established by the Applicant and hence the sanction proposed cannot be sustained."*
54. Based on a balance of probability the Athlete submitted that she *"took medication to attempt and cure a medical challenge she was encountering. It is a medical issue that many people face, and they attempt to cure the same through ordinary hospital visits and over the counter medication. The question that arises, can this really be deemed to be an intentional breach of the Code? We humbly submit that the answer is in the negative."*
55. Referring to Article 10.2.3 it was the Athlete's submission that *"an anti-doping 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 c*an establish that the Prohibited Substance was Used Out-of-Competition." Further, *"From the plain reading of this, the hearing panel are required to make a fair legal presumption of no intention if the athlete can establish that the prohibited substance was used out of competition, yet the prohibition is an in-competition prohibition."*
56. It was the Athlete's assertion that *"the reasons for why the anti-doping findings was arrived at has been provided."* Equally the Athlete submitted that she had

no fault or negligence on her part leading to the doping finding stating, *"[…] The Respondent was on medication to cure a significant ailment or discomfort. There were limited alternatives available to the Respondent in seeking to remedy the ailment she was facing. The most prudent person in the Respondent's situation, considering her economic realities, would have ended up in the very similar situation she found herself in."*

57. The Athlete submitted that even if there was a finding that she was at fault or/and negligent this was not significant, stating *"[…] The Respondent's pursuit to get care and redress (of) a medical challenge significantly mitigates any fault or negligence on her part. This is once again a situation of the Respondent reacting in a manner anyone in her situation would have reacted."*
58. It was the Athlete's submission that she should not be sanctioned for the period of four years, there being no basis for this sanction stating, *"Article 10 of the Code in respect to sanction requires the penalty of 4 years to be meted out if it established that the breach by the athlete was intentional."*, further asserting, *"[…] Respondent has already submitted that the Applicant has not discharged the burden of proof bestowed upon it in order to sustain this sanction."*
59. The Athlete averred that the proportionality test ought to be applied in this case, "*The principle of proportionality dictates that the punishment ought to be proportionate with the offence committed. The individual situation of this case warrants a proportionate punishment to be applied."*
60. Relying on **CAS 2005/A/830 S. v. FINA** the Athlete stated *"that where a sanction would be tantamount to attacking the personal rights of the athlete, the proportionality test ought to be applied."*
61. Further, the Athlete averred that she *"simply sought medical treatment which eventually resulted in the unfortunate doping violation outcome. The right to health*

is well set and safeguarded. We humbly submit that the pursuit of this right by the Respondent should be considered in determining any punishment against her."

62. It was the Athlete's submission that she *"had never in her life committed a sporting violation. Since she was suspended, she never engaged in any other form of athletics to try and circumvent the ban."*

63. The Athlete variously prayed that if the panel does find any violation on her part, *"a reprimand should suffice in the circumstances."*, concluding, *"a. the ADRV was not intentional, was not the Respondent's fault or negligence and if any fault or negligence existed, it was not significant. b. the sanction sought by the Applicant be rejected in its entirety; and c. in the alternative to (b) above there should be a reduction of the Period of Ineligibility based on No Significant Fault or Negligence on the part of the Respondent to a ban of no more than twelve months."*

C. JURISDICTION

64. 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.

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

D. APPLICABLE RULES

66. 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

67. Uncontested Facts:
    a. The Athlete's urine samples were collected on 27th February 2022 during the Kilimanjaro Marathon by a Tanzanian Olympic Committee Doping Control Officer (DCO) as per the Doping Control Form (DCF) numbered 8 in the Applicant's Charge Document.
    b. The Test Report numbered 9, attached in the Applicant's Charge Document also remains unchallenged.
68. The Panel shall examine the following:
    i. Whether the Athlete committed the charged anti-doping rule violation (ADRV);
    ii. If the finding in (i) is in the affirmative, whether the violation committed by the Athlete was intentional;
    iii. No Fault/Negligence & No Significant Fault/Negligence – Origin – Knowledge;
    iv. Sanction.

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

69. The Applicant's prosecution was based on the charge of ***Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/methasterone and its metabolite 2a,17a-dimethyl-5aandrostane 3a,17β-diol*** as outlined at paragraph 10 of its charge document dated 6th June 2023.

70. 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'

71. Article 3.1 of WADC/ADAK ADR provides the Burdens and Standards of Proof: '*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*'. (Our Emphasis)

72. In all her responses including in her submissions, the Athlete did not deny the presence of the prohibited substance in her Sample A (Urine Sample) collected on 27/02/2022 at the Kilimanjaro Marathon, Tanzania as per her Doping Control Form (DCF) and as further duly reflected in the subsequent Test Report both attached in Applicant's Charge Document and numbered 8 & 9 respectively.

73. World Anti-Doping Code (WADC)'s/ADAK ADR's Article 3 ***Proof of Doping*** postulates at ***Article 3.2.1*** that *'Analytical methods or Decision Limits approved by WADA after consultation within the relevant scientific community or which have been the subject of peer review* ***are presumed to be scientifically valid****.'*, as submitted by the Applicant. (Our Emphasis)

74. Further WADC's/ADAK ADR's Article 2.1.2 states that '***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***'; (Our Emphasis)

75. The Applicant asserted that the Athlete did not request for a Sample B analysis thus waiving her right to the same under World Athletics (WA) Rule 37.5, a claim that was unchallenged by the Athlete who did not dwell on the issue of the occurrence of the ADRV delving instead into the matters of intentional, negligent, fault and sanction.
76. As observed by the Applicant in its submissions, *'where use and presence of a prohibited substance **has been demonstrated**'* – in the relevant Test Report of the Athlete's Urine Sample from the Accredited Laboratory tabled (No. 9 attachment in the 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**'*. (Our Emphasis)
77. Therefrom it is this Panel's finding that the Applicant had established the Athlete's anti-doping rule violation (ADRV) to its comfortable satisfaction.

ii. Was the violation committed by the Athlete intentional?

78. Article 3.1 of WADC/ADAK ADR's provides the Burdens and Standards of Proof: '*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, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability*'. (Our Emphasis)
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:***

10.2.1.1 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.58*** (Our Emphasis)

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.] (*Our Emphasis)

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.* (Our Emphasis)

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****.]* (Our Emphasis)

81. Consequently, in determining whether there was intention to commit the violation, the first aspect to be reviewed in this case is **if** under Article **10.2.1.1**, ***the Athlete can establish that the anti-doping rule violation was not intentional***. (Our Emphasis)
82. The Applicant in its submissions referred to the Athlete's written explanation which it attached in its Charge Document. In her undated/unsigned letter, the Athlete wrote as transcribed verbatim below:

    "DEAR Mr. Rogoncho

    *I Agnes mumbua I confirm I came to ADAK office at 15th june 2023 to ask about my sample testeted positive, where I meat MWAKIO and I explain to him as follows: *At the begining of the year 2022 I went to a clinic in machakos and I took family planning injection and I used to have an irregular period and painful cramps during my monthly period. And from time to time I used to take painkillers from the chemistry depending on where I am and depending on the nature.*

    Am not sure if it can be the injection I took for family planning or it the painkillers I took immornal balancing of my period. And this teste was the first time to me and still it was the first time to interact with dopping. I had not attended any dopping class or knew anything about dopping. I was very new in this matter." (Our Emphasis)
83. Further to this, it is noted that in her subsequent submissions, the Athlete reiterated that she had been taking medication designed to aid her deal with pain she was experiencing during her menstrual cycle and knee pains and named those drugs as Depo-Provera and Diclofenac, the latter which was

also captured in her DCF during the test that gave rise to the Adverse Analytical Finding (AAF).

84. While the Athlete has quoted Article 10.2.1.2 of the Code which requires the Applicant to demonstrate the violation to be intentional in order for a sanction of 4 years to be applied, we wish to bring to the attention of the Athlete that the applicable article in her case is Article 10.2.1.1 for the reason that the composition of the prohibited substance confirmed to be present in her Urine Sample was a Non-Specified substance, whereas Article 10.2.1.2 that she relied on concerned Specified Substances. Similarly, we wish to point out to the Applicant that it is not Article 10.2.1 specifically that shifted the burden to the Athlete to demonstrate no intention as stated in their submissions at their *para.23*. It is under the dictates of Article 10.2.1.1 that the burden to establish 'lack' of intention shifted to the Athlete, (note that under Code Article 10.2.1.2 the burden of intentionality resides with the Applicant).

85. The Applicant relied on ***CAS 2019/A/6213 World Anti-Doping Agency WADA v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Katerina Kašková.*** We note that the panel in ***Kašková*** correctly called the burden to fall on the Athlete by first observing in their ***para.64*** that, *'The Sole Arbitrator accepts […] Article 10.2.1.1 CADC ADR provides the period of ineligibility shall be four (4) years where the anti-doping rule violation* ***does not*** *involve a specified substance* ***unless the athlete can establish that the violation was not intentional***'. Please note the article relied on herein mirrors WADC's Article 10.2.1.1.

86. Having called the rightful party to its respective burden, the panel in the ***Kašková*** case proceeded to sum up thus, *'[…] 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 of the circumstances which the athlete relies is more probable that their non-occurrence… Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete…. contained the substance in question. Absent of any proof of purchase… absent of disclosure in the doping control form, there is no element substantiating the athlete's contention that she did use that product […].* (Our Emphasis).

87. In her explanation the Athlete said that '*[…] from time to time I used to take painkillers from the chemistry depending on where I am and depending on the nature,*' but other than the Diclofenac declared in the DCF, no other painkiller(s) was cited and/or proof of purchase attached for perusal by this Panel. As for the Diclofenac and Depo-Provera identified by the Athlete, it is not demonstrated to this Panel by the Athlete which active ingredients in either of them gave rise to the Adverse Analytical Finding (AAF) in her Urine Sample.
88. The Panel notes that while a chronological history is provided by the Athlete, the history does not succinctly cite/name the entirety of '*any drug she took purely for medical purposes to cure a problem she was experiencing*'. The Athlete said she was not even sure which (if any) of her cited drugs gave rise to the AAF. Additionally, while the Athlete commenced her explanation with reference to attendance to a clinic in Machakos, no authenticated medical records were provided as concrete proof of her attendance to such clinic for treatment for the said ailment.

89. This Panel is guided by WADC's/ADAK ADR's Article 10.2.1.1's *58 [Comment to Article 10.2.1.1:*

> ***58*** *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.****]* (Our Emphasis)

90. We acknowledge the Athlete's submissions that, she "*took medication to cure a medical issue that had arisen in her day to day activities. In respect to the medication taken for her knee pain, the Respondent disclosed the same to the Applicant. It thus beats logic that she would disclose such details and still be deemed to have had the intention of violating the anti-doping rules*". It is this Panel's opinion though, that the Athlete's protestations were critically curtailed by her lack of specific demonstration of for example origin and/or concrete medical documentation/evidence in light of WADC/ADAK ADR's Comment No. 58.

91. The Applicant averred that the Athlete was in contact with a non-Specified substance '*which is often used to enhance performance but the Athlete did not adduce evidence in support of the origin*' of the said prohibited substance, a submission accepted and considered by this Panel to have a serious bearing on the Athlete's established ADVR. (Our Emphasis)

92. In the circumstances, it is our considered opinion that by a balance of probabilities the Athlete did not establish that the anti-doping rule violation was not intentional.

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

93. Having found the Athlete was unable to establish lack of intention 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 pursuant to its Code definition:

> ***No Fault or Negligence****: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. 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)

94. Additionally, the Panel finds that the above reasoning applies to ***No Significant Fault or Negligence*** as viewed under its Code definition:

> ***No Significant Fault or Negligence:*** *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)

95. On knowledge the Applicant upheld the principle of strict liability submitting that ignorance is no excuse. The Applicant argued that *'an athlete*

competing in national and international competitions and who knows that she is subject to doping controls because of her participation in national and/or international competitions cannot simply assume as a general rule that the products she ingests are free of prohibited/specified substances.' The Athlete on the other hand stated that this was her first test and it was also her first time to interact with doping and we add in a neighboring country to boot. It is noted that the Athlete's claim of having encountered doping for her first time during the test that produced the AAF in her explanation was not challenged by the Applicant and therefore the Panel accepts that the Athlete had not received any formal anti-doping education from the Applicant's Agency.

96. Arising therefrom it behooves the Panel to quote WADA's International Standard for Education (ISE) 2021 Article 7.2.1 which 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).
97. 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.* (Our Emphasis)
98. The Athlete's DCF indicated she was born on 24/10/1995 though Panel was not told about her level of formal education and for how long she has been participating in sports but suffice it to say that the Athlete communicated that she needed all the training on anti-doping topics to build her competencies in clean sport behavior and for making informed decisions. It

behooves the Applicant to address the glaring gaps that continue to exist for those sportspeople like the Athlete who practice their individual sports relatively unsupervised and who may be challenged in accessing quality, easy to understand/usable clean sport anti-doping information from genuine doping authorities. (Our Emphasis)

99. It is noted by the Panel that this was the Athlete's first violation. The Athlete also stated that '*since she was suspended, she has never engaged in any other form of athletics to try and circumvent the ban*' a claim which was not controverted by the Applicant.

F. SANCTIONS

100. The Applicant in its *para.42* "*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 ban of no more than twelve months. At this juncture, we wish to note to the Applicant that Article 10.3.3 is tailored for violations of Article 2.7 or 2.8 and is not relevant to the instant case. The ADRV in this matter is under Article 2.1. (Our Emphasis)

101. Other relevant considerations within the sanction were:

WADC's ARTICLE 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS:

> *An anti-doping rule violation in Individual Sports in connection with* ***an In-Competition test automatically*** *leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.55* (Our Emphasis)

55 [Comment to Article 9: For Team Sports, any awards received by individual players will be Disqualified. […]

102. 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.* (Our Emphasis)

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. Proportionality

103. The Athlete relying on ***CAS 2005/A/830 S. v. FINA Award of 15 July 2005*** argued that proportionality be considered; this Panel having dissected the merits in the ***FINA*** case opines that the circumstances in both cases are not comparable granted in the ***FINA*** case relied upon by the Athlete, the respondent athlete therein '*certainly was able to establish how the prohibited substance entered her system* {***para. 34***}' whereas in instant case origin was not established. Therefore, the relevant WADC/ADAK ADR Article/Rule

10.2.1 is to be applied as is, unencumbered by the Article 10.2.1.1's proviso whose conditional requirement to prove lack of intention was not achieved by the Athlete in the instant case. In other words, failure by the Athlete to establish lack of intention for presence of the prohibited substance in her system constrained the rules to not afford her any of the reductions encapsulated under parent Article 10.2, including the *No Fault/ Significant or Negligence* considerations. (Our Emphasis)

104. Nevertheless, the Panel notes that Article 10.13.1 provided as follows:

> ***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****, and the Athlete or other Person can establish that such delays are 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. 75*
>
> *75 [Comment to Article 10.13.1: In cases of anti-doping rule violations* ***other than under Article 2.1,*** *the time required for an Anti-Doping Organization to discover and develop facts sufficient to establish an anti-doping rule violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Article to start the sanction at an earlier date should not be used.]* (Our Emphasis)

105. The Panel take notes of the following self-evident documented factual timelines in regard to initiation and progression of this matter:

a. According to the Athlete's DCF, the Athlete's test was carried out on 27/02/2022, (No. 8 in Applicant's Charge Document);
b. The Test Report, (No. 9 in the Applicant's Charge Document) shows the Athlete's Urine Sample was received by the Laboratory on 03-Mar-2022;
c. In the same Test Report it is shown that the Laboratory Modified its findings on 22-Apr-2022 and Submitted them on 25-Apr-2022;
d. Further the Test Report shows a Mugera, Christine ***Printed*** the Test Report on **27-Mar-2023**;
e. The ADRV Notice by the Applicant was dated 4th May 2023 and the Applicant set the Mandatory Provisional Suspension to commence on 25th May 2023.

106. This Panel, recalling that the Athlete raised the matter of proportionality of the length of the ban on her, takes note that there was a disproportionately long delay of one (1) year and one (1) month before the Test Report was printed, let alone the ADRV brought to the Athlete's notice and the established facts tabled before this Panel speak for themselves.

107. In particular, the records furnished to the Tribunal show that there was an inordinate delay in the printing of the Test Report which had a domino effect on Notification of the ADRV to the Athlete. Since the automatic disqualification in Code's Article 9, as read together with Article 10.10, are applicable in this instant matter, (the Athlete's Sample was collected during a competition event), the Athlete, whom the established facts on record show was not the cause of the inordinate delay will likewise be inordinately disadvantaged when, as it must happen, any results which she may have attained after the date of collection of the Sample that

produced the AAF, but before the ADRV Notification, are also disqualified in line with Code's Article 10.10.

108. It is therefore in the interest of natural justice that the Panel be cognizant of the facts on record and apply itself to the required Code proportionality considerations.

ii. Credit for time served under the provisional suspension

109. WADC's 10.13.2.1 provided that *'If a Provisional Suspension is respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.'* There was no contestation that the Athlete was respecting her mandatory provisional suspension.

G. DECISION

110. Consequent to the discussion on 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 the Athlete's Sample Collection which was on **27th February 2022** for a period of four (4) years: (27th February, 2022 to 27th February, 2026).
c. Disqualification of any and/or all of the Athlete's competitive results from **27th February 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 __ 12th _____day of _____October_____2023

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Mrs. J Njeri Onyango, FCIArb, Chairperson

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Mr. Gabriel Ouko, Member **Ms. Mary N. Kimani, Member**