

REPUBLIC OF KENYA



**THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
SDTADK NO. E001 OF 2023
IN THE MATTER BETWEEN**

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

-Versus-

RASHID ISSA..... RESPONDENT

DECISION

Hearing : Via Written Submissions

**Panel : Mrs. Elynah Sifuna-Shiveka.....Panel Chairperson
Mr. Gabriel Ouko.....Member
Mr. Gichuru Kiplagat..... Member**

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

Mr. Peter Maina of Peter Maina & Company Advocates for the Respondent.

The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016 whose address of service is **Anti-Doping Agency of Kenya, Parklands Plaza, 2nd Floor, Muthithi Road/Chiromo Lane Junction, P.O. Box 66458-80100. Nairobi.**
2. The Respondent is a male adult of presumed sound mind, a National level Athlete whose address for service shall be **Peter Maina & Company Advocates, Hazina Towers, 13th Floor, Uhuru Highway, Utalii Street P.O. Box 14448-00100, Nairobi.**

Abbreviations and Definitions

3. The following abbreviation are used herein as indicated;
ADAK – Anti-doping Agency of Kenya
ADR – Anti-doping Rule
ADRV – Anti-Doping Rule Violation
KBBF – Kenya Bodybuilding Federation and Fitness
SDT – Sports Disputes Tribunal
WADA – World Anti-Doping Agency

Factual Background

4. The Respondent is a male body builder hence the IFBB competition rules, IFBB Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
5. On 9th of October, 2022, during the Mr. and Miss East Africa Bodybuilding championship in Eldoret, an ADAK Doping Control Officer notified the Respondent that he had to undergo a doping control process. However, the athlete adamantly, evaded, refused and failed to provide his sample for testing.
6. Failure to submit to sample collection resulted to the commission of an Anti-Doping rule violation (ADRV) of Evading, Refusing or Failing to Submit to Sample collection under S2.3 of the WADA Code (2021).
7. 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 14th December 2022. In the said communication the Athlete was offered an opportunity to provide an explanation for the evasion by 4th January 2023.

8. The same letter also informed the Athlete of his rights and other avenues for sanction reduction including elimination of the Period of Ineligibility where there is no fault or negligence, reduction of the period of ineligibility based on No significant fault or Negligence, substantial assistance in Discovery or Establishing Code violations, results management agreements and case resolution agreements. The athlete was given until 4th January 2023 to respond and request for a hearing if need be.
9. The Respondent, vide WhatsApp, responded to the charges and took full responsibility for his actions. In his communication, the athlete admitted that he was at fault for walking away from the doping control centre without providing a sample.

Charges

10. The Anti-Doping Agency of Kenya ADAK therefore is preferring the following charge against the Athlete Respondent;
Evading, Refusing or Failing to Submit to Sample Collection.
11. No plausible justification has been advanced for the failure to submit to sample collection.

Jurisdiction

12. The results management panel has jurisdiction under section 31B (a) of the Anti-Doping Act 2016 and as amended to hear and determine this case.

Preliminaries

13. The proceedings commenced by the Applicant filing a notice to charge the Respondent dated 9th January, 2023 at the Sports Dispute Tribunal and received on 11th January, 2023.
14. Upon reading the notice to charge dated 9th January, 2023 by the Applicant's counsel Bildad Rogoncho the Tribunal directed and ordered as follows;
 - i) The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, this Direction 1, and all relevant documents on the Respondent, by 17th February, 2023
 - ii) The Panel constituted to hear this matter shall be;
 - a) Mrs. Elynah Sifuna-Shiveka
 - b) Mr. E. Gichuru Kiplagat;
 - c) Mr. Gabriel Ouko;
 - iii) The matter shall be mentioned on 23rd February, 2023 to confirm compliance and for further directions
15. On 23rd of February 2023 the matter came up for the 1st mention Mr. Rogoncho for the Applicant while the Athlete was present. The Athlete Respondent introduced himself as Rashid Wasamwa Issa. The Chairman asked him whether he understood the nature of the proceedings on that day and he responded in the affirmative. The

Athlete also stated that he didn't require a pro-bono counsel as he will engage his own.

16. Mr. Rogoncho requested that the athlete be allowed fourteen (14) days to engage a counsel and put in a notice of appointment. He added that they were yet to serve the Athlete with the charge documents but they endeavor to do so by the end of the week via WhatsApp. The Athlete stated that he was amenable to being served via WhatsApp. The matter was to be mentioned on 16th March, 2023.
17. The matter come up for mention on 16th of March, 2023; Mr. Rogoncho was present for the Applicant while the Athlete was absent. There was no counsel that had come on record to represent the Athlete. The Tribunal directed the Applicant to serve a mention notice upon the Respondent and scheduled 23rd of March, 2023 as date of the next mention.
18. On 27th April, 2023 when the matter came up for mention Mr. Rogoncho was present for the Applicant, while the Athlete was not present. Mr. Rogoncho informed the Tribunal that the purpose of the mention was to confirm if the athlete had found an advocate to represent him. Mr. Rogoncho reported that the athlete had emailed him stating that he had been unable to find an advocate and sought the Tribunal to get a pro bono counsel for him. The Registry stated that it would take 14 days to get a pro bono counsel. The Tribunal directed that the matter shall be mentioned on 11th May, 2023 for further directions.
19. On 18th May, 2023 the matter came up for mention and Mr. Rogoncho appeared for the Applicant. It was confirmed that Mr. Njoroge had come on record to represent the Athlete Respondent. However, he wasn't present but Ms. Mathenge held brief for him. She requested for 21 days to meet the Athlete and thereafter file a response to the charge. Mr. Rogoncho did not object. By consent the matter was stood over to 15th of June, 2023. The respondent was to file and serve their response on or before the mention date.
20. The matter came up for mention on 29th of June, 2023 and Mr. Rogoncho appeared for the Applicant while Ms. Maina holding brief for Mr. Njoroge for the Respondent indicated that their response was ready but the athlete was yet to sign it. She requested for a further one week which Mr. Rogoncho did not object to. The matter was scheduled for mention on 13th July, 2023 to confirm compliance.
21. On 27th July 2023 the matter came up for mention to confirm compliance. Mr. Rogoncho for the Applicant while Ms. Masenge was holding brief for Mr. Maina for the respondent athlete. Ms. Masenge requested to file a response within 3 days and 14 days to file her written submissions. The matter was scheduled for mention on 10th August, 2023 to confirm compliance.
22. On 10th of August, 2023 during the scheduled mention both parties confirmed filing of their written submissions and requested for the decision date. Mr. Rogoncho appeared for the Applicant while Ms. Masenge held brief for Mr. Maina for the Respondent. The Tribunal directed that the decision was to be rendered on 31st of August, 2023.
23. However, due to unforeseen circumstances the decision was set for delivery on 21st of September, 2023.

Submissions

24. Below is a summary of the main relevant facts and allegations based on Parties written submissions.

A. Applicant's Submissions

25. Mr. Rogoncho, Counsel for the Applicant, informed the Panel that the Agency wished to adopt and own the Charge Document dated 28th February 2023 and the annexures thereto as an integral part of its submissions.

26. He submitted that the Athlete who was charged with an ADRV for Evading, Refusing or Failing to submit to Sample Collection in contravention of ADAK ADR (herein referred to as ADAK Rules.

27. The Athlete is a National Level athlete and therefore the results management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in Anti-Doping Act No. 5 of 2016 to constitute a hearing panel which the Athlete was comfortable with.

28. The matter was set down for hearing and both parties agreed to proceed by written submissions on any sanction or penalty which might be imposed.

29. In his submissions he listed the legal position under Article 3 of ADAK ADR/WADC... the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel. He also listed the Presumptions under Article 3.2 which included that facts relating to an ADRV may be established by any reliable means including admissions. He laid down the roles and responsibilities of the athlete as under WADC's Article 22.1 and also the principles enunciated in preface to the ADR regarding the duties of the athlete.

30. At No 19 of its submissions the Applicant stated that *"In his defence, the Respondent made several admissions and a few general denials. In his **evidence in chief** the respondent made the following admissions;*

- a) *He admitted to being approached and requested to provide his urine sample*
- b) *He admitted to being tested on several occasions*
- c) *He admitted to having refused to provide his sample*
- d) *He admitted to walking away from the venue without complying to the request of sample collection*

31. Counsel for the Applicant touched on the matter of burden of proof-shifting to the athlete to demonstrate no fault, negligence or intention to entitle him to a reduction of sanction.

32. For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, **she/he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV. According to established case-law of **CAS 2014/A/3820, par.77** the proof by a balance of probability requires that **one explanation is more probable than the other possible explanation**. For that purpose, an athlete must provide actual evidence as opposed to mere speculation.

33. Regarding Fault/Negligence the Applicant's Counsel argued that the Athlete failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR. He specifically singled out Rule 22.1.2 *To be available for Sample collection at all times* and Rule 22.1.6 *To cooperate with Anti-Doping Organizations investigating anti-doping rule violations*.

34. It's clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before intentionally evading, refusing, or failing to submit to sample collection, he was thus grossly negligent.

35. The Applicant submits that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that his intentionally evading, refusing, or failing to submit to Sample collection will not be in violation of the Code. Ignorance is no excuse.

Sanctions

36. For an ADRV under article 2.3, evading sample collection, or without compelling justification, refusing, or failing to submit to Sample collection after notification as authorized in these Anti-Doping Rules or other applicable Anti-Doping rules provides for a regular sanction of a four-year period of ineligibility.

37. The Applicant submits that in the circumstances, the Respondent has not adduced evidence in support of the intention not to evade sample collection. Bearing this in mind, the Applicant is convinced that the Respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADAC to warrant sanction reduction.

38. From the foregoing, the applicant prays for a sanction of 4 years' period of ineligibility since a case has been made against the athlete and a sanction

should ensue.

B. Athlete's Submissions

39. The Respondent Counsel posits that their submissions stem from a charge document dated 28th February, 2023 wherein the athlete was charged for evading, refusing or failing to submit to sample collection contrary to Anti-Doping rules and Article 2.3 of the WADA Code (2021).
40. It is the Applicant's case that on 9th October 2022, during the Mr. and Miss East African body building championship in Eldoret, an ADAK Doping Control Officer notified the Athlete that he was to undergo doping control process, the athlete adamantly, evaded, refused and failed to provide his sample for testing.
41. Hon. Chairperson, the Athlete is a man who takes six meals a day as part of his training, on that material day, he woke up at 4.00 am to prepare for the competition and it is at that time that he took his first meal. Following his instructor's advice, the Athlete was not to take any other meal until he was done with the competition.
42. The Athlete after the competition and emerging the winner, he was approached for an interview which amidst it, he was requested by the ADAK officials for a sample test.
43. The Athlete after the interview accompanied the officials to the Anti-Doping Centre for testing. On reaching there, the Athlete was unable to produce the sample, something that was beyond his control. That being the case and with an intention of having his sample tested, the Athlete took a dozen of 500ml of water to facilitate the sample production which was in vain.
44. The Respondent submits that at the time he was tired and hungry, having stayed close to twenty-four (24) hours without food. The Athlete was retained at the Centre the whole night without being offered a meal or anything to eat. He dozed off and when he woke up at 5.00am, his whole body was trembling.
45. The counsel postulates that this is a man who was used to six meals a day, his body was used to frequent meals and at that time he was forced to stay without a single meal. Nevertheless, the Athlete was still willing to abide by the Anti-Doping rules. He requested the officials to get him a meal but they declined.
46. Due to the circumstances, the Athlete requested if he could be allowed to get to his apartment and get himself something to eat. The officials allowed him on condition that he be accompanied by the ADAK officials which he accepted. They therefore left the Anti-Doping centre headed to the Athlete's apartment with the athlete walking ahead slightly faster as he was in a bad condition. The speed at which the athlete was walking, was facilitated by

his health conditions at that particular time, he was rushing to save his life. It is upon reaching his apartment that he realized that the officials had been denied access.

47. Consequently, the Athlete was later shocked to learn that he had been charged of violating the Anti-Doping Rules and Article 2.3 of the WADA Code.

Issues for determination;

Whether the Athlete evaded, refused or failed to submit sample collection

48. The Respondent avers that Article 2.3 of the WADA Code provides for evading, refusing or failing to submit to sample collection without compelling justification after notification by a duly authorized person.
49. The Respondent counsel submits that solely the Athlete did not evade, refuse or fail to submit the sample collection as charged and if that was the case, he couldn't have agreed to accompany the ADAK officials to the sample collection centre and even stay overnight taking dozens of bottles of water to facilitate the sample production.
50. The Athlete is a law abiding citizen who has never been charged with an ADRV before. He is a man, who has participated in various competitions majority of which he emerged as a winner. The competitions follow random testing which he has never failed to do so and even did tests when he was not active in competition. This is therefore to mean that the Athlete could not at this point to refuse to submit his sample as he been doing so before.
51. The Respondent's counsel submits that the previous wins of the Athlete have all been genuine. The Athlete started his body building in 2007 and won his first title of Mr. Nakuru in 2014. It therefore took him seven (7) good years of hard work and determination to win the title. If the Athlete was a person doping, he couldn't be patient for all that while. In 2015 May, he won Mr. Nairobi and the same year he became the 3rd runners up in Mr. Kenya competitions.
52. Still in 2015 the Athlete won the Mr. Modern fitting staged in Mombasa. In 2016, he defended his title Mr. Nairobi, he later went to Dubai and became the 1st runners up. A week later he came back to Kenya and took part in Mr. Kenya competition in which he emerged victorious and in 2017 there was only won competition in which he took the pole position.
53. It is therefore, undisputable that the Athlete is a man, fond of winning competitions and in all the competitions, his samples have always tested negative.
54. The Athlete in 2017, started a gym business which necessitated him to take a break from the sport to focus on his business. He stated that this move cannot be taken by a person that is doping. It is at this time that he ran in a random test with ADAK officials and was still found negative.
55. The athlete is a mentor to the young generation that want to venture into

the body building career and finding him guilty of these charges will negatively impact on his mentees.

56. Article 10.3.1 of ADAK Rules provide for four (4) year period of ineligibility for the violation of Article 2.3 and further provides for an exception where the athlete can establish that the commission of the ADRV was not intentional, the period of ineligibility shall be two (2) years.
57. It is our humble submission that the Athlete did not intentionally refuse to produce a sample for testing. His actions are what any reasonable man could do under the circumstance.
58. In conclusion we submit that the Athlete has been at all times an advocate of the Anti-Doping Rules, educating the young generation on the importance of participating in "clean" competitions. We pray for a lenient sanction best on the above pleadings and submissions since failure to produce the sample was not intentional.

Jurisdiction

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

Applicable Law

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

The following constitute anti-doping rule violations:

2.3 Evading, Refusing or Failing to Submit to Sample Collection

Evading *Sample* collection, or without compelling justification, refusing or failing to submit to *Sample* collection after notification as authorized in applicable anti-doping rules.

*[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading *Sample* collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to *Sample* collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" *Sample* collection contemplates intentional conduct by the Athlete.]*

Er.

A. Sanctions

71. With respect to the appropriate period of ineligibility, Article 10.3 of the WADC/ADAK ADR provides that:

The period of ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.5 or 10.6 are applicable:

10.3.1 For violations of Article 2.3 or Article 2.5, the period of Ineligibility shall be four years unless, in the case of failing to submit to Sample collection, the Athlete can establish that the commission of the anti-doping rule violation was not intentional [as defined in Article 10.2.3], in which case the period of Ineligibility shall be two years.

72. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

If a Provisional Suspension is imposed and 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. ...

73. In regard to Disqualification, Article 10.8 of the ADAK ADR reads as follows:

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 the resulting Consequences including forfeiture of any medals, points and prizes.

Decision

74. Consequent to the discussions on merits of this case:

- (i) The Respondent is sanctioned to a period of Ineligibility of two (2) years;
- (ii) The period of Ineligibility shall be from 4th January 2023, being the date on which the Athlete was provisionally suspended, until 3rd January 2025;
- (iii) All competitive results obtained by the Respondent Athlete from and including 9th October 2022 are disqualified including prizes, medals, and points;
- (iv) Each party shall bear its own costs;
- (v) The right of appeal is provided for under Article 13 of WADA Code, IAAF Competition Rules and Article 13 of ADAK ADR.

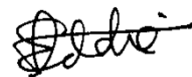
Dated at Nairobi this 21st day of September, 2023



Mrs. Elynah Sifuna-Shiveka, Panel Chairperson



Mr. Gabriel Oucho, Member



Mr. Gichuru Kiplagat, Member