

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. E024 CONSOLIDATED WITH
E030 OF 2023

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

-versus-

EVANGELINE MAKENA KATHENYA..... RESPONDENT

DECISION

Hearing: 31st August, 2023

Panel: Mrs. Elynah Sifuna-Shiveka - Deputy Chairperson
Mr. Allan Mola Owiny - Member
Mr. Bernard Wafula Murunga - Member

Appearances: Mr.Rogoncho for the Applicant
Athlete Represented herself

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a female athlete competing in national events.

Background and the Applicant's Case

3. The proceedings have been commenced by way of filing charge documents against the Respondent by the Applicant dated 31/05/2023 and 22/06/2023 respectively.
4. The Applicant brought charges against the Respondent that on **10th March, 2023** during the 3rd AK Field & Track weekend meet at Thika ICT, an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7125570 ("A" sample) and B 7125570("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. Both samples were transported to the Qatar Doping Control Laboratory. The "A" sample was subsequently analysed at the WADA accredited laboratory in Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance **S9. Glucocorticoids/prednisone** which falls under the 2023 WADA prohibited list.
6. On **31st March, 2023** during the 4th AK Field & Track Weekend Meet at Mombasa ICT, an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7126228 ("A" sample) and B 7126228 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.

7. Sample "A" was subsequently analysed at the WADA accredited laboratory in Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance *S9. Glucocorticoids/prednisolone, prednisone & triamcinolone acetonide* which is listed under S9 of the 2023 WADA prohibited list.
8. The first findings were communicated to the Respondent by Sarah Shibutse, Chief Executive Officer of ADAK through Notices of Charge and mandatory provisional suspension dated 04/05/23. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 25th May, 2023.
9. The same letter also informed the athlete of her right to request for the analysis of the B-sample; 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 or Negligence, substantial assistance in discovering or establishing code violations, result management agreements and case resolution agreements. The athlete was given until 25th May, 2023 to respond and request for a hearing if need be.
10. The Respondent, reverted to the charges on 25th May 2023 vide WhatsApp. In her communication she admitted to suing the prohibited substance after suffering from a tendon injury. However, she did not attach any medication prescriptions or treatment notes in support of her claims.
11. The second findings were communicated to the Respondent by Sarah Shibutse, Chief Executive Officer of ADAK through Notices of Charge and mandatory provisional suspension dated 31/5/2023. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 21st June, 2023.
12. The same letter also informed the athlete of her right to request for the analysis of the B-Sample; 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 discovering or establishing code violations, results management agreements and case resolution agreements. The Athlete was given until 21st June, 2023 to respond and request for a hearing if need be.

13. The Respondent, reverted to the charges on 5th June, 2023 vide WhatsApp. In her response she admitted to using the prohibited substance after suffering from a tendon injury. However, there was no attachment of any medication prescriptions or treatment notes to support her claims.
14. The Applicant states that the Respondent's explanation in both instances was not satisfactory and that she did not request a sample B analysis hence waiving her right to the same.
15. The Doping control process was carried out by competent personnel and using the right procedures in accordance with the WADA International standards for Testing and Investigations.
16. Moreover, the Applicant states that the Respondent has a personal duty to ensure what whatever enters her body is not prohibited.
17. Subsequently, ADAK preferred the following charges against the Respondent in both cases:

*Presence of a prohibited substance S9.
Glucocorticoids/prednisone & triamcinolone acetonide*

18. The Applicant for both ADRVs prays separately for:

- a) The athlete be sanctioned to 18 months period of ineligibility as provided by the ADAK Anti-Doping Rules, Article 10.2.1.2.

- b) Disqualification of results in the event during which the ADRV occurred and in competitions after sample collections or commission of ADRV with all resulting consequences including forfeiture of any medals, points or prizes.
- c) Automatic publication of sanction.
- d) Costs of the suit, Article 10.12.1

19. The Applicant contends that this Tribunal has jurisdiction to entertain the two matters under Sections 55, 58 and 59 of the Sports Act and sections 31B(a) and 32 of the Anti-Doping Act.

The Response

- 20. The Respondent admitted promptly via WhatsApp that she took prednisolone to take care of a tendon injury. which she had but little did she know that the medication contained prohibited substance.
- 21. During the hearing she asked for forgiveness and regretted her actions.
- 22. The Respondent did not attach any medical notes showing the treatment, management and medication she received.

Hearing

- 23. The matter came up for mentions on various dates. Furthermore, the two cases ADAK Case No.E024 of 2023 and ADAK Case No.E030 of 2023 were consolidated as they involved the same Athlete and the courses of action arose within a period of 3 weeks of each other.
- 24. The Respondent attended the hearing in person

Deliberations

- 25. The panel has taken into account the hearing that took place on 31st

August, 2023 attended by both parties, the written submissions by the Applicant that followed and the Tribunal's records.

Legal Position

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

Presumptions

27. It 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 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 Findings** 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.....

Roles and responsibilities of the Athlete

28. 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.

29. The athlete herein is also under duty to uphold the spirit of sports 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.”*

Anti-Doping Agency of Kenya Position

30. 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 prosecution.

Proof of Anti-Doping Rule Violation

31. The Athlete is charged with presence of a Prohibited Substance, a violation of Article 2.1 of the ADAK ADR.
S9. Glucocorticoids/prednisone and S9. Glucocorticoids/prednisolone, prednisone & triamcinolone acetonide are specified substances and attracts a period of ineligibility of 2 years.
32. ADAK submitted that where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated in order to establish an ADRV.
33. Similarly, ADAK noted that in Article 10.2.1 of WADA Code the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him or her to a reduction of sanction.
34. The Applicant therefore urged the Tribunal to find that an ADRV has been committed by the Respondent herein.

Origin

35. From the explanation given by the athlete, she promptly admitted and confirmed the presence of the prohibited substances in her samples through ingestion of the same to treat her tendon injury.

Intention

36. 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.'
37. According to the established case-law in **CAS 2017/A/4962 World Anti-Doping Agency (WADA) v. Comitato Permanente Anti-Doping San Marino NADO (CPA) & Karim Gharbi**, the panel asserted that, "It is the athlete that 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 into his/her body.”

38. The establishment of the source of the prohibited substance in the Respondent’s sample corroborating with the purpose or intent to use, provides the applicant and panel with an explanation to which they can base their conclusion regarding the Respondent’s intention when ingesting the prohibited substance.
39. In **CAS 2017/O/4978 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Ivan Shablyuyev**, the panel provided that, “An athlete must establish how the prohibited substance entered his/her system in order to discharge the burden of establishing the lack of intention.”
40. The Respondent was afforded the opportunity to disapprove her intent by demonstrating how the prohibited substance entered her body. From her admission, she confirmed that she procured and used the prohibited specified substance to treat her tendon injury.

Fault/Negligence

41. 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 her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.
42. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body. In the instant case the athlete did not take any tangible precautions to ensure that whatever she ingested did not contain any prohibited substance. She acted negligently and she is at fault.
43. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon her as a national level athlete. She was thus grossly negligent.

Knowlegde

44. 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 or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

Sanctions

45. For an ADRV under Article 2.1. Article 10.2.1 of the ADAK ADR provides for regular sanction of 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.
46. On its face Article 10.4 creates two conditions precedent to elimination or reduction of 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.
47. In **CAS 2015/A/4160 World Anti-Doping Agency (WADA) v International Weightlifting Federation (IWF) & Davit Gogia** the panel provided the threshold for the reduction of a sanction for non-specified substances, it asserted that **‘Where an athlete has not established, on the balance of probabilities, how a non-specified substance entered his body and has not produced any corroborating evidence – in addition to his word – which establishes to the comfortable satisfaction of the hearing body, the absence of intent from his side to enhance sport performance, it is not sufficient for him to simply assert a state of fact for the panel to accept as true. Considering that the athlete did not offer substantial assistance in discovering or establishing Anti-Doping Rule Violations, did not admit an Anti-Doping rule violation in the absence of other evidence or promptly admitted an Anti-Doping Rule violation after being confronted with a violation, he cannot obtain a**

reduction of the period of ineligibility under the IWF Anti-Doping Policy (ADP). Therefore, the standard period of ineligibility to be imposed upon the athlete is of four years, and this sanction must be increased to 8 years if it is the athlete's second Anti-Doping rule violation.

48. The Respondent has established the origin of the prohibited substance and the intention and purpose to use the prohibited specified substance.
49. In the circumstances, we are convinced that the respondent has demonstrated no intention on her part as required by the ADAK rules and the WADAC to warrant sanction reduction.
50. In conclusion the Applicant avers that Article (WADA 2.1.1) emphasizes that it is an athlete's personal duty to ensure that no prohibited substance enters her body and that it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation by the analysis of the athlete's sample which confirms the presence of the prohibited substance.
51. ADAK submits that the ideal considerations while sanctioning the athlete are as follows;
 - a) The ADRV has been established as against the athlete;
 - b) The Respondent herein has given explanation for her failure to exercise due care in observing the products ingested and used;
 - c) The sanction of 18 months ineligibility ought to be imposed as origin and no intention has been proved by the respondent.
52. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.2.1.2 of the ADAK Rules and sanction the

athlete to 18 months ineligibility period.

CONCLUSION

53. In the circumstances, the Tribunal imposes the following consequences:

- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be 18 months from the date of the mandatory provisional suspension of the lead file which is E024 of 2023 which is 25th May, 2023 upto 24th January, 2025;
- b. Disqualification of results in the event during which the ADRV occurred and in competitions after sample collections or commission of ADRV with all resulting consequences including forfeiture of any medals, points or prizes;
- c. Automatic publication of sanction.
- d. Each party to bear its on costs;
- e. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.

25. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated and delivered at Nairobi this ___ 26th ___ day of ___ October ____, 2023.

Signed:

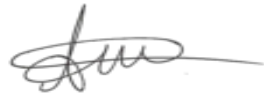
Mrs. Elynah Sifuna-Shiveka



Chairperson, Sports Disputes Tribunal

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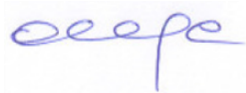
Mr. Allan Mola Owinyi



Member, Sports Disputes Tribunal

Signed:

Mr. Bernard Wafula Murunga



Member, Sports Disputes Tribunal