

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. E021 OF 2023

WORLD ANTI-DOPING AGENCY.....APPELLANT

-VERSUS-

MS. AGATHA JERUTO KIMASWAI.....1ST RESPONDENT

ANTI-DOPING AGENCY OF KENYA.....2ND RESPONDENT

DECISION

Panel:

John M. Ohaga SC, C.Arb - Chairperson

Elynah Shiveka (Mrs) - Member

Benard Murunga Wafula - Member

Appearances:

Mr. Ross Wenzel appearing together with Ms. Marissa Sunio for the Appellant;

Mr. Kivindyo Munyao, instructed by TripleOKlaw LLP Advocates for the 1st Respondent;

Mr. Bildad Rogoncho for the 2nd Respondent

CONTENTS

A. INTRODUCTION	3
I. THE PARTIES	3
II. FACTS	3
B. PLEADINGS AND PRELIMINARIES	4
C. SUBSTANTIVE CLAIMS	5
I. THE APPELLANT'S CASE	5
II. THE RESPONDENTS' CASE	8
D. ISSUES FOR DETERMINATION	9
E. ANALYSIS	10
I. <i>WHETHER ARTICLE 13.1.1 OF ADAK'S ANTI-DOPING RULES, WHICH ALLOWS THE SUBMISSION OF EVIDENCE AND LEGAL ARGUMENTS NOT RAISED IN THE FIRST INSTANCE HEARING, APPLIES, AND IF SO WHETHER IT PERMITS THE INTRODUCTION OF ISSUES NOT ADDRESSED INITIALLY</i>	10
E. DISPOSITION	15

Abbreviations

- ADR** Anti-Doping Rules
- ADRV** Anti-Doping Rule Violation
- CAS** Court of Arbitration for Sports
- WADA** World Anti-Doping Agency
- WADC** World Anti-Doping Code

A. INTRODUCTION

I. The Parties

1. The Appellant, World Anti-Doping Agency (herein after referred to as “WADA”), is a Swiss private law foundation with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada established in 1999 and is governed by the World Anti-Doping Code (herein referred to as “WADC”), which sets out the anti-doping rules, policies, and standards that are adopted and implemented by sports organizations worldwide. WADC is considered a legal framework that guides anti-doping efforts globally.
2. The 1st Respondent, Ms. Agatha Jeruto Kimaswai, (herein referred to as “the Athlete”) is a 29-year old National Level middle distance runner from Kenya.
3. The 2nd Respondent is the Anti-Doping Agency of Kenya, a statutory body established through the Anti-Doping Act, 2016 with a mandate to inter alia, protect athletes’ fundamental rights to participate in doping-free sport.

II. Facts

4. Ms. Agatha Jeruto Kimaswai, a 29-year-old middle-distance runner from Kenya (“the Athlete’), had imposed her a four-year period of ineligibility by Athletics Kenya on 22nd September 2015 due to an Adverse Analytical Finding of Norandrosterone from an out-of competition test performed on 15th May 2015. This period ended on May 19, 2019.
5. On 23rd December 2021, during an Out-of-Competition doping control test, she tested positive for hydroxy-clomiphene, a Clomifene metabolite. A Notice of Anti-Doping Rule Violation (herein referred to as “ADRV”) was issued on 18th February 2022, leading to her provisional suspension from 10th March 2022.

6. In response to the Notice, Ms. Kimaswai denied the charges, providing medical documents explaining how the substance entered her body.
7. ADAK filed a Notice of Charge at the Sports Disputes Tribunal (**'the Tribunal'**) on 13th April 2022.
8. The Panel appointed by the Chairperson of the Tribunal as required under the relevant rules, after considering the Notice of Charge and the written submissions filed on behalf of ADAK, imposed a two (2) year sanction on 2nd March 2023.
9. The Athlete's defense included allegations that she had experienced health issues for which she had been prescribed certain medication; lack of awareness about the prohibited substance, minimal education on anti-doping, and impaired decision-making due to ill-health.
10. The Panel, after considering these defences, found the Athlete guilty of an anti-doping rule violation and imposed a two-year period of ineligibility from 10th March 2022.
11. WADA received the Appealed Decision on 16th March 2023, and on 11th May 2023, filed a Statement of Appeal against the Panel's decision.

B. PLEADINGS AND PRELIMINARIES

12. The Appeal stems from a Decision dated 2nd March, 2023, issued by the Sports Disputes Tribunal in Kenya. The Tribunal, comprising Mrs. J. Njeri Onyango, Mr. Gabriel Ouko, Ms. Mary N. Kimani, Mr. Edmond Kiplagat, and Mr. Allan Owinyi (the "**First Instance Panel**"), made the following determinations:
 - a. *The applicable period of ineligibility of two (2) years is hereby upheld;*
 - b. *The period of ineligibility shall be from the date of the provisional suspension from 10th March 2022 for twenty-four (24) months;*
 - c. *Disqualification of any and/or all of the Athlete's competitive results from 10th March 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.*

13. Subsequently, on 11th May 2023, the Appellant submitted a detailed Notice of Appeal, elucidating the factual nuances of the case, delineating procedural intricacies, and providing an exhaustive list of exhibits in support of their contentions.
14. Following that, on 5th July 2023, the Appellant submitted their substantive arguments, thereby fortifying their position in the ongoing appeal.
15. The 1st Respondent responded promptly, submitting her own arguments on 26th August 2023, contributing to the to the legal discourse surrounding the appeal.
16. Showing responsiveness and commitment to the process, the Appellant submitted a rejoinder on 8th September 2023, directly addressing the points raised by the 1st Respondent.
17. Notably, it is observed that the 2nd Respondent did not file any submissions in this appellate process.

C. SUBSTANTIVE CLAIMS

I. The Appellant's Case

18. The Appellant's case asserts that the Athlete, committed an Anti-doping Rule Violation (ADRV) under Article 2.1 and 2.2 of the ADAK ADR due to the detection of Clomifene metabolites, a prohibited substance, in her sample. The Appellant contends that intent, fault, or negligence need not be demonstrated for establishing an ADRV under the relevant articles.
19. The Appellant emphasized that the Athlete's second ADRV triggers Article 10.9.1.1 of the ADAK ADR, which prescribes a period of ineligibility greater than six (6) months. However, the first instance Panel which rendered the Appealed Decision was allegedly unaware of the

Athlete's first ADRV, preventing the application of the enhanced sanction.

20. Regarding the second ADRV, the Appellant argues that the Athlete cannot claim "No Significant Fault or Negligence" under Article 10.6.1.1 of the ADAK ADR. The Athlete allegedly failed to take necessary precautions, such as checking medication ingredients, and thus bears significant fault.
21. The Appellant proposes a six (6) year ineligibility period for the second ADRV, combining the first ADRV's four-year ban. Alternatively, the Appellant suggest a period between four (4) to six (6) years. The Appellant also seeks the disqualification of results from 23rd December 2021, and calls for a fairness analysis.
22. In procedural requests, the Appellant insists that it reserves the right to submit additional evidence and present witnesses.
23. The Appellant requested the Appellate Panel to uphold the appeal, set aside the First Instance Panel's decision, find the Athlete in violation, impose a six (6) year or alternatively four (4) to six (6) year period of ineligibility, disqualify results from 23rd December 2021, and allocate costs to ADAK or jointly to the Respondents, including a significant contribution to WADA's legal costs.
24. The Appellant further argued that Article 13.1.1 of ADAK's Anti-Doping Rules and the World Anti-Doping Code grants a broad scope of review on appeal, allowing consideration of all relevant issues, even those not initially raised in the first instance. They asserted that this provision is essential to correct any mistakes or omissions made by the prosecuting body at the initial hearing.
25. The Appellant emphasized that during the first instance hearing, the Panel conducted a comprehensive analysis of the Athlete's ADRV to

determine the period of ineligibility. However, the Appellant contended that evidence not raised initially but arising from the circumstances addressed in the first hearing, specifically the 1st Respondent's prior Anti-Doping Rule Violation, is relevant and can be raised in the appeal.

26. The Appellant highlighted that it had the option to appeal directly to the Court of Arbitration for Sport (CAS) but chose not to, and asserts that CAS hears appeals on a *de novo* basis, meaning prior proceedings do not limit evidence or carry weight in the CAS hearing. It argues that the 1st Respondent's references to CAS case law are irrelevant, outdated, and taken out of context.
27. The Appellant disputed the 1st Respondent's claim that the standard of proof for multiple violations was not met, asserting that there is no requirement for an Anti-Doping Organization to prove intent for the multiple violation articles to be applied. They maintained that the relevant requirement is for WADA to establish that the Athlete committed the additional ADRV after receiving notice of the first violation.
28. It is their contention that the 1st Respondent has multiple anti-doping violations, citing the decision by Athletics Kenya in 2015, where the 1st Respondent received a four (4) year period of ineligibility for the presence of Norandrosterone in her sample. The Appellant dismissed the 1st Respondent's analysis of aggravating circumstances, stating that they do not rely on such factors.
29. Regarding the period of ineligibility, the Appellant sought a range between four to six years based on ADAK ADR Article 10.9.1.1, which requires an analysis of the Athlete's fault for the second anti-doping rule violation.

30. The Appellant maintained its position with respect to multiple violations and the appropriate period of ineligibility, asserting that nothing in the 1st Respondent's submission disturbs WADA's submissions and requests for relief.
31. Finally, the Appellant confirmed that it integrates and relies upon the entirety of its requests for relief in Section V of its Brief.

II. The Respondents' Case

32. The 1st Respondent challenged the assertion of multiple violations on two grounds; being the Issue that the Multiple Violation was not prosecuted at the Trial Stage and the Standard of Proof for Multiple Violation was not met.
33. The 1st Respondent argued that under the Anti-Doping Act, ADAK had the exclusive prerogative to investigate and prosecute the issue of multiple violations before the trial stage, but it did not.
34. She emphasized Article 10.9.3.1 of ADAK ADR which outlines that a violation is considered a second violation only if ADAK can establish that it occurred after the athlete received notice of the first violation.
35. The 1st Respondent contended that since ADAK did not prosecute this issue initially, it cannot be introduced on appeal.
36. The 1st Respondent asserted that the Appellant cannot usurp ADAK's role in investigating and prosecuting as per Article 20.5.1 of the WADA Code.
37. The 1st Respondent maintained that ADAK had the responsibility to prove the multiple violation to the comfortable satisfaction of the Panel, citing Article 3.1. ADAK ADR and **CAS 2018/0/5712 IAAF vs. RUSAF & Ekaterina Galitskaia**.
38. Referring to CAS decisions, the 1st Respondent argued that the mere presence of subsequent violations does not constitute multiple violations unless specific conditions are met.

39. The first instance Panel acknowledged the Athlete's violation but concluded that ADAK did not establish that it was intentional, making ADAK ADR Rules Article 10.22 applicable.
40. The 1st Respondent requested that the Appellant's claim of multiple violations not be considered, and the decision of the Trial Tribunal be upheld.
41. With regard to the applicable ineligibility period, the 1st Respondent emphasized that the question of multiple violations should have been presented at the first instance Panel, and if considered at the appellate stage, she questions whether a fully served sanction can be used as an aggravating circumstance.
42. Referring to CAS 2016/0/4469, the 1st Respondent argued against extending the ineligibility period to six (6) years, asserting that it would constitute double jeopardy.
43. The 1st Respondent sought to uphold the two (2) year period imposed by the first instance Panel, commencing from 10th March 2022, considering the principle of proportionality.
44. In conclusion, the 1st Respondent requested the dismissal of the appeal and that all costs of the proceedings be borne by the Appellant.

D. ISSUES FOR DETERMINATION

45. Having considered all the facts and the pleadings herein, the Appeal Panel framed the following issues for determination:
 - i. *Whether Article 13.1.1 of ADAK's Anti-Doping Rules, which allows the submission of evidence and legal arguments not raised in the first instance hearing, applies, and if it permits the introduction of issues not addressed initially;*
 - ii. *Whether the Appellant met the required standard of proof for establishing multiple violations, as argued by the 1st Respondent, citing Article 3.1 of ADAK ADR and relevant CAS decisions.*

- iii. *Whether the Tribunal erred in granting the minimum illegibility period to the Athlete;*
- iv. *Whether the question of multiple violations, if considered at the appellate stage, impacts the determination of the applicable ineligibility period, and if a fully served sanction can be used as an aggravating circumstance, taking into account the principle of proportionality and double jeopardy;*

E. ANALYSIS

I. Whether Article 13.1.1 of ADAK's Anti-Doping Rules, which allows the submission of evidence and legal arguments not raised in the first instance hearing, applies, and if it permits the introduction of issues not addressed initially

46. Article 13.1.1 of ADAK's Anti-Doping Rules states:

"The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker. Any Party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing."

47. In this context, the Appellant introduced new evidence related to the Athlete's previous Anti-doping Rule Violation, which was not raised in the initial hearing.

48. The Appellant argued that Article 13.1.1 allows for the expansion of the scope of review, asserting that the Appeal should not be limited to issues brought before the first instance panel.

49. The Appellant contended that restricting the scope of review to issues raised initially would unduly fetter its right of appeal, emphasizing the duty to correct mistakes and omissions on appeal. The argument centers on the flexibility provided by Article 13.1.1 to address all relevant issues, even if not part of the original hearing.

50. In conclusion, based on Article 13.1.1, the scope of review on appeal is broad and not confined to the issues raised before the initial decision maker. Therefore, the Appellant is within its rights to introduce evidence and legal arguments related to the Athlete's previous Anti-Doping Rule Violations, provided they arise from the same cause of action or general facts addressed in the first instance hearing.
51. This interpretation aligns with the principle that the appeal process should allow for a comprehensive review of all relevant aspects, ensuring a fair and thorough examination of the case.
52. This issue sets the stage for the Appellant's ability to bring forth new evidence and arguments, particularly regarding the Athlete's past violation, and emphasizes the importance of Article 13.1.1 in guiding the scope of the appeal.
53. The Appeal Panel therefore finds that the Appellant is allowed to bring about new issues at the Appeal stage as the circumstances are related. This issue emphasizes the tension between the Appellant's right to raise new issues on appeal and the 1st Respondent's assertion that the appeal should be limited to matters addressed in the first instance. It establishes the Appellant's position that Article 13.1.1 allows for a comprehensive review on appeal, ensuring fairness and correction of any oversights.

II. Whether the Appellant met the required standard of proof for establishing multiple violations, as argued by the 1st Respondent, citing Article 3.1 of ADAK ADR and relevant CAS decisions.

54. The central issue is whether the Appellant met the required standard of proof for establishing multiple violations, with the 1st Respondent contending that the standard set by Article 3.1 of ADAK ADR and relevant CAS decisions has not been satisfied.
55. The 1st Respondent relies on Article 3.1 of the ADAK ADR, emphasizing the standard of proof necessary for sports organizations.

56. Additionally, the 1st Respondent cited relevant CAS decisions, particularly **CAS 2018/0/5712 IAAF v. RUSAF & Ekaterina Galitskaia and CAS 2020/A/7526 WA v. Salwa Eid Naser & CAS 2020/A/7559 WADA v. WA & Salwa Eid Naser**, to support their argument.
57. The 1st Respondent argued that, based on Article 3.1 of the ADAK ADR, the Appellant needed to prove the multiple violations to the comfortable satisfaction of the Panel. The relevant CAS decisions, as cited by the 1st Respondent, establish precedents for the standard of proof in anti-doping cases.
58. The Appellant, on the other hand, countered these arguments and demonstrated that they have indeed met the required standard of proof for establishing multiple violations.
59. The Appeal Panel is satisfied that the Appellant has met the requisite threshold.

III. Whether the Tribunal erred in granting the minimum ineligibility period to the Athlete;

60. The pivotal question before the Appeal Panel is whether there was an error in the first instance Panel's decision to grant the minimum ineligibility period to the Athlete.
61. This evaluation is hinged on whether the first instance Panel adequately considered the conditions stipulated in Article 10.9.4 of the Anti-Doping Rules pertaining to multiple violations.
62. It is clear that Article 10.9.4 of the Anti-Doping Rules stands as the guiding rule specifically outlining the criteria for determining the ineligibility period in cases of multiple violations and states that each Anti-Doping rule violation must take place within the same ten (10) year period in order to be considered multiple violations.
63. We have scrutinized the first instance Panel's decision to impose the minimum ineligibility period to the Athlete and assessed whether the

Panel took into account the conditions specified in Article 10.9.4 concerning multiple violations.

64. It is our finding that a correct application of the conditions delineated in this article by the first instance Panel would validate the Appellant's assertion after a meticulous analysis of the rules.

IV. Whether the question of multiple violations, if considered at the appellate stage, impacts the determination of the applicable ineligibility period, and if a fully served sanction can be used as an aggravating circumstance, taking into account the principle of proportionality and double jeopardy

65. The central issue to address is whether, at the appellate stage, the consideration of the question of multiple violations has an impact on determining the applicable ineligibility period. Additionally, it raises the question of whether a fully served sanction can be employed as an aggravating circumstance. This issue intertwines with the principle of proportionality in applying sanctions.
66. Relevant rules for consideration include Article 10.9.3.1 of ADAK's Anti-Doping Rules, which specifies the conditions for a violation to be considered a second violation.
67. Moreover, the principle of proportionality, not explicitly mentioned but inherent in anti-doping adjudication, necessitates a reasonable balance between the misconduct and the sanction.
68. The Appellant asserted that the consideration of multiple violations inherently impacts the determination of the ineligibility period, as it affects the severity of the violations and, consequently, the appropriate sanction. It was clear that this is a crucial factor in assessing the overall gravity of the Athlete's infractions.
69. Conversely, the 1st Respondent contended that since the question of multiple violations was not raised at the initial trial stage, it should not

be considered at the appellate stage. She brought about emphasis that the principle of finality and the fact that the first instance Panel already determined the ineligibility period hence limiting the scope of the appellate review.

70. The argument about a fully served sanction being used as an aggravating circumstance involves a nuanced legal analysis.
71. The Appellant emphasized that such a sanction, is relevant and is connected to the current case, hence should be considered in determining the appropriate ineligibility period. On the contrary, the 1st Respondent was of the view that once a sanction is fully served, it should not be used to enhance a subsequent penalty as it would amount to double jeopardy.
72. Upon meticulous examination of the applicable provisions, the Appeal Panel has come to the conclusion that the imposition of an additional ineligibility period does not contravene the principle of double jeopardy. Article 10.9.4 of the Anti-Doping Rules expressly provides for the consideration of multiple violations, stipulating that each anti-doping rule violation must occur within a span of 10 years.
73. In light of this statutory framework, the imposition of an extended ineligibility period for the Athlete, based on multiple violations meeting the temporal criteria, conforms to the explicit provisions delineated in the Anti-Doping Rules.
74. The Appeal Panel recognizes the clarity and specificity of Article 10.9.4, which outlines the permissible circumstances under which multiple violations may be sanctioned.
75. By adhering to the stipulated timeframe, the Panel ensures that the principle of double jeopardy is not offended, as the Athlete's violations fall within the ambit of the established regulatory framework.

76. Consequently, the Appeal Panel upholds the legitimacy of applying an extended ineligibility period in this instance, emphasizing the fidelity to the delineated rules governing multiple violations within the defined temporal parameters.

E. DISPOSITION

77. After a comprehensive review of the submissions presented by both the Appellant and the 1st Respondent, as well as a meticulous analysis of the relevant provisions within the Anti-Doping Act, ADAK ADR, and the WADA Code, the Appeal Panel hereby renders the following disposition:

I. Admissibility of Appellant's Claim on Multiple Violations

78. The Panel, in alignment with the principles articulated in Article 13.1.1 of ADAK's Anti-Doping Rules, affirms the admissibility of the Appellant's claim on multiple violations. The provision explicitly allows the submission of evidence and legal arguments not initially raised, provided they emanate from the same cause of action or general facts addressed in the first instance hearing.

79. Consequently, the Panel rejects the 1st Respondent's contention that ADAK's exclusive prerogative in prosecuting the issue at the trial stage restricts the admissibility of the Appellant's claim.

II. Standard of Proof for Establishing Multiple Violations

80. The Panel acknowledges the 1st Respondent's emphasis on the standard of proof, citing Article 3.1 of ADAK ADR and relevant CAS decisions. However, the Tribunal finds that the Appellant has met the required standard of proof in establishing the Athlete's multiple violations within the specified temporal parameters, as per Article 10.9.4.

III. Introduction of Previous Anti-Doping Rule Violation on Appeal

81. Addressing the issue of introducing the Athlete's previous anti-doping rule violation not raised in the first instance hearing, the Tribunal

underscores the permissibility outlined in Article 13.1.1 of ADAK's Anti-Doping Rules.

82. The Tribunal emphasizes that the scope of review on appeal is not limited to issues brought before the initial decision maker, provided they arise from the same cause of action or general facts. Consequently, the Tribunal deems the introduction of the previous violation on appeal permissible.

IV. Impact on Applicable Ineligibility Period and Double Jeopardy

83. In contemplating the implications of multiple violations on the applicable ineligibility period, the Panel finds that the determination of an extended ineligibility period aligns with the provisions of Article 10.9.4 of ADAK ADR.
84. The Panel dismisses the notion of double jeopardy, emphasizing that the regulatory framework expressly allows for such sanctions if each violation occurs within a ten (10) year period.
85. In conclusion, the Panel allows the Appeal, upholds the Appellant's claim of multiple violations, and affirms the extended ineligibility period in adherence to the Anti-Doping Rules to the intent that:
- i. The Appealed Decision is set aside;
 - ii. The 1st Respondent is sanctioned with a period of ineligibility of six (6) years from the date of the provisional suspension, being 10th March, 2022;
 - iii. All competitive results obtained by the 1st Respondent from and including 23rd December 2021 until the date of the provisional suspension are disqualified with all resultant consequences including forfeiture of medals, points and prizes;
 - iv. All costs associated with these proceedings are to be borne by the Respondents.

DATED at NAIROBI this 23rd day of November 2023

Signed:

John M. Ohaga

**John M Ohaga, SC; CARb
Panel Chairperson**

Shiveka

Benard Wafula Murunga

Elynah Shiveka (Mrs), Member

Benard Wafula Murunga, Member

Sports Disputes Tribunal