

REPUBLIC OF KENYA



THE JUDICIARY OFFICE OF THE SPORTS DISPUTES TRIBUNAL
SDTADK NO. E005 OF 2024

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

-VERSUS-

CAROLINE JEPCHUMBA KIGEN.....RESPONDENT

DECISION

PANEL:

- | | |
|--------------------------|----------------|
| 1. John M Ohaga SC, CArb | - Chairperson; |
| 2. Elynah Sifuna-Shiveka | - Member |
| 3. Peter Ochieng' | - Member |

COUNSEL APPEARING:

Mr. Bildad Rogoncho, instructed by Anti-Doping Agency of Kenya; No appearance for the Respondent;

1. ABBREVIATIONS AND DEFINITIONS

The following abbreviations used herein have the indicated definitions:

ADAK-Anti-doping Agency of Kenya

ADR- Anti- Doping Rule

ADRV-Anti- Doping Rule Violation

WA- World Athletics

AK-Athletics Kenya

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

All the definitions and interpretation shall be construed as defined and interpreted in the constitutive document both local and international.

Table of Contents

2. PARTIES	2
3. THE CHARGE	2
4. BACKGROUND	3
5. SUBMISSIONS BY ADAK.....	5
6. JURISDICTION.....	8
7. APPLICABLE RULES.....	8
8. MERIT	9
9. SANCTIONS	11
10. DECISION.....	12

2. PARTIES

2.1 The Applicant is the Anti-Doping Agency of Kenya (hereinafter ADAK) a state corporation established under section 5 of the Anti-Doping Act (Cap 245B) (2022), represented in this proceeding by Mr. Rogoncho.

2.2 The Respondent is a female adult of presumed sound mind, a national and athlete, not represented in these proceedings.

3. THE CHARGE

3.1 The Anti-Doping Agency (ADAK) has charged the Respondent with the charge of:-

"Presence of prohibited substances S1.1 Anabolic Androgenic Steroids (AAS)/ exogenous origin of Testosterone"

3.2 ADAK posits that S1.1 Anabolic Androgenic Steroids (AAS)/ exogenous origin of Testosterone is listed under S1.1 of the World Anti-Doping Code International Standard Prohibited List (WADA)'s 2023 Prohibited List.

4. BACKGROUND

4.1 On 16th August 2023, an ADAK Doping Control Officer ("DCO") collected a urine sample from the Respondent. The sample was split into two separate bottles, which were given reference numbers `A 7199563` (the "A Sample") and B 7199563 (the "B Sample") respectively.

4.2 Both samples were transported to the Laboratoire Suisse d'Analyse du Dopage, an Anti-Doping Laboratory ("WADA")-accredited Laboratory in Switzerland, (the "Laboratory") where A sample was analyzed in accordance with the procedures set out in WADA's International Standard for Laboratories and returned an Adverse Analytical Finding (AAF) for presence of prohibited substances: *S1.1 Anabolic Androgenic Steroids (AAS)/exogenous origin of Testosterone* which is listed under S1.1 of WADA'S 2023 Prohibited List.

4.3 The findings were communicated to the Respondent Athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 6th December, 2023. The Respondent was, in the said communication, offered an opportunity to provide an explanation for the same by 26th December, 2023. She was also informed of her right to request for the analysis of 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.

4.4 On 8th January 2024, a Notice to Charge was presented to the Tribunal by Mr. Bildad Rogoncho, on behalf of the Applicant.

4.5 The following were the Tribunal's directions dated 12th January, 2024:

- i. The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, this Direction No.1, and all relevant documents on the Respondent by 31st January, 2024;
- ii. The Applicant shall, at the time when it effects service upon the Respondent, or as soon thereafter as practicable, engage with Respondent for the purpose of establishing whether or not the Respondent will require pro bono Counsel;
- iii. In the event that the Respondent expresses her desire to be represented by pro bono Counsel, the Applicant will notify the Tribunal's registry and cooperate with the Tribunal in the allocation of pro bono Counsel for the Respondent and serve the documents in (i) above upon such Counsel to facilitate the effective representation of the Respondent;
- iv. The Panel constituted to hear this matter shall be:
Mr. John M Ohaga- Chairperson
Ms. Elynah Shiveka- Member
Mr. Peter Ochieng- Member;
- v. The matter to be mentioned on 1st February, 2024 at 2:30pm via Microsoft Teams to confirm compliance and for further directions.

4.6 When the matter came up for mention on 1st February 2024, Mr. Rogoncho informed the Panel that ADAK had served the Athlete with the day's mention date and the charge documents. Moreover, Mr. Rogoncho stated that the Athlete did not confirm attendance and was not present in court. Subsequently, Mr. Rogoncho requested fourteen (14) days to trace the Athlete. The Tribunal granted the request and set the next mention for **15th February 2024**.

4.7 At the mention on 15th February 2024, Mr. Rogoncho reported that Athletics Kenya was assisting in tracing the Athlete. He mentioned that they were unable to trace the Athlete. He added that ADAK had served Athletics Kenya with the notices and in turn, they were aware of the matter. He requested that ADAK be allowed to proceed in accordance with Article 3.25 of the ADAK ADR and close the matter. In response, the Chairperson stated that there was no evidence of service and no documentation of the efforts made. Mr. Rogoncho then requested that the matter be scheduled for mention the following week to ensure compliance. The Tribunal set the matter for mention on 29th February 2024 at

2:30pm and ordered the Applicant to file a comprehensive affidavit of service detailing the efforts made at effecting.

4.8 During the next mention, Mr. Rogoncho informed the Tribunal that he was still unable to reach the Athlete and was seeking to activate Article 3.25 in order to close this matter. The Panel granted leave to proceed in terms of Article 3.35 of ADAK ADR and directed the Applicant to frame and file written submissions within fourteen (14) days.

5. SUBMISSIONS BY ADAK

5.1 ADAK's submissions were filed on **18th April, 2024**. The Respondent is stated to be a national level athlete, and thus the World Athletics Competition Rules, the World Athletics Anti-Doping Regulations, the World Anti-Doping Code (WADC), and the Anti-Doping Agency of Kenya Anti-Doping Rules 2021 (ADAK ADR) apply to her.

5.2 ADAK submitted that it has met the requirements of Article 3.2 of WADC and has, to the required standards and methods established the facts relating to an ADRV by the Respondent. That there was analytical proof of the presence of *S1.1 Anabolic Androgenic Steroids (AAS)/exogenous origin of Testosterone* which is a prohibited substance in the Respondent's sample.

5.3 Regarding the origin, ADAK submitted that the Respondent did not participate in the proceedings and thus, did not provide any explanation as to how the prohibited substance entered the Athlete's system.

5.4 On intention, ADAK submitted that for an ADRV to be committed nonintentionally, the Respondent must prove on a balance of probability that the ADRV was not intentional. ADAK relied on Rule 40.3 of the WA Rules and delineated that the term 'intentional' was meant to "*identify athletes that cheated*". ADAK further asserted that, in order to prove this, it must be shown that the Athlete or any 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 ADRV, and manifestly disregarded that risk.

- 5.5 ADAK further relied on the case of CAS 2019/A/6213 World Anti-Doping Agency (WADA) v Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Katerina Kaskova to buttress the Athlete's burden of establishing that the violation was not intentional. Additionally, ADAK argued that it is not sufficient to simply suggest that the prohibited substance must have entered one's body inadvertently, from supplements or other products: concrete evidence should be adduced. In the absence of any concrete evidence, there is no element substantiating the Athlete's contention that she did not use that product or that it was contaminated.
- 5.6 ADAK further submitted that since proof of source is a critical first step in exculpation of intent, the Respondent's inability to establish how the prohibited substance entered her body, raises questions regarding her intention when she was in contact with the prohibited substance.
- 5.7 ADAK submitted that the Respondent was duly notified of the procedural steps and her rights in accordance with ADAK rules and WADA code. However, the Respondent's non-participation in these proceedings meant that she failed to provide an alternative plausible explanation disproving her intent when she ingested the prohibited substance.
- 5.8 ADAK submitted that in view of her non-participation in these proceedings, the Respondent did not discharge her burden on a balance of probabilities. Moreover, an Athlete with clean hands who faces an imminent four-year ban would leave no stone unturned in her quest to prove her innocence and nonintention to dope. The Applicant asserted that the Respondent in this case, however, chose not to participate, and many questions regarding her intention remain unanswered.
- 5.9 ADAK further submitted that the Athlete's burden of proof is limited to establishing that a prohibited substance has been properly identified in the Athlete's tissue or fluids. If the Athlete is successful in proving this requirement, there is a legal presumption that the Athlete committed an offence, regardless of the intention of the athlete to commit such offence.
- 5.10 It was ADAK's submission that an offence has therefore been committed as it was established that a prohibited substance was present in the Athlete's tissues or fluids. There is thus a legal assumption that the Respondent is responsible

for the mere presence of a prohibited substance, regardless of the intention of the Athlete to commit such an offence.

5.11 On fault/negligence, ADAK submitted that the Respondent is obligated to be knowledgeable of and comply with the Anti-Doping Rules and to take responsibility in the context of Anti-Doping, for what she ingests and uses.

That the Respondent has a personal duty to ensure that no prohibited substance enters their body and that in the instant case, the Athlete did not take any tangible precautions to ensure that whatever she ingested did not contain any prohibited substance and hence, acted negligently and is at fault despite being a national level Athlete.

5.12 Regarding knowledge, the Applicant further submitted that the principle of strict liability applied in situations such as this where the urine/blood samples are collected from an Athlete have produced adverse analytical results. Hence, the Athlete is strictly liable for any prohibited substances found in their system, regardless of the manner they got there or whether there was intent to cheat.

5.13 In buttressing these arguments, the Applicant submitted that the Anti-Doping Rule Violations occur whenever a prohibited substance is found in bodily specimen, whether the Athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. That in the instant case, the Athlete has had an expansive career in athletics participating in both national and international levels and has exposure to the campaign against doping in sports.

5.14 It was ADAK's position 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.

5.15 ADAK further submitted that Article 10.2.1 of the ADAK ADR shifts the onus to the Athlete to demonstrate no fault, negligence or intention, in order to be a beneficiary of reduction of the 4 years' ineligibility sanction set out in Article 2.1.

5.16 ADAK considers that the following relevant issues have arisen and should be considered in setting the sanction:

- 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 herself with AntiDoping policies.*
- c) *The Respondent herein has failed to give any explanation for her failure to exercise due care in observing the products ingested and used and as such the ADVR was a result of her negligent acts.*
- d) *The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding*

5.17 Therefore, it was ADAK's submission that the Panel should consider the sanction provided in Article 10.3.3 of the ADAK Rules and sanction the Athlete to a period of ineligibility of four (4) years.

6. JURISDICTION

6.1 The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following laws:

- a) Sports Act, No. 25 of 2013 under Section 58.
- b) Anti-Doping Act, No 5 of 2016, under section 31(a) and (b),(as amended from time to time).
- c) ADAK Anti-Doping Rules , under Article 8.

In the circumstance, the Tribunal assumes jurisdiction from the above- mentioned provisions of Law.

7. APPLICABLE RULES

Section 31(2) of the Anti-Doping Act, 2022 (Cap 245B) provides that the Tribunal shall be guided by the World Anti-Doping Code (2021), the International Standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act (Cap 223) , the Agency's Anti-Doping Rules, amongst other legal resources when making its determination.

8. MERIT

8.1 In the absence of participation by the Athlete, the following issues are uncontested:

- a) **THAT** the urine sample was collected from the Athlete on the 16th of August 2023.
- b) **THAT** there is no indication of previous ADRV by the Athlete.
- c) **THAT** a notice of charge was issued by the Applicant's Chief Executive Officer, dated 6th December, 2023 and that in the said communication the Athlete was offered an opportunity to provide an explanation for the ADRV by the 26th December, 2023 but no response was received from the Athlete despite the said charge document having been sent to the Athlete's known E-mail address and telephone number as contained in the doping control form.

8.2 On the question: *Did the Athlete commit the charged Anti-Doping Rule Violation?*

The Applicant's prosecution is based on the provisions of the Act which is as follows; *Presence of prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/exogenous origin of Testosterone*, as outlined in paragraph D10 of the charge documents dated **31st January, 2024**.

8.3 In the charge document, the Applicant has indicated that there was no known Therapeutic Use Exemption (TUE) recorded at the IAAF for the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards for Laboratories which may have caused adverse analytical findings. The Applicant further submitted that the Athlete failed to respond to charges within the specified time as set out in the notification of charge and, upon the Respondent being served with the charge document in the current proceedings.

DETERMINATION

8.4 The Panel has reviewed the Affidavit of Service filed by the Applicant at the request of the Tribunal to confirm effective service of the charge document. Having done so, the Panel is satisfied that much effort was put in by the Applicant to contact the Respondent via all known means, including through email and service through the Athletics Kenya Federation. The Affidavit in

question is deponed by Mr. Stanley Mwakio on 20th March 2024 and filed at the Tribunal on the same date. There is a further supplementary affidavit of service deponed by Mr. Stanley Mwakio on 3rd April 2024 and filed on the said date.

8.5 The Panel is thus satisfied that proper service was effected on the Respondent who failed to respond.

8.6 The Applicant had also submitted that despite notifying the Respondent of the adverse analytical finding, the Respondent did not request for the analysis of Sample B and therefore waved her right of analysis of the same.

8.7 Further, the WC, WADC and ADAK ADAR Articles 2.1.2 provide that sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following:

- i. *“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,*
- ii. *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; or*
- iii. *Where the Athlete’s A or B Sample is split into two parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Athlete waives analysis of the confirmation part of the split Sample.”*

8.8 In the circumstances, the Panel is comfortably satisfied that the Applicant has established that the Athlete in this matter has committed an ADRV.

8.9 On the question: *Was the violation committed by the Athlete intentional (especially where an unspecified substance is involved)?* The Code places the burden of proof upon the Athlete to rebut a presumption or establish specific facts or circumstances, and the standard of proof shall be by balance or probability. In the present circumstances, in the absence of the Athlete’s participation or any document to the contrary, the presumption would be that the specified facts and circumstances have not been controverted.

8.10 In the absence of any response from the Respondent, it would not be necessary to go into the issue of whether the ingestion of the substance was intentional or otherwise or whether to assess the degree of fault or not at all. It is the position of the Panel, therefore, that the existence of the ADRV has been sufficiently demonstrated to the required degree by the Applicant.

9. SANCTIONS.

9.1 It was the submission by the Applicant that an ADRV under Article 2.1 and 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 committed intentionally. If Article 10.2.1 does not apply, the period of ineligibility shall be two years.

9.2 It was further submitted that Article 10.4 establishes 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. These are:

- i. that the Athlete must establish how the specified substance entered his or her body, or*
- ii. that the Athlete did not intend to take the specified substance to enhance his or her performance.*

It is only when these two conditions are met that the Athlete can benefit from a reduction in the period of ineligibility.

9.3 The Applicant's position in the submissions is that the Athlete in the current case has not discharged the burden by any degree to warrant reduction of the sanction specified. Consequently, the Respondent's lack of participation in these proceedings, no explanation has been provided regarding the manner in which the prohibited substance got into her system to disprove her lack of intention to dope and therefore, the first venue to warrant reduction of a sentence is excluded.

9.4 The Applicant further submitted that the Respondent's intention and level of fault cannot be inferred and must be supported with concrete evidence. Therefore, at the end, the Applicant submitted that the Applicant has not demonstrated no fault or negligence to warrant sanction reduction.

9.5 The Panel's position is that the breach of the relevant code requirements has been committed. Given that there is no response by the Respondent to dispel that position, the Panel also considers that there is a duty upon the Respondent to acquaint themselves with the requirements of Anti-Doping Rule violations and to be responsible for what is ingested. It is the Panel's finding that in the absence of a response, there are no circumstances to grant the Respondent any reduction in the specified period of ineligibility. The Panel also makes the following findings:

1. WADC's Article 10.13.2 provides that credit may be awarded for the Provisional period of suspension served by an Athlete as against the period of ineligibility that they are sanctioned.
2. The Panel has not been informed that there has been any breach of the period of mandatory suspension by the Respondent.

10. DECISION.

Consequent to the discussions on merits above, the Panel orders are as follows.

- a) The period of ineligibility shall be four (4) years;
- b) The period of ineligibility shall be from the date of the provisional suspension and therefore commences on the 26th December, 2023 to _
25th December, 2027.
- c) Any and or all competitive results by the Respondent effective the 16th
August, 2023 are hereby disqualified;
- d) Each party shall bear its own costs;
- e) The right of Appeal is provided for under Article 13 of the ADAC, ADR and the WADA Code.

Dated at Nairobi this 23rd day of May 2024.

Signed:

John M. Ohaga

John M Ohaga, SC Panel Chairperson

Shiveka



Elynah Sifuna-Shiveka, Member

Peter Ochieng, Member