

REPUBLIC OF KENYA



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IN THE SPORTS DISPUTES TRIBUNAL AT NAIROBI

SDTADK NO. E008 OF 2024

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

-VERSUS-

GIDEON KIPKOSGEI.....RESPONDENT

DECISION

PANEL:

- | | |
|------------------------------|---------------|
| 1. MRS. ELYNAH SHIVEKA | - PANEL CHAIR |
| 2. MR. NJERI ONYANGO, FCIArb | -MEMBER |
| 3. MR. GABRIEL OUKO | -MEMBER |

COUNSEL APPEARING:

MR. BILDAD ROGONCHO- COUNSEL FOR ADAK/ APPLICANT

NO APPEARANCE FOR THE RESPONDENT

1. ABBREVIATIONS AND DEFINATIONS

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.

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2. PARTIES

1. The applicant is the Anti-Doping Agency of Kenya (hereinafter ADAK) a state corporation established under section 5 of the Anti-Doping Act No 5 of 2016, represented in this proceeding by Mr. Rogoncho Advocate
2. The Respondent is a male adult of presumed sound mind, a national and athlete, not represented in these proceedings

3. THE CHARGE

3.1 The Anti-Doping Agency has charged the Respondent as an athlete with the charge of;-

“Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS) Testosterone”

3.2. S1.1 Anabolic Androgenic Steroids (AAS)/Testosterone is listed under S1.1 of 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 7199560` (the A Sample) and B 7199560 (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”). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA’s International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding (“AAF”) for presence of a prohibited substances S1.1 Anabolic Androgenic Steroids (AAS)/Testosterone.

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. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 26th December 2023

4.4 On 8th January 2024 a notice of charge was presented to the Tribunal by Mr. Bildad Rogoncho, on behalf of the Applicant. The following were the Tribunal's directions dated the same day:

- 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 engage with the Respondent for the purpose of establishing whether the respondent would require Pro bono counsel;
- iii. The panel constituted to hear this matter shall be as follows;
 - a. Elynah Shiveka, panel chairperson,
 - b. Gabriel Ouko, member,
 - c. J Njeri Onyango, member
- iv. The matter to be mentioned 1st February 2024 to confirm compliance and for further directions.

4.5. During the mention on 1st February 2024, Mr. Rogoncho informed the Tribunal that they had been unable to locate the Athlete. Mr. Rogoncho prayed for twenty-eight (28) days to try trace the athlete. The Tribunal granted the request and set the next mention to be on 29th February 2024

4.6. At the mention on 29th February 2024, Mr. Rogoncho stated that the Athletics Kenya Federation who were assisting in tracing the Athlete, unfortunately, were unable to trace him. He added that they had served the Federation with the notices and that they are aware of the existence of the matter. He prayed that they be allowed to file their submissions as per Article 3.2.5 of the ADAK ADR and close this matter. The Tribunal directed the Applicant file a comprehensive Affidavit of service as evidence in efforts made in order to activate Article 3.2.5 of the ADAK ADR. The next mention was set for 21st March 2024.

4.7. During the mention on 21st March 2024, Mr. Rogoncho informed the Tribunal that the purpose of the mention was to confirm filing of Affidavit of Service by the applicant. He confirmed to have complied with the same. He requested to be allowed to proceed by disposing the matter by way of written submissions. He further requested for fourteen days to file their submissions. The Tribunal granted the request and gave the Applicant fourteen(14) days to file their written submissions as the matter would proceed under Article 3.2.5 of the ADAK ADR. The Tribunal set the next mention as 18th April 2024.

4.10. At the mention on 18th April 2024, Mr. Rogoncho confirmed that the submissions had been filed and was now seeking a date for the decision from the Panel. The Tribunal granted the date for rendering the decision as 4th May, 2024 at 2.30pm.

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 WA Competition rules, the WADC and ADAK ADR apply to him.

5.2. ADAK submitted that they had met the requirements of Article 3.2 and had to the required standards and methods established the fact of an ADRV by the Respondent. That there was analytical proof of the presence of a prohibited substance in the Respondent's sample.

5.3. ADAK further submitted that the Respondent under Article 2.1 had to take responsibility in context of Anti-Doping, for what he ingested and used.

5.4. 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.

5.5. ADAK further submitted that Article 10.2.1 shifts 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.

5.6. On origin, the Respondent didn't participate in these proceedings thus no explanation was provided for the origin of the prohibited substance and therefore the origin has not been established.

5.7. On intention, ADAK submitted that for an ADRV to be committed non-intentionally, the Respondent must prove on a balance of probability that the ADRV was not intentional. ADAK relied on **CAS 2019/A/6213 World AntiDoping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková** the panel in paragraph 2 asserted that:

5.8. **"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".**

5.9. 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 his body, raises questions regarding his intention when he was in contact with the prohibited substance.

5.10. ADAK submitted that the likelihood of the Respondent establishing a lack of intent without providing a source would be extremely difficult.

5.11. ADAK submitted that the respondent was duly notified of the procedural steps and his rights in accordance with ADAK rules and WADA code. However, the Respondent's non-participation in these proceedings means that he failed to provide an alternative plausible explanation disproving his intent when she ingested the prohibited substance.

5.12. ADAK submitted that in view of his non participation in these proceedings the Respondent didn't discharge his 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 his quest to prove his innocence and non-intention to dope. The Respondent in this case, however, chose not to participate, and many questions regarding his intention remain unanswered.

5.13. ADAK further submitted that the Agency'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 Agency 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.

5.14. 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

5.15 On the question of fault/negligence ADAK placed reliance on ADAK ADR 2.1.1 & 2.1.3. The Respondent has responsibility to be knowledgeable and comply with the ADAK ADR but was negligent in discharging such responsibility.

5.16. ADAK urged this panel to apply the principle of strict liability in this instance placing reliance on **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.”**

5.17. 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 wasn't found in his system.

5.18. 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 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 ADVR was a result of his negligent acts.

5.19. 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

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

7. APPLICABLE RULES

Section 31(2) of the Anti-Doping Act, provides that, the Tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations 2021, the Sports Act, the WADA Code 2021 and International Standards established under it, the UNESCO Convention against Doping in sports, 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 the 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 a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/Testosterone , as outlined at paragraph D10 of the charge documents, Dated 31 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 they failed to respond to charges within the specified time as set out in the notification of charge and also, upon the respondent being served with the charge document in the current proceedings.

8.4. This 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 and is deponed on the 20th March 2024 and filed at the Tribunal on the 21st of March 2024.

8.5. The Applicant had also submitted that despite being notified of the adverse analytical finding by the Applicant, the Respondent did not request for the analysis of Sample B and therefore waved his right of analysis of the same.

8.6. Further, WC, WADC and ADAK ADAR articles 2.1.2 states as follows; Sufficient proof of an anti-doping 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 sample, A sample where the Athlete waves 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 in the Athlete's sample. Without a contrary analysis of the Athlete's A sample, then the presence of the prohibited substance in the Athlete's sample has 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.

8.7. The Panel is satisfied that proper service was effected on the Respondent who failed to respond. And in the circumstances, the Panel is comfortably satisfied that the Applicant has established that the Athlete in this matter has committed an ADRV.

8.8. 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 athletes participation or any document to the contrary, the presumption would be that the specified facts and circumstances have not been controverted.

8.9. In the absence of any response from the Respondent, it would not be necessary to go into the issues 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 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 committed intentionally. If Article 10.2.1 does not apply, the period of eligibility shall be two years. It was further submitted that Article 10.4 creates 2 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; that the Athlete must establish how the specified substance entered his or her body, or that the Athlete did not intend to take the specified substance to enhance his or her performance. It is only if those two conditions are met that the Athlete can benefit from a reduction in the period of ineligibility.

9.2. 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. And as a consequence of the Respondent's lack of participation in these proceedings, no explanation has been provided for how the prohibited substance got into his system and therefore, the first venue to warrant reduction of a sentence is excluded. The Applicant further submitted that on the second limb, the Respondent would also not in the absence of intentionally setting out intentions, have any ground to establish the level of degree of fault and that the same assessment is not applicable in the present circumstances. Therefore, at the end, the Applicant submitted that there are no grounds in the current proceedings to warrant any reduction of the sentence.

9.3. The Panel's position is that the breach of the relevant code requirements has been committed. There being 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 the 25th December 2027;
- c) Any and or all competitive results by the Respondent effective the 16th of 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 9th day of May 2024.

Signed:

E. Shiveka

Elynah Shiveka
Panel Chairperson

[Signature]

[Signature]

