

REPUBLIC OF KENYA



THE JUDICIARY OFFICE OF THE SPORTS DISPUTES TRIBUNAL
SDTADK NO. E018 OF 2023

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

VERSUS

STEPHEN KIPCHIRCHIR KIPLAGAT.....ATHLETE

DECISION

Panel:

John M. Ohaga SC, CArb - Panel Chair

Mrs. J Njeri Onyango, FCIArb - Member

Mary N Kimani - Member

Appearances:

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

Mr. Maranga, Advocate instructed by Wann Law Advocates for the 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

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A. INTRODUCTION

I. The Parties

1. The Applicant, Anti-Doping Agency of Kenya (hereinafter referred to as **ADAK**), is 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. Facts

3. On 18th December 2022, an ADAK Doping Control Officer ("DCO") collected a Urine Sample from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles, which were given reference numbers A 7125422 (the "A Sample") and B 7125422 (the "B Sample") in accordance with the Prescribed WADA procedures.
4. Both Samples were transported to the Qatar Doping Control Laboratory - ("WADA") - accredited Laboratory in Qatar (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for presence of a prohibited substance *S1.1 Anabolic Androgenic Steroids (AAS)/ Pregnanediol, Androsterone and Etiocholanolone* which are listed as an Anabolic Agent under S1 of WADA's 2023 Prohibited List.
5. 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 29th March 2023. In the said

communication the Respondent was offered an opportunity to provide an explanation for the same by 18th April 2023.

6. The Respondent failed to respond to the charges within the specified timeline of 18th April 2023 and was yet to respond as at the time of filing the Charge Document.
7. The Respondent'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.
8. 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.
9. 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.
10. A charge document was prepared and filed by ADAK, and the Respondent through his Counsel presented a Response thereto.

B. PLEADINGS AND PRELIMINARIES

11. A Notice to Charge was presented to the Tribunal on 19th April 2023 by Mr. Bildad Rogoncho on behalf of the Applicant. The Tribunal's order on 20th April 2023 directed:
 - i) Serve all relevant documents to the Athlete by 11th May 2023.
 - ii) Constituted panel members.
 - iii) Mentioned compliance and further directions for 11th May 2023.

12. The matter was mentioned several times due to various reasons such as the Athlete's absence, request for time extensions, and personal issues.
13. On 2nd November 2023, the hearing took place, wherein the Athlete testified virtually, stating his occupation as a runner and providing additional documents. During cross-examination, he explained his use of traditional medicine and his athletic history.
14. The hearing was adjourned due to the Athlete's distress, and further proceedings were scheduled. Both parties complied with submission requirements by 7th March 2024. The Tribunal scheduled judgment for 18th April 2024.

C. SUBSTANTIVE CLAIMS

I. The Applicant's Submissions

15. The Anti-Doping Agency of Kenya wished to adopt and own the Charge Document dated 25th April 2023 and the annexures thereto as an integral part of its submissions.
16. The Respondent herein is charged with an Anti-Doping Rule Violation in respect of the *Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/ Pregnenediol, Androsterone and Etiocholanolone* contrary to the provisions of Article 2.1 of ADAK AntiDoping Rules (hereinafter referred to as ADAK ADR).
17. 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.

18. The matter was set down for hearing and the athlete was represented by the firm of Wann Law Associates.
19. The matter came up for hearing, and both parties agreed to proceed by written submissions on any sanction or penalty which might be imposed.
20. 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.
21. The Applicant submits that what they find that ideal considerations while sanctioning the Respondent are:
 - A. The ADRV has been established as against the athlete.
 - B. The knowledge and exposure of the athlete to Anti-Doping procedures and programs and/or failure to take reasonable effort to acquaint themselves with Anti-Doping policies.
 - C. The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was because of his negligent acts.
 - D. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.
22. From the foregoing, the Applicant urged the Panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the athlete to 4 years ineligibility.

II. The Athlete's Submissions

23. Counsel for the Athlete stated that they would rely on their statement of defence dated 12th September 2023 and filed on the same day, list and bundle of documents dated 12th September 2023 and the facts articulated in the witness statement by Stephen Kipchirchir Kiplagat on 12th September 2023.
24. It was the Athlete's submission "*that it was never his intention to cheat in his field of athletics*". He submitted that the case before the Panel was a matter that constituted misfortune, respiration, depression and humanity.
25. Relying on "*CAS 2018/A/4643 Maria Sharapova v International Tennis Federation*", wherein the panel set out factors for consideration in assessment of degree of fault on the part of the athlete as follows; **professional experience, perceived and actual degree of risk, any impairment, disclosure of medication on the Doping Control Form, Admission of the ADRV in a timely manner and any other relevant factors and specific circumstances** that can explain the athlete's conduct".
26. The Athlete amongst others enumerated his loss of his family (wife and children), erectile dysfunction, no history of medical education, use of traditional herbal medicines administered by his grandmother, caring for his brother's house in Nairobi, his visit to a pharmacy whose contact he lost after loss of his phone under unfortunate circumstances, sudden demise of his brother who would have been a witness to confirm the details he had provided to the panel.
27. On humanity basis he submitted that the panel ought to consider the provided circumstances that could explain his athletic conduct; The Athlete restated that he visited a pharmacist he genuinely could not now

locate for Malaria treatment and erectile dysfunction after disclosing to the pharmacist about his athletic career. He submitted that his brother who owned the Nairobi house could have helped with the pharmacy location issue but has since passed away.

28. In furtherance of his case the Athlete stated, *"Illuminating further, in the case of Kurt Fogo vs National Rugby League (CAS A2/2011), the panel observed that: "The athlete must demonstrate that the substance was not intended to enhance the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent."*
29. In addition Athlete averred that he *"provided to this panel that the medicine administered to him by his "gogo" was meant to help with his medical condition of erectile dysfunction and the medicine administered to him in the Nairobi pharmacy was meant for the latter condition and malaria (as he had explained to both his "gogo" and the pharmacist.",* arguing *"Similar sentiments are also to be found in the case of ADAK v Henry Kiprotich Sang (2021) that to prove lack of intention, the Respondent must clearly proof on a balance of probability that one explanation is more probable than the other possible explanation."*
30. Further, relying on *CAS 2017/A/4962 WADA V. Comitao Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi*, it was the Athlete's submission *"that for an ADRV to be committed non-intentionally, the Athlete bears the burden of proof of establishing that the anti-doping rule violation was unintentional and thus to establish how the relevant forbidden substance entered his/her body. The same case went on to state under Par. 56 that the Athlete bears the burden of establishing that the violation was not intentional and therefore must establish how the*

substance entered his or her body on the “balance of probability”, a standard long established in CAS jurisprudence”.

31. As against the case in *ADAK v Judith. Jepngetich (2021)*, the Athlete contended that he had provided the panel with an explanation for the presence of the prohibited substance in his system and additionally, *“The Respondent persists that the presence of the prohibited substance in his system was never intentional nor was aware of its ingestion”*. Hence the Athlete surmised that he, *“[...] all along acted in good faith by taking the prescribed medicine in order to manage the erectile dysfunction medical problem as well as malaria”*.
32. In regard to the four (4) year sanction sought by the Applicant, it was the Athlete’ submission *“that a four (4) year suspension or two (2) year suspension was not proportional, fair or just in regard to the Respondent’s violation if any; it was provided in **Ferdinand Omanyala v Athletics Kenya** [2019] eKLR at para. 84 & 87 that the doping violation being unintentional and the Athlete having shown No Fault or Negligence in the circumstances of the case, then sanctions meted against the athlete should be reduced or eliminated altogether in order that the said sanctions are within the ambit of proportionality, fairness and justice”*.
33. It was the Athlete’s prayer that the Panel dismisses the entire charge with costs and *“that if the panel is constrained to sanction, it considers the period served under period of suspension and the same be credited against the sanction”*.

D. ISSUES FOR DETERMINATION

34. Having considered all the facts and the pleadings herein, the Panel framed the following issues for determination:
 - i. *Whether the Athlete committed an Anti-Doping Rule Violation*
 - ii. *Whether the violation committed by the Athlete was intentional*

- iii. *Whether the Respondent Demonstrated Fault/Negligence/ Origin and Knowledge* iv. *Whether the Respondent is subject to a four-year ineligibility sanction*

E. ANALYSIS

I. Whether the Athlete committed an Anti-Doping Rule Violation

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

Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids

(AAS)/ Pregnanediol, Androsterone and Etiocholanolone as outlined at para. D.10 of the Applicant's Charge Document dated 25th April 2023.

36. The Applicant asserted "*that the Respondent failed to respond to the charges within the specified timeline of 18th April 2023 and was yet to respond as at the time of filing the Charge Document*". It was also averred that the Athlete did not request for analysis of his B Sample and therefore waived his right of analysis of the same. In the Athlete's witness statement, the Athlete acknowledged he was to provide an explanation by 18th April 2023. We note that the Athlete did not request for his B Sample analysis nor presented any subsequent arguments in respect of his B Sample analysis during the proceedings in this matter.

37. Furthermore, under Article 22.1 of the Anti-doping Rules, the athlete is entrusted with various roles and responsibilities, including compliance with the rules, availability for sample collection, responsibility for what they ingest, and cooperation with anti-doping organizations investigating rule violations. Moreover, the athlete is obligated to uphold the spirit of sport, as outlined in the preface to the anti-doping rules, which

emphasizes values such as ethics, fair play, excellence in performance, and respect for rules and other participants.

38. WADC/ ADAK ADR Article 2.1.2 states: 'Sufficient proof of an antidoping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample;' Without a contrary analysis to the Athlete's A Sample, then presence of a prohibited substance in the Athlete's A Sample had been demonstrated by the Applicant. As argued 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 in order to establish an ADRV."* (Our Emphasis).
39. According to this, the presence of a prohibited substance in the athlete's A Sample, where the B Sample is not analyzed or where the analysis confirms the presence of the substance, it is considered sufficient proof of an anti-doping rule violation. Thus, the demonstration of the use and presence of a prohibited substance does not necessitate proof of intent, fault, negligence, or knowing use on the athlete's part to establish an antidoping rule violation, as argued by the applicant.
40. The Panel therefore is comfortably satisfied that the Applicant had established that the Athlete in this matter had committed an ADRV.

II. Whether the violation committed by the Athlete was intentional

41. The pivotal question at hand is whether the athlete's actions leading to the anti-doping rule violation (ADRV) were intentional. Here's a coherent breakdown of the key considerations.
42. Firstly, under the World Anti-Doping Code (WADC), particularly Article 10.2.1, the burden of proof rests on the athlete to establish that the ADRV was not intentional. This burden must be met by demonstrating specified facts or circumstances with a standard of proof by a balance of probability.
43. Specifically addressing non-specified substances, Article 10.2.1.1 stipulates that unless the athlete can establish lack of intention, a period of ineligibility of four years shall be imposed. It's crucial to note the commentary emphasizing the difficulty in proving lack of intention without identifying the source of the prohibited substance.
44. WADC Article 10.2.1 provides:

“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)"

45. WADC/ADAK ADR's Article 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 antidoping rule violation and manifestly disregarded that risk.' (Our Emphasis)
46. The definition of "intentional" under WADC/ADAK ADR's Article 10.2.3 clarifies that it encompasses conduct where the athlete knew or disregarded the significant risk of violating anti-doping rules. Given the presence of a non-specified substance in the athlete's body, it becomes the athlete's responsibility to prove the absence of intention during the ADRV.
47. The prohibited substance found in the Athlete's body in this matter was a Non-Specified substance hence as under WADC/ADAK ADR's Article **10.2.1.1**, it was the Athlete's responsibility to establish his lack of intention while committing the ADRV.
48. The Panel took cognizance of the various relevant factors the Athlete relied upon to explain his conduct as an athlete; while we observe that some of these factors were noted to be unfortunate, this Panel agreed with the Applicant (in its Para. 33) that the one focal point the Athlete chiefly relied on is the origin of prohibited substance; nevertheless, evidence of such origin was sorely lacking, the Athlete having stated that he unfortunately lost his phone and with it the details of the chemist/pharmacy where the prohibited substance was ostensibly procured and/or administered.
49. The Applicant relying on *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**” (Our Emphasis)*

50. Further it was the Applicant’s submission (at their Para. 31) 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**”*. (Our Emphasis)
51. Assessing the specific circumstances of this matter, the Panel is of the opinion that the Athlete provided it with precious little in the way of

concrete and/or collaborative material to enable it interrogate his lack of intention to dope. The Athlete's word seemed to be the only 'proof' the Athlete tabled without the necessary factual, independently verifiable evidence(s). Other than the Athlete saying he lost his phone under unfortunate circumstances no evidence was tabled to collaborate his word, including no further explanation was rendered regarding the said 'unfortunate circumstances'.

52. The Athlete in his submissions at his para.27 stated, *"Illuminating further, in the case of Kurt Fogo vs National Rugby League (CAS A2/2011), the panel observed that: "The athlete must demonstrate that the substance was not intended to enhance the athlete's performance." (Our Emphasis). Further to this, the Athlete submitted that he "provided to this panel that the medicine administered to him by his "gogo"/(grandmother) was meant to help with his medical condition of erectile dysfunction and the medicine administered to him in the Nairobi pharmacy was meant for the latter condition and malaria (as he had explained to both his "gogo" and the pharmacist."* While this explanation was possible and could explain his athletic conduct, the Athlete did not collaborate his grandmother's herbal medication with any backing by an independent herbal practitioner for instance. Alternatively, the Athlete provided no clear proof of his said ED medical condition from a recognized hospital, save his mention of the Nairobi pharmacist. In the event of the said lost phone and inability to locate the pharmacy as claimed by the Athlete, it is difficult to verify the Athlete's word, that is, that a pharmacy/chemist in Nairobi did indeed treated him for the ED medical condition, as the only such relevant exhibit in the Athlete's list of

documents could not be independently verified against the actual dispensing chemist/pharmacy.

53. 'Demonstrate' as used in *Kurt Fogo*, according to this Panel, and as held by various other panels means clearly showing for instance, how the prohibited substance entered his body. In this regard this Panel is well guided by the panel in *CAS 2023/A/9451 - CAS 2023/A/9455 - CAS 2023/A/9456 Valieva* para.359. *'Having said that, it is readily apparent that the most persuasive and probative evidence that the Athlete can adduce in an effort to discharge the burden is factual evidence as to the origin of the Prohibited Substance. But this is not a rule of law, it is a matter of evidence. It was explained, as WADA submitted, by the highly regarded arbitrator, Mr Yves Fortier, in CCES v Findlay, SDRCC DT 16-0242 at para.77 the following way: "It appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says, contained the [Prohibited Substance]. With respect to for the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body."* (Our Emphasis)
54. Further, the Athlete's stand that, "[...] nor was (he) aware of its ingestion," was overridden by the Athlete's own submission quoting *Kurt Fogo* that "[...], The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent." (Our Emphasis)
55. Cumulatively, in regard to the explanation proffered by the Athlete in this case, this Panel is of similar view to that of the panel in *CAS 2023/A/9451 - CAS 2023/A/9455 - CAS 2023/A/9456 Valieva* para.373 *'In any event, the Panel is not persuaded by the Grandfather Explanation. There are too many shortcomings in the evidence, and too many unanswered questions, for the*

Panel to decide that her account is more likely than not. It is certainly possible that the Athlete ingested the TMZ in this way, but possible is not probable and the Athlete fails to discharge her burden in this respect. In the view of the Panel, the Athlete has not established, on the balance of probabilities, that the origin of the TMZ in her Sample was the strawberry dessert provided by Mr. Solovyov. (Our Emphasis)

56. Arising from the above, the Panel's finding was that, by a balance of probabilities, the Athlete was unable to establish that the violation was not intentional.
57. Having arrived at the view, it is the panel's finding that the Athlete has not established lack of intention hence 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.

III. Whether the Respondent Demonstrated Fault/Negligence/ Origin and Knowledge

58. 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.
59. 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.

60. 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."

61. 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 was not found in his system.

62. 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.

63. It is the Applicant's submission that the Respondent was negligent due to his failure to exercise caution to the greatest possible extent and his conduct does not warrant a finding of no fault and negligence.

64. 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.
65. 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.
66. 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.
67. The Applicant submits 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.
68. From the explanation given by the athlete, he acknowledges having been traditionally treated through administration of herbal medicines, he

further stated that he suffered from Malaria and visited a pharmacy, which he lost contact with after losing his phone under unfortunate circumstances.

69. In light of these considerations, the panel finds that the Respondent has not met the requisite standard of care expected from an athlete and has failed to sufficiently demonstrate their lack of fault or negligence. Therefore, the panel affirms the applicant's contention that the respondent bears responsibility for the anti-doping rule violation.
70. Further, it is the Panel's consideration that the origin of the prohibited substance has not been established.

IV. Whether the Respondent is subject to a four- year ineligibility sanction

71. 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.
72. 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.

73. 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 pre- condition 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”*.
74. It was the Applicant’s submission that the Respondent has not discharged his burden by a balance of probability to warrant the reduction of a sanction. Consequently, no explanation was provided for how the prohibited substance got into his system thus the first avenue to warrant sanction reduction was closed off.
75. 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”*.
76. It was 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 and inability to provide any cogent evidence highlighting that he did not 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 has not demonstrated no fault or negligence to warrant sanction reduction.

77. It was the Applicant's submission that the Respondent did not meet the set threshold by ADAK rules and the WADC to warrant sanction reduction.
78. Submitting on sanction, the Applicant in its para. 43 urged the panel "to consider the sanction provided for in Article 10.3.3 of the Adak Rules and sanction the athlete to four years ineligibility". (Our Emphasis)
79. The Athlete on the other hand, relying on *Ferdinand Omanyala v. Athletics Kenya [2019] eKLR* at para.84 &87 submitted "that a four (4) year or two (2) year suspension was not proportional, fair or just in regard to the Respondent's violation, if any; [...]" and argued that *that the doping violation being unintentional and the Athlete having shown No Fault or Negligence in the circumstances of the case, then sanctions meted against the athlete should be reduced or eliminated altogether in order that the said sanctions are within the ambit of proportionality, fairness and justice*". It is our considered opinion that the instant matter departs from the *Ferdinand Omanyala* at point in the latter matter wherein the athlete discharged his burden as required by WADC's/ADAK ADR's Article 10.2.1.1. Therefore, the two are not comparable, including on the factors regarding proportionality, fairness and justice.
80. Having delved into and delivered its verdict on the issue of establishment of lack of intention by the Athlete, this Panel adopts the view of the panel in *CAS 2023/A/9451 - CAS 2023/A/9455 - CAS 2023/A/9456 Valieva* para.345 'It is sometimes said that it follows from this wording that, unless and

until an athlete is able to prove that the violation was not intentional, it is presumed that the ADRV was committed intentionally. The Panel takes the view, as did the panel in SR/0000120259 at para.28, that it is unnecessary to go so far, all the more-so where there is no mention within the clause of such a presumption arising should an athlete not be able to show the requisite lack of intention. **In the Panel's view, it is enough to say that, should an athlete not carry his or her burden in this respect, then it follows from the wording of the clause that the period of ineligibility is four years.** It is unnecessary to go on to say that a presumption therefore arises that the athlete violated the rules intentionally, especially in circumstances where the original version of this rule within the 2015 WADC expressly referred to athletes who cheat. It is perfectly possible for an athlete to fail to meet their burden and, at one and the same time, not be a cheat. If the WADA wanted to go so far as to impose a presumption to this effect, it would have and should have said so. It is difficult enough to prove a negative without branding each and every athlete who fails to do so a presumptive cheat'.

81. Further Article 10.7 provides:

10.7 Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault Suffice it to state here that the Athlete did not meet any of the provisions essential for mitigating the recommended sanction under this article.

82. Further Code Article 10.10 provides:

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

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

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

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

83. In conclusion, based on the evidence and legal framework presented, the respondent is subject to a four-year ineligibility sanction for the intentional anti-doping rule violation.

F. DISPOSITION

84. Consequent to the discussion on the merits of this case, the Panel orders:
- a. The period of ineligibility shall be **four (4) years**;
 - b. The period of ineligibility shall be from the date of mandatory Provisional Suspension for a period of four (4) years starting **18th April 2023 to 17th April 2027**;
 - c. Disqualification of any and/or all of the Athlete's competitive results from **18th December 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 18th day of *April* 2024

John M. Ohaga

John M Ohaga, SC; CARb; FCI Arb Chairperson

J Njeri Onyango

J Njeri Onyango (Mrs), Member

Ms. Kimani Mary

Ms. Kimani Mary, Member