

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
DOPING CASE NO. E015 OF 2023

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

VERSUS

ELIUD KIBET TOO ..... ATHLETE

**DECISION**

**Panel:**

Mrs. Elynah Sifuna-Shiveka - Panel Chairperson  
Mr. Gabriel Ouko - Member  
Mr. Allan Mola Owinyi - Member

**Appearances:**

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

No appearance for the Respondent Athlete during the entire proceedings

**Abbreviations:**

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

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### A. Introduction

#### i. Parties

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

#### ii. Factual Background

3. Upon reading the Notice to Charge dated 11<sup>th</sup> April 2023 presented to the Tribunal on the same date by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in the order dated 24<sup>th</sup> April 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 11<sup>th</sup> May 2023;
  - ii. The panel constituted to hear this matter shall be:
    - a. Mrs. Elynah Sifuna-Shiveka – Panel Chair
    - b. Mr. Gabriel Ouko – Member
    - c. Mr. Allan Owinyi – Member
  - iii. The matter shall be mentioned on 11<sup>th</sup> May 2023 to confirm compliance and for further directions.
4. The matter came up for mention on 11<sup>th</sup> May 2023 where Mr. Rogoncho appeared for the Applicant. The Athlete was not present. Mr. Rogoncho informed the Tribunal that the athlete had been served but had stopped picking his calls since then. Mr Rogoncho prayed for more time to be able to reach the athlete. At ADAK’s request the matter was set for mention on 8<sup>th</sup> June 2023, with ADAK to serve the athlete with a mention notice.
5. The matter was mentioned on 8<sup>th</sup> June 2023. In attendance was Mr. Rogoncho for ADAK. The athlete was absent. Mr. Rogoncho indicated that the athlete had refused to cooperate and was not picking up his calls. He requested for a hearing date. The Chairman on hearing the presentations set a hearing date of 29<sup>th</sup> June 2023 and Mr. Rogoncho was to serve a notice to the athlete.
6. The matter came up for hearing on 29 June 2023. In attendance was Mr. Rogoncho for ADAK. The athlete was absent. Mr. Rogoncho stated that he was not ready to proceed with the hearing and requested for another date. The matter was set for hearing on 27<sup>th</sup> July 2023.

7. On 27<sup>th</sup> July 2023 the matter came up for the hearing. Mr. Rogoncho for the Applicant. There were no appearances for the Respondent. Mr. Rogoncho for the Applicant informed the Tribunal that despite having served the Athlete with all the necessary documents and the affidavit of service is on record, the Athlete has never responded. He requested the Tribunal to grant the Applicant 14 days to file submissions. The Chairman directed for the matter to be mentioned on 10<sup>th</sup> August 2023 to confirm filing and service of the submissions on the Respondent and to take a decision date.
8. On 10<sup>th</sup> August 2023 the matter came up for a mention. In attendance was Mr. Rogoncho for the Applicant. There were no appearances by the Respondent. Mr. Rogoncho stated that he was yet to file his submissions and prayed for three more days. The Tribunal ordered and directed that the Applicant was to file written submission on or before 14<sup>th</sup> August 2023 and the matter to be listed for decision delivery on 14<sup>th</sup> September 2023.

## **B. Parties' Submissions**

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

9. The Anti-Doping Agency of Kenya wishes to adopt and own the charge documents dated 25<sup>th</sup> April 2023 and the annexures thereto as an integral part of its submissions.
10. The Respondent herein is charged with an Anti-Doping Rule Violation of presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and 19-noretiocholanolone contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).

11. The Respondent is a National Level Athlete and therefore the Result Management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2016 to constitute a hearing panel which the Respondent was comfortable with.
12. The matter was set down for hearing. The Respondent however did not participate in the proceedings.
13. The matter came up for hearing, and the Respondent was duly informed of his procedural rights under the ADAK rules and WADA Code however the Respondent did not to participate in in the proceedings.

I. BACKGROUND/FACTS (as per the Applicant's Submissions)

14. The Respondent is a male Athlete hence the World Athletics (hereinafter WA) competition rules<sup>2</sup>, WA Anti-Doping Regulations<sup>3</sup> the World Anti-Doping Code (hereinafter WADC)<sup>4</sup> and the Anti-Doping Agency of Kenya Anti-Doping Rules (hereinafter ADAK ADR) apply to him.
15. On 11th November 2022, an ADAK Doping Control Officer ("DCO") collected a urine Sample from him. Assisted by the DCO, he split the Sample into two separate bottles, which were given reference numbers A 4630894 (the "A Sample") and B 4630894 (the "B Sample") in accordance with the Prescribed WADA procedures.
16. Both Samples were transported to the World Anti-Doping Agency ("WADA") - accredited Laboratory in Rome, Italy, the Laboratorio Antidoping FMSI (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 presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and 19-noretiocholanolone are listed as an exogenous Anabolic Androgenic Steroids (AAS) under S1.1 of WADA’s 2022 Prohibited List.

17. The findings were communicated to the Respondent athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 6th March 2023. In the said communication the Respondent was offered an opportunity to provide an explanation for the same by 27th March, 2023.
18. The Respondent didn’t provide any explanation for the occurrence of this ADRV as he didn’t participate in the proceedings in any way.
19. 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.
20. 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.
21. The response and conduct of the Respondent were evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule Violation and referred to the Sports Disputes Tribunal for determination.

## II. LEGAL POSITION

22. The Applicant submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

### III. PRESUMPTIONS

23. It is further provided at Article 3.2 that facts relating to Anti-Doping rule violation may be established by any reliable means including admissions and the methods of establishing facts and sets out the presumptions. Which include.
- a. Analytical methods or decision limits ...
  - b. WADA accredited Laboratories and other Laboratories approved by WADA are presumed to have conducted sample analysis and custodial procedures in accordance with the international standards for laboratories.
  - c. Departures from any other International Standards or other Anti-Doping rule or policy set forth in the code or these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other Anti-Doping rule violation shall not invalidate such evidence or results.
  - d. The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.
  - e. The hearing panel in a hearing ....

#### IV. ROLES AND RESPONSIBILITIES OF THE ATHLETE

24. That under Article 22.1 the Athlete has the following Roles and responsibilities;
- a. To be knowledgeable of and comply with the anti-doping rules,
  - b. To be available for Sample collection always,
  - c. To take responsibility, in the context of Anti-Doping, for what they ingest and use,
  - d. To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-Doping rules,
  - e. To disclose to his or her international federation and to the agency any decision by a non-signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years,
  - f. To cooperate with Anti-Doping organizations investigating Anti-Doping rule violations.
25. 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 as follows;
- “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
- Courage
- Community and solidarity”

#### V. ANTI-DOPING AGENCY OF KENYA POSITION

26. The burden of proof expected to be discharged by the Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

#### VI. PROOF OF ANTI-DOPING RULE VIOLATION

27. The Respondent is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR S1.1 Anabolic Androgenic Steroids (AAS)/19- norandrosterone and 19-noretiocholanolone) is a Non-Specified Substance and attracts a period of ineligibility of 4 years.
28. 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.
29. Similarly, Article 10.2.1 the burden of proof shifts to the Respondent to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction.
30. We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent Athlete herein.

#### VII. INTENTION

31. Rule 40.3 of the WA Rules sets out that the term intentional is meant to “identify those athletes who cheat. The term, therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an Anti-Doping rule violation or knew that there was a significant risk that the conduct might constitute an Anti-Doping rule violation and manifestly disregarded that risk.”

32. According to the established case-law of CAS 2019/A/6213 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková the panel in paragraph 2 asserted that:

“The athlete bears the burden of establishing that the violation was not intentional. Lack of intention cannot be inferred from protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete’s clean record. The submissions, documents and evidence on behalf of the athlete must be persuasive that the occurrence of the circumstances which the athlete relies on is more probable than their non- occurrence. It is not sufficient to suggest that the prohibited substance must have entered his/her body inadvertently from some supplements or other product. Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete, or that the specified product claimed to be taken, contained the substance in question. Absent any proof of purchase, information as to the specific type of supplement used, by whom it is produced, etc.

and absent any disclosure of the food supplement on the doping control form, there is no element substantiating the athlete's contention that s/he did use that product or that it was contaminated".

33. CAS jurisprudence and praxis dictates that the Respondent bears the responsibility of disproving his lack of intention to dope by a balance of probabilities. The Respondent is required to adduce concrete evidence explaining how the prohibited substance entered his system. The Respondent in this matter, however, didn't provide an alternative explanation supported with cogent evidence of how the prohibited substance entered his system.
34. It's the Applicants submission that an athlete cannot simply plead his lack of intention to dope instead he must produce convincing explanations to prove by a balance of probabilities that he did not engage in conduct which he constituted an ADRV and manifestly disregarded that risk.
35. The Applicants avers that the Respondent was duly notified of the procedural steps and his rights in accordance with ADAK rules and the WADA code. Moreover, the Respondent was afforded a platform to provide specific, objective, and persuasive evidence with a view to disproving his lack of intention to dope. However, the Respondent's non-participation in the proceedings means that he failed to provide an alternative plausible explanation disproving his intent when he ingested the prohibited substance.
36. The Respondent's intention cannot be inferred; instead, he must adduce concrete evidence that seeks to absolve him of these charges. It's the Applicant's submission that the Respondent didn't discharge his burden

by a balance of probabilities, moreover an athlete with clean hands who faces an imminent four- year ban would leave no stone unturned in his quest to prove his innocence and non-intention to dope. The respondent in this case, however, chose not to participate, and many questions regarding his intention remain unanswered.

37. Thus, 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.

#### VIII. ORIGIN

38. The Respondent didn't participate in these proceedings thus no explanation was provided for how the prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and 19-noretiocholanolone) entered his system.
39. In that regard, we do submit that the origin of the prohibited substance has not been established.

#### IX. FAULT/NEGLIGENCE

40. 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.

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

2.1.1 It is each Athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or metabolites or markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault negligence or knowing Use on the athlete's part be demonstrated to establish an Anti-Doping rule violation under Article 2.1.

42. In CAS 2019/A/6482 Gabriel da Silva Santos v. Fédération Internationale de Natation (FINA), the panel in paragraph 2 stated that,

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

43. The applicant contends that the Respondent in this case fell short of the no fault or negligence threshold due to his failure to exercise a high level of diligence expected from an athlete to avoid taking a prohibited substance.

The Respondent has also failed to show the steps he took to ensure that the prohibited substance wasn't found in his system.

44. The Respondent bears a personal duty of care in ensuring compliance with the Anti-Doping regulations. The standard of care expected from an athlete of his caliber who has participated in national and international competitions is high. It's the Applicant's submission that the Respondent was negligent due to his failure to exercise caution to the greatest possible extent and his conduct doesn't warrant a finding of no fault and negligence.

#### X. KNOWLEDGE

45. The Applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an Anti-Doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.
46. Further, the Applicant contends that the Respondent has had an expansive career in athletics participating at both the national and international level, and it is evident that he has had exposure to the campaign against doping in sports.
47. The Applicant avers that an athlete competing in national and international competitions and who also knows that he is subject to

doping controls because of his participation in the national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited substances.

48. We submit that it cannot be too strongly emphasized that the Respondent is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the Respondent to make reasonable inquiries on an ongoing basis whenever the Respondent uses the product.

## XI. SANCTIONS

49. 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.
50. 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.

51. In CAS 2015/A/3945 Sigfus Fossdal v. International Powerlifting Federation (IPF), the panel provided the threshold for the reduction of a sanction, and it stated that “Under the applicable regulations, a precondition for having the period of ineligibility either eliminated or reduced is that the athlete should establish how the prohibited substance entered his or her system. The burden of proof is on the athlete, and this should be established on the balance of probabilities”.
52. It’s the Applicants submission that the Respondent hasn’t discharged his burden by a balance of probability to warrant reduction of a sanction. Consequent to the Respondent’s non-participation in the proceedings, no explanation was provided for how the prohibited substance got into his system thus the first avenue to warrant sanction reduction was closed off.
53. In CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO), the panel asserted that:

“In order for a reduction or elimination of the otherwise applicable 2 years period of ineligibility to apply, an athlete must first establish the origin of the prohibited substance on the balance of probabilities. The failure to demonstrate the origin of the substance excludes the reduction of the sanction. If the athlete establishes the source of the prohibited substance, then he must establish that he bore No Fault or Negligence or No Significant Fault or Negligence by a balance of probability”.
54. It’s the Applicant's submission that the Respondent ‘s intention and level of fault when inducing the prohibited substance cannot be inferred and must be supported with concrete evidence. The Respondent’s failure to



participate in the proceedings and inability to provide any cogent evidence highlighting that he didn't intentionally use the prohibited substance means that his level of fault was high as there has been no other explanation stating otherwise, and thus he hasn't demonstrated no fault or negligence to warrant sanction reduction.

55. It's the applicant's submission that the Respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.

## XII. CONCLUSION

56. 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.
57. We find that ideal considerations while sanctioning the Respondent are:
  - A. The ADRV has been established 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 her negligent acts.
  - D. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

58. From the foregoing, we urge 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.
59. It is our submission that ADAK has made out a case against the Respondent and that there was indeed an Anti-Doping Rule Violation by the Respondent, and a sanction should ensue.

**ii. The Athlete's Submissions**

60. The Athlete did not make any submissions.

**C. JURISDICTION**

61. 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.
62. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

**D. APPLICABLE RULES**

63. 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?**

64. The Applicant's prosecution is based on the charge of:

*Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and 19-noretiocholanolone),*

as outlined at paragraph 10 of its charge document dated 25<sup>th</sup> April 2023.

65. Other than the WhatsApp communication presented by the Applicant, there was no further response recorded from or for the Athlete according to records held at the Tribunal. The question that requires to be answered was, did such a named Athlete exist? The Doping Control Form dated 11/11/2022 in the Charge Document presented by the Applicant and adopted indicates the existence of this Athlete.

66. Consequently, the Panel is persuaded that a successful test was physically conducted as recorded in the DCF dated 11/11/2022 which does appear to be a legitimate WADA document. Therefore, we conclude that it was more probable than not that there existed such a person as the Athlete named in this matter.

67. Further, the Respondent Athlete did not request for a Sample B analysis thus waiving his right to the same under WA rule 37.5 and in essence accepting the Test Results of his A Sample. As stated by the Applicant "*Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an ADRV*". Hence we accept that the Applicant has established to this Panel's comfortable satisfaction that the Athlete committed the ADRV as charged.

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

68. On the issue of intention, the substances found in the Athletes body being Non-Specified Substances, CAS case law places responsibility on the Athlete to disprove lack of intention to dope by a balance of probabilities. The Athlete is responsible of adducing evidence of how the prohibited substance got into his system. The Respondent Athlete in this matter, however, didn't provide an alternative explanation supported with concrete evidence of how the prohibited substance entered his system.
69. The Respondent when requested to respond to the charge presented could only respond that he was dealing with an injury and would respond in a "few" days. After his 'few days', he did not respond and subsequently, despite numerous notices served on him by the Applicant, he did not respond to any communication up to the time of writing of this decision.
70. 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.*
71. Consequently, in determining whether there was intention to commit the violation, there are two aspects to be reviewed:
- a. Whether he manifestly disregarded the risk.
  - b. Whether the Athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV.
72. There being not a shred of controverting evidence from the Athlete, the Panel accepts that the Athlete committed the ADRV intentionally. That said, the Panel does not deem it necessary to assess whether the Athlete

may have No Fault or Negligence in committing the ADRV, the rationale being that the threshold of establishing that an ADRV was not committed intentionally is lower than proving that an athlete had No Fault or Negligence in committing the ADRV.

73. Additionally, the Panel finds that the above reasoning applies to No Significant Fault or Negligence.

#### F. SANCTIONS

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

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

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

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

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

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

58 [Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]

76. Article 10.6 provides that:

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

77. Further Article 10.7 provides:

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

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

79. Further Code Article 10.10 provides:

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

*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other*

*anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.*<sup>73</sup>

*73 [Comment to Article 10.10: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]*

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

80. 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.

81. 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.*

82. 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) Having found as above, the Panel holds that the Athlete intentionally committed the ADRV in question and further wilfully and

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

**G. DECISION**

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

- a. The applicable period of ineligibility of **four (4) years** is hereby upheld.
- b. The period of ineligibility shall be from the date of this decision for a period of four (4) years starting **14<sup>th</sup> September 2023 to 14<sup>th</sup> September 2027**.
- c. Disqualification of any and/or all of the Athlete's competitive results from **11<sup>th</sup> November 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   14<sup>th</sup>   day of   September   2023



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**Mrs. Elynah Sifuna-Shiveka, Panel Chairperson**



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**Mr. Gabriel Ouko, Member**



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**Mr. Allan Owinyi, Member**