

REPUBLIC OF KENYA



IN THE SPORTS DISPUTES TRIBUNAL AT NAIROBI
SDTADK NO. E011 OF 2024

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

-VERSUS-

GEORGE JUMA KAJULARESPONDENT

DECISION

PANEL:

- | | | |
|-------------------------------|---|-------------|
| 1. Mr. John Ohaga SC, CARb | - | Chairperson |
| 2. Mrs. Njeri Onyango, FCIArb | - | Member |
| 3. Mr. Benard Murunga | - | Member |

COUNSEL APPEARING:

Bildad Rogoncho, instructed by the Anti-Doping Agency of Kenya;

Ms. Gakii Nyamu, instructed by Gakii Nyamu & Company, Advocates for the Athlete.

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
KBBF	-	Kenya Body Building Federation
IFBB	-	International Federation of Body Building and Fitness
WADC	-	World Anti-Doping Code
SDT	-	Sports Disputes 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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1.00 INTRODUCTION

1.1 The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**the Applicant**') a state corporation established under Section 5 of the Anti-Doping Act No 5 of 2016, represented in this proceeding by Mr. Rogoncho Advocate

2.0 The Respondent is a male adult of presumed sound mind and an athlete participating in the sport of body building. He is a national of Tanzania and is represented in these proceedings by Gakii Nyamu & Co Advocates (**'the Respondent'** or '**the Athlete'**).

3.0 THE CHARGE

3.1 The Anti-Doping Agency has charged the Respondent with the offence of -
"Presence of a prohibited substance S5. Diuretics and Masking Agents/Canrenone"

3.2. S5 Diuretics and Masking Agents/Canrenone.

4.0 BACKGROUND

4.1. On 11th October 2023, during the Mr. & Mrs. East Africa Bodybuilding Contest 2023, an ADAK Doping Control Officer ("DCO") collected a urine sample from the Respondent. As is usual, the sample was split into two separate bottles, which were given reference numbers A **1272279** ("the A Sample") and B **1272279** ("the B Sample") respectively in accordance with the Prescribed WADA procedures.

4.2. Both samples were transported to the WADA accredited laboratory in Qatar where the A Sample was analyzed as prescribed and returned an adverse analytical finding (AAF) for presence of a prohibited substance: S.5 Diuretics and Masking Agents/Canrenone under S.5 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. He was also informed of the process and possible consequences dependent on his actions in response to the Notice.

4.4 The Respondent responded to the charges via WhatsApp and denied the charges. He further stated that during the competition, he was given a tablet by one of the athletes who informed him that the tablet was safe for consumption and would assist in reduction of body water mass. He, however, did not provide the name of the said athlete or the name of the tablet he ingested. He further requested for the cost of the B Sample analysis but after consideration of the costs he chose not to proceed with the B Sample analysis.

4.5 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 issued 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. John Ohaga, Panel Chairperson,*
 - b. J Njeri Onyango, Member*
 - c. Benard Murunga, Member,*
- iv. The matter to be mentioned 1st February 2024 to confirm compliance and for further directions.*

4.6. The Respondent in his defence filed a Replying Affidavit dated 6th March 2024 wherein he stated that he had been an athlete for quite a long period

upon which he had never been tested or found culpable of any offenses related to doping. Further, he averred that, in the event the prohibited substance was found in his system, it was not intentional.

- 4.7. The Respondent initially sought to have the Sample B tested but was apprehensive of the potential financial costs that would have to be incurred, thus, he did not make a formal request for a sample B analysis. In effect, he waived the right to the same under IFBB Rule 37.5. Even so, he confirmed that the results would be the same as those of sample A.
- 4.8. The matter was then subjected to a hearing process before a Panel of the Sports Disputes Tribunal in the manner prescribed by the Rules. During the hearing, the Applicant contended that 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. On the other hand, the Respondent professed his lack of intention to violate the anti-doping rules in order to exculpate him off the charges. Further, he contended that the penalty sought against him would be disproportionate.
- 4.9. Consequently, and upon completion of the hearing, the matter parties were directed by the Panel to make their conclusive arguments vide written submissions and a mention date issued to confirm compliance. Mr. Rogoncho for the Applicant and Mr. Nyamu for the Respondent both confirmed that the submissions had been filed and sought a date for the Decision from the Panel. The Tribunal fixed the date for rendering the decision as 20th June, 2024 at 2.30pm.

5.0 SUBMISSIONS BY ADAK

- 5.1. ADAK's submissions were filed on 21st May 2024. In the Submissions, ADAK reaffirmed that the Respondent is a national level athlete, and thus the International Federation of Bodybuilding and Fitness (hereinafter IFBB)

Competition rules, IFBB Anti-Doping Regulations, 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. They also submitted 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 2 years' ineligibility sanction set out in Article 10.3.3.
- 5.6. **ADAK**, thus, considered it integral to impose the maximum penalty as a form of deterrence to any future conduct of athlete that can jeopardize the sanctity of sports.
- 5.7. **Rule 40.3 of the IFBB 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.
- 5.8. According to the established case-law of **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”.

- 5.10. 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 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 precondition 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”.

- 5.11. 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.
- 5.12. ADAK submitted that the likelihood of the Respondent establishing a lack of intent without providing a source would be extremely difficult.
- 5.13 In any event, the ADAK averred that CAS jurisprudence and praxis dictates that the Respondent bears the responsibility of disproving his lack of intention to dope by a balance of probabilities. The Respondent is required to adduce concrete evidence explaining how the prohibited substance entered his system. The Respondent in this matter, however, didn't provide an alternative explanation supported with cogent evidence of how the prohibited substance entered his system.
- 5.14 Thus, an athlete cannot simply plead his lack of intention to dope instead he must produce convincing explanations to prove by a balance of probabilities that he did not engage in conduct which constituted an ADRV and manifestly disregarded that risk.
- 5.15. ADAK submitted that the respondent was duly notified of the procedural steps and his rights in accordance with ADAK rules and WADA code.
- 5.16. 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.
- 5.17 Rule 40.3 of the WA Rules as noted above sets out that the term intentional is meant to identify those athletes who cheat.
- 5.18 The Applicant submitted that it has long been established by CAS praxis that the athlete bears the burden to establish that the violation wasn't intentional. In *CAS 2018/O/5754 Sergey Fedorovtsev v. Russian Anti-Doping Agency (RUSADA), World AntiDoping Agency (WADA) &*

Fédération Internationale des Sociétés d'Avirons (FISA), the Panel in paragraph 2 averred that,

“In order to disprove intent, an athlete cannot merely speculate as to the possible existence of a number of conceivable explanations for the adverse analytical finding (“AAF”) and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent: a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur. Instead, an athlete has a stringent obligation to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective, and persuasive evidence of his submissions.”

- 5.19 It was the Applicant’s submission that the Athlete failed to discharge his burden by a balance of probabilities. The Respondent failed to show how the prohibited substance got into his system and the explanations he adduced were unsubstantiated. By a balance of probabilities, the Respondent failed to provide a plausible explanation supported with concrete evidence of how the prohibited substance got into his system.
- 5.20 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
- 5.21 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.

5.22 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.”

5.23 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 himself 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.

5.24. Therefore, it was ADAK’s submission that the Panel should consider the sanction provided in 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 non-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.

5.25 The Applicant stated that, there is a consistent line of jurisprudence that supports the importance of establishing source when an athlete seeks to prove the absence of intent. In *CAS Anti-Doping Division (OG*

PyeongChang) AD 18/003 World Curling Federation (WCF) v. Aleksandr Krushelnickii the Panel in paragraph 4 stated that

“Establishment of the source of the prohibited substance in a sample is not mandated in order to prove an absence of intent. However, the likelihood of finding lack of intent in the absence of proof of source would be extremely rare, and if an athlete cannot prove source, it leaves the narrowest of corridors through which the athlete must pass to discharge the burden which lies upon him”.

5.26 The Respondent proffered that the prohibited substance got into his system through oral ingestion; the athlete's explanations that he was given by a fellow participant were unsubstantiated as they had no evidentiary basis supporting them.”

6.0 BURDEN OF PROOF

6.1 According to the established case-law in *CAS 2017/A/4962 World AntiDoping Agency (WADA) v. Comitato Permanente Antidoping 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”*

6.2 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 the Panel with an explanation to which they can base their conclusion regarding the Respondents intention when ingesting the prohibited substance.

6.3 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”, stated the Applicant.

7.0 FAULT/NEGLIGENCE

7.1 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.

7.2 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.

7.3 The Applicant, relying on **CAS 2017/A/5301 Sara Errani v. International Tennis Federation (ITF) & CAS 2017/A/5302 National Anti-Doping Organization (NADO) Italia v. Sara Errani and ITF** stated that, the Panel in paragraph 3 observed that *"In order to determine the athlete's level of fault, an objective and a subjective level of fault must be taken into consideration. The objective level of fault or negligence points to what standard of care could have been expected from a reasonable person in the athlete's situation and the subjective level consists in what could have been expected from that particular athlete, in the light of his/her capacities. The point of departure for the level of care to be expected from athletes is their high responsibility to take care that no prohibited substance enters their system. A player is responsible for any prohibited substance, or any metabolites or markers found to be present in his/her sample"*.

7.4 Athletes as custodians of the WADC and are required to undertake rigorous measures to discharge their obligations. The Respondent in this case has

failed to portray the steps he undertook to ensure no prohibited substance entered his system.

7.5 From the foregoing, the onus is on the Respondent to ensure that he upholds high standards which are bestowed upon him by virtue of being an experienced athlete. It's the Applicant's submission that the Respondent was negligent due to his failure to exercise the utmost duty of care.

8.0 **KNOWLEDGE**

8.1 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.

8.2 Further, the Applicant contends that the Respondent has had a career in body-building participating at both the national and international level, and it is evident that he has had exposure to the campaign against doping in sports.

8.3 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.

8.4 The Applicant submitted that it cannot be too strongly emphasized that the Respondent Athlete 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.

9.0 JURISDICTION

9. 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.

10.0 APPLICABLE RULES

10. 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 World Anti-Doping Code 2021 and International Standards established under it, the UNESCO Convention against Doping in Sports, amongst other legal resources when making its determination.

11.0 ATHLETE'S SUBMISIONS

The Athlete crystallised his case as involving 4 issues as discussed hereunder:

11.1 Whether the Respondent took any prohibited substance willfully and with intent

11.1.1 The Respondent submitted that the ingestion of the prohibited substance was not intentional and should therefore be absolved from the charge.

He placed reliance on **CAS 2017/A/5296 World Anti-Doping Agency v. Gil Roberts** which agreed with the Respondent in the case therein that he had adequately established an origin of the substance by placing reliance on the decision of *CAS 2009/A/1 926 International Tennis Federation v. Richard Gasquet and CAS 2009/A/1930 WADA v. ITF & Richard Gasquet by stating that:*

" ... [I]t is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them /s more likely than no/ to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In the case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred in other words. For the Panel to be satisfied that a means of ingestion, is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred.

The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred. " [see par. 52]. Further on. the Panel in their decision ultimately dismissed the appeal [see par. 84-85], in consideration of the foregoing, and in contemplation of the evidence put before the Panel both in written and orally , the Panel concludes that the Athlete has established the origin of the prohibited substance on a balance of probabilities. Furthermore, the Panel finds that even with the exercise of the utmost caution, the Athlete could never have envisioned that kissing his girlfriend of three years would lead to an adverse analytical finding for trace amounts of a banned substance that he was not familiar with. The Panel finds, therefore, that the Athlete acted without fault or negligence. The appeal must therefore be dismissed."

11.1.2 Moreover, the Respondents wished to associate themselves with the sentiments of the Panel in **CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)**, where the Panel stated at paragraphs 14 -17 that,

"The next issue is the issue of intent, the determination of which depends upon the proper construction of the phrase in Rule 154 (WADC 10.4): "that such specified substance was not intended to enhance the Athlete's sport performance ". We are of the view that the task of the Panel is to give effect to the natural and ordinary meaning of these words having regard to 'the context of the rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product

which contained the specified substance was not intended to enhance his sport performance. The time at which the absence of intent is to be shown is the time of ingestion of the substance.,,,, it is necessary to establish an anti-doping rule violation to the "comfortable satisfaction of the hearing Panel bearing in mind the seriousness of the a/legation which is made" (Rule 46 WADC 3.1). This standard of proof is greater than a mere balance of probabilities but less than prov/beyond a reasonable doubt.

On the other hand, where the Policy or the WADC places the burden of proof upon the athlete to rebut a presumption or to establish specified facts or circumstances, the standard of proof borne by the athlete is a balance of probability. That the athlete must satisfy "a higher burden of proof" then the athlete seeks an elimination or reduction in the period of ineligibility under Rule I54 Or WADC IO.4 Bearing these provisions in mind are unstified on the prescribed higher standard of proof in this case, that, in all the circumstances and on the evidence, the Appellant did not Intend to enhance his sport performance when he ingested the product which contained the specified substance."

11.2 Whether the Applicant has proven the charges per the required standard

11.2.1 The Respondent averred that the Applicant did not prove the charges in accordance with the required standards set out in Article 3.1 of ADAK Rules. He alleged that it was upon the Applicant to discharge the burden of how the alleged prohibited substance entered the Athlete's body.

11.3 What degree of fault, if any, should be assigned to the Respondent

11.3.1 Additionally, the Respondent averred that upon establishing the path of ingestion and that the same was not willful and intentional, they made a plea to absolve the Respondent of fault

11.4 Whether the ineligibility period should be imposed

11.4.1 Lastly, the Respondent relied on **CAS 2021/A/8056 Olda Pestova vs Russia Anti-Doping Agency (RUSADA)** under paragraph 4 which provided for the threshold for the reduction of sanction as follows: "*A period of ineligibility*

can be reduced based on no significant fault or negligence only in cases where the circumstances justifying deviation from the duty of exercising utmost caution are truly exceptional and not in the vast majority of the cases”

12.0 DETERMINATION

12.1 The issue then to be determined is whether the Athlete committed the Anti Doping Rule Violation as set out in the Charge Document. The Applicant’s prosecution is based on the Code which is as follows: as outlined in Paragraph D10 of the Charge Documents dated 31st January 2024, *Presence of a prohibited substance S5. Diuretics and Masking Agents/Canrenone,*

12.2 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 over the high costs and therefore waved his right of analysis of the same.

12.3 Further, 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 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.*

12.4 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.

12.5 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.

12.6 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.

13.0 MERITS

13.1 The following were uncontested:

13.1.1 That the Urine Samples had been collected from the Athlete on 11th October 2023;

13.1.2 That this was the Athlete's first ADRV;

13.1.3 That the Athlete received from the Applicant the Notice of Charge/ADRV letters dated 8th January 2024 and 6th December 2023 which provided for mandatory provisional suspension;

14.00 CONSIDERATION

14.1 Did the Athlete commit the charged anti-doping rule violation?

14.1.1 The Applicant's prosecution is based on the charge of: *Presence of a prohibited substance S5. Diuretics and Masking Agents/Canrenone*, as outlined at para. 10. of the Applicant's Charge Document dated 31st January 2023.

14.1.2 In its submissions the Applicant averred that the Athlete did not request for analysis of his B Sample and therefore waived his right of analysis of the same. As established in the discussion on IS Departures, the Panel accepted that the Athlete had been properly informed by the Applicant about his right to request for his B Sample analysis and therefore it is our opinion that the Athlete by not requesting for the same within the period provided in his ADRV Notification letter waived his right as per ISRM 2023's *Article 5.1.2.1*

(c) *'The Athlete's right to request the analysis of the "B" Sample or, failing such request, that the "B" Sample analysis may be deemed irrevocably waived'*.

14.1.3 Further WADC/ ADAK ADR Article 2.1.2 states: *'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 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;'*

14.1.4 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). The Panel therefore is comfortably satisfied that the Applicant had established that the Athlete committed an ADRV.

14.2 **Was the violation committed by the Athlete intentional?**

14.2.1 A prohibited substances was detected in the Athletes body, S5. Diuretics and Masking Agents/canrenone. We opine that the sanction should be based on the violation that carries the most severe sanction, that is, Masking Agents/canrenone as upheld by Panel in *CAS 2012/A/2959* para.8.4:

'The parties agree that Mr. Nilforushan's three AAFs are to be considered a single violation, and that Mr. Nilforushan's sanction is to be based on the violation that carries the most severe sanction, i.e. Phentermine, which is not a specified substance. Accordingly, Article 10.4 ADRHA (lack of intention to enhance performance in relation to specified substances) is of no application.' (Our Emphasis)

14.2.2 In respect to the Non-Specified Substance 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.]

14.2.3 The Code places the burden of proof upon the Athlete to rebut a presumption or establish specified facts or circumstances and the standard of proof shall be by a balance of probability. In the present case, the burden of proof that the ADRV was not intentional is on the Athlete.

14.2.4 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 anti-doping rule violation and manifestly disregarded that risk.'

14.2.5 Consequently, in determining whether there was intention to commit the violation, there are two aspects to be reviewed:

- a. Whether he manifestly disregarded the risk;
- b. Whether the Athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV.

14.2.6 The Respondent Athlete in this matter, however, did not advance a case of his lack of intention in commission of the ADRV or even provide an alternative explanation supported with concrete evidence of how the

prohibited substance entered his system. In particular, he did not mention the athlete who issued the prohibited substance. While arguing the IS Departures, the Athlete only steadfastly held that he was oblivious of the prohibited substances in the pill. Knowing the risks that comes with the competition that he was involved in, we find it incredibly hard to believe that a pill can be handed over to the athlete and without even bothering to find out who has handed it to him or what it contains he just ingests the same. There would be serious negligence on the part of an athlete in any event and lack of appreciation of the prudent man test.

14.2.7 There being no controverting evidence in regard to commission of ADRV with intent by the Athlete, the Panel accepts that the Athlete committed the ADRV intentionally. That said, the Panel 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.

14.2.8 Additionally, the Panel finds that the above reasoning applies to *No Significant Fault or Negligence*.

15.0 SANCTIONS.

15.1 It was the submission by the Applicant that for an ADRV under Article 2.1, Article 10.3.3 of the ADAK ADR provides for a regular sanction of a two (2) year period of ineligibility where the ADRV involves a specified substance and the Agency can establish that the ADRV was committed intentionally. Since Article 10.2.1 does not apply, the period of eligibility shall be two (2) years.

15.2 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.

15.3 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. 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.

15.4 The Panel's position is that the breach of the relevant code requirements has been committed. 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. The Respondent did not convince the Panel that the manner in which the prohibited substance was ingested was borne out of legitimate ignorance. It is the Panel's finding, that there are no circumstances to grant the Respondent any reduction in the specified period of ineligibility. The Panel also makes the following findings:

15.4.1 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.

15.4.2 The Panel has not been informed that there has been any breach of the period of mandatory suspension by the Respondent.

15.5 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 eight years if it is the athlete's second Anti-Doping rule violation.'

15.6 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".

16.0 **DECISION.**

16.1 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 11th of October 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 ADAK, ADR and the WADA Code.

Dated at Nairobi, this 20th day of June 2024.

Signed:



John M Ohaga SC, CARb Panel Chairperson



J Njeri Onyango, FCI Arb Member



Benard Murunga, Member