

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
DOPING CASE NO. E012 OF 2024

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

VERSUS

ALFRED OWINO OUMA..... ATHLETE

**DECISION**

**Hearing:** Written Submissions

**Panel:**

Mrs. Elynah Shiveka- Panel Chair

Mr. Allan Owinyi – Member

Mr. Peter Ochieng – Member

**Appearances:**

Mr. Bildad Rogoncho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant.

The Athlete absented himself from the entire proceedings before the Tribunal.

**Abbreviations**

ADAK- Anti-Doping Agency of Kenya

ADAK ADR- Anti-Doping Rules

WADA Code- World Anti-Doping Agency

DCO- Doping Control Officer

DCF- Doping Control Form

ADAMS- Anti-Doping Administration and Management System

IFBB- International Federation of Body Builders

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## **A. Introduction**

### **i. Parties**

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter referred to as **ADAK**), a state corporation established under section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Athlete is a male adult of presumed sound mind, a National Level Athlete, (hereinafter referred to as the Athlete).

### **ii. Factual Background**

3. Upon reading the Notice to Charge dated 8<sup>th</sup> January 2024 presented to the Tribunal on same date by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in the Direction No. 1 dated as follows:
  - 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 Athlete by 31<sup>st</sup> January 2024;
  - ii. The Applicant shall upon effecting of service or as soon as is practicable, engage with the Respondent to establish whether they need pro bono counsel;
  - iii. The panel constituted to hear this matter shall be:
    - a. Mrs. Elynah Shiveka- Panel Chairperson;
    - b. Allan Owinyi – Member;
    - c. Mr. Peter Ochieng – Member;
  - iv. The matter shall be mentioned on 1<sup>st</sup> February 2024 to confirm compliance and for further directions at 2.30pm via Microsoft Teams.
4. The matter came up for mention on 1<sup>st</sup> February when Mr. Rogoncho appeared for the Applicant. The Athlete was neither represented nor did he present himself before the Tribunal. Mr. Rogoncho informed the tribunal that the athlete was from the Body Building Federation and of Kenyan descent. He further stated that they had served the athlete with the mention date and the charge document. The matter was listed for

mention for further directions on 15<sup>th</sup> February 2024 at 2.30pm via Microsoft Teams.

5. At the mention on 15<sup>th</sup> February 2024, Mr. Rogoncho was in attendance for the Applicant while the Athlete was absent. Mr Rogoncho stated that the Body Building Federation was assisting in tracing the athlete to no avail. He added that he had served the Federation with notices and they were aware of the matter. He prayed that they be allowed to file their submissions as per Article 3.25 of the ADAK ADR and close this matter.
6. The Chairperson stated that they had no evidence of service and nothing to demonstrate the efforts made in tracing the athlete. Mr. Rogoncho requested the matter to be mentioned the next week to ensure compliance. The Tribunal directed the Applicant to file a comprehensive Affidavit of Service as evidence of the efforts made in order to activate Article 3.25 of the ADAK ADR. The matter was listed for mention for further directions on 29<sup>th</sup> February 2024.
7. When the matter came up for mention on 29<sup>th</sup> February 2024 Mr. Rogoncho appeared for the Applicant while the Athlete was absent. The mention was to confirm filing of Affidavit of Service by the Applicant and further directions. Mr. Rogoncho confirmed that they had filed the Affidavit and requested that the matter be canvassed by way of written submissions. The matter was listed for mention to confirm compliance on 21<sup>st</sup> March 2024 at 2.30pm via Microsoft Teams.
8. On 21<sup>st</sup> March 2024 the matter came up for mention to confirm filing of submissions. Mr. Rogoncho appeared for the Applicant. There was no appearance for the Respondent Athlete. The Panel noted that the Applicant had filed their submissions. The Tribunal ordered that the matter be listed for judgement on 25<sup>th</sup> April 2024.

## **B. Parties' Submissions**

### **i. The Applicant's Submissions**

9. The Anti-Doping Agency of Kenya wished to adopt and own the Charge Document dated 31<sup>st</sup> January 2024 and the annexures thereto as an integral part of its submissions.
10. The Respondent herein is charged with an Anti-Doping Rule Violation of presence of a prohibited substance *S5. Diuretics and Masking Agents/hydrochlorothiazide and its metabolite 4-amino-6-chloro-1,3-benzenedisulphonamide (ACB)* contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).
11. The Respondent is a National Level Athlete and therefore the Result Management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2016 to constitute a hearing panel which the Respondent was comfortable with.
12. The matter was set down for hearing. The Respondent however did not participate in the proceedings.
13. The matter came up for hearing, and the Respondent had been duly informed of his procedural rights under the ADAK rules and WADA Code however the Respondent did not to participate in in the proceedings.

#### **I. BACKGROUND/FACTS (as per the Applicant's Written Submissions)**

14. The Respondent is a male Athlete hence the International Federation of Bodybuilding and Fitness (hereinafter IFBB) competition rules, IFBB Anti-Doping Regulations the World Anti-Doping Code (hereinafter WADC) and the Anti-Doping Agency of Kenya Anti-Doping Rules (hereinafter ADAK ADR) apply to him.

15. On 8<sup>th</sup> **October 2023**, during the Mr. & Mrs. East Africa Bodybuilding Contest 2023, an ADAK Doping Control Officer (“DCO”) collected a urine Sample from the athlete. Assisted by the DCO, they split the Sample into two separate bottles, which were given reference numbers A **1272278** (the “A Sample”) and B **1272278** (the Sample”) in accordance with the Prescribed WADA procedures.
16. Both Samples were transported to the World Anti-Doping Agency (“WADA”) - accredited Laboratory in Qatar, Anti-Doping Lab Qatar - Doping Analysis Lab,(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 *S5. Diuretics and Masking Agents/hydrochlorothiazide and its metabolite 4-amino-6-chloro-1,3-benzenedisulphonamide (ACB)* which are listed as a Diuretic and Masking Agent under S5 of the 2023 WADA prohibited list.
17. The findings were communicated to the Respondent Athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and a mandatory Provisional Suspension dated 6<sup>th</sup> December 2023. In the said communication the Respondent was offered an opportunity to provide an explanation for the same by 26<sup>th</sup> December 2023.
18. The Respondent didn’t provide any explanation for the occurrence of this ADRV as he didn’t participate in the proceedings in any way.
19. The Respondent athlete’s AAF was not consistent with any applicable TUE recorded at the IFBB for the substances in question and there is no apparent departure from the IFBB Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings.
20. The Respondent did not request a sample B analysis thus waiving his right to the same under WA rule 37.5 and confirmed that the results would be the same as those of Sample A in any event.

21. The response and conduct of the Respondent were evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule Violation and referred to the Sports Disputes Tribunal for determination.
22. A charge document was prepared and filed by ADAK's Advocates, and the Respondent failed to present a response thereto.
23. The matter went through a viva voce hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules and the matter is pending determination resulting to a request for submissions from the parties.

## II. LEGAL POSITION

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

## III. PRESUMPTIONS

25. It is 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 the 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 Finding 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 ....

#### IV. ROLES AND RESPONSIBILITIES OF THE ATHLETE

26. 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.



27. The Respondent herein is also under duty to uphold the spirit of sport 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”

#### V. ANTI-DOPING AGENCY OF KENYA POSITION

28. The burden of proof expected to be discharged by the Anti-Doping Organization under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

#### VI. PROOF OF ANTI-DOPING RULE VIOLATION

29. The Respondent is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. *S5. Diuretics and Masking Agents/hydrochlorothiazide and its metabolite 4-amino-6-chloro-1,3-benzenedisulphonamide (ACB)* is a Specified Substance and attracts a period of ineligibility of 2 years but may be 4 years if intent is proven.

30. 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 to establish an ADRV.
31. Similarly, Article 10.2.1 the burden of proof shifts to the Respondent to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction.
32. We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent Athlete herein.

## VII. INTENTION

33. 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."*
34. 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".*

35. 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.
36. It's the Applicant's submission that 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 he constituted an ADRV and manifestly disregarded that risk.
37. The Applicants avers that the Respondent was duly notified of the procedural steps and his rights in accordance with ADK rules and the WADA code. Moreover, the Respondent was afforded a platform to provide specific, objective, and persuasive evidence with a view to

disproving his lack of intention to dope. However, the Respondent's non-participation in the proceedings means that he failed to provide an alternative plausible explanation disproving his intent when he ingested the prohibited substance.

38. The Respondent's intention cannot be inferred; instead, he must adduce concrete evidence that seeks to absolve him of these charges. It's the Applicant's submission that the Respondent didn't discharge his burden by 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.
39. Thus, under the ADAK ADR, an offence has therefore been committed as soon as it has been established that a prohibited substance was present in the Respondent's tissue or fluids. There is thus a legal presumption that the Respondent is responsible for the mere presence of a prohibited substance. The burden of proof resting on the Agency 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 an offence.

#### VIII. ORIGIN

40. The Respondent didn't participate in these proceedings thus no explanation was provided on how the prohibited substance *S5. Diuretics and Masking Agents/hydrochlorothiazide and its metabolite 4-amino-6-chloro-1,3- benzenedisulphonamide (ACB)* entered his system.

41. In that regard, we do submit that the origin of the prohibited substance has not been established.

#### IX. FAULT/NEGLIGENCE

42. 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.
43. 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.*

44. In 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."*

45. 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.
46. The Respondent bears a personal duty of care in ensuring compliance with the Anti-Doping regulations. The standard of care expected from an athlete of his caliber who has participated in national and international competitions is high. It's the Applicant's submission that the Respondent was negligent due to his failure to exercise caution to the greatest possible extent and his conduct doesn't warrant a finding of no fault and negligence.

#### X. KNOWLEDGE

47. 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.
48. Further, the Applicant contends that the Respondent has had an expansive career in athletics participating at both the national and international level, and it is evident that he has had exposure to the campaign against doping in sports.

49. 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.
50. The Applicant submits that it cannot be too strongly emphasized that the Respondent 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.

## XI. SANCTIONS

51. 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 intentional”*. If Article 10.2.1 does not apply, the period of ineligibility shall be two years.
52. On its face Article 10.4 creates 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. 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.

53. In 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 pre- condition 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”*.
54. It’s the Applicants submission that the Respondent hasn’t discharged his burden by a balance of probability to warrant reduction of a sanction. Consequent to the Respondent’s non-participation in the proceedings, no explanation was provided for how the prohibited substance got into his system thus the first avenue to warrant sanction reduction was closed off.
55. 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”*.
56. It’s the Applicant's submission that the Respondent ‘s intention and level of fault when inducing the prohibited substance cannot be inferred and must be supported with concrete evidence. The Respondent’s failure to participate in the proceedings and inability to provide any cogent evidence highlighting that he didn’t intentionally use the prohibited



substance means that his level of fault was high as there has been no other explanation stating otherwise, and thus he hasn't demonstrated no fault or negligence to warrant sanction reduction.

57. It's the applicant's submission that the Respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.

## XII. CONCLUSION

58. Article (WADA 2.1.1) emphasizes that it is an athlete's personal duty to ensure that no prohibited substance enters his or her body and that 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 by the analysis of the athlete's sample which confirms the presence of the prohibited substance.
59. The Applicant submits that what they find that ideal considerations while sanctioning the Respondent are:
  - 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 themselves 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 ADRV was because 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.

60. From the foregoing, the Applicant urged the panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the athlete to 4 years ineligibility.
61. It is their submission that ADAK has made out a case against the Respondent and that there was indeed an Anti-Doping Rule Violation by the Respondent, and a sanction should ensue.

**ii. The Athlete's Submissions**

62. The Athlete did not make any submissions.

**C. JURISDICTION**

63. 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).
  - c. Anti-Doping Rules under Article 8.
64. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

**D. APPLICABLE RULES**

65. 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:**

## E. MERITS

### i. Did the Athlete commit the charged anti-doping rule violation?

66. The Applicant's prosecution is based on the charge of *Presence of a prohibited substance S5. Diuretics and Masking Agents/hydrochlorothiazide and its metabolite 4-amino-6-chloro-1,3-benzenedisulphonamide (ACB)* as outlined at para. D.1. of the Applicant's Charge Document dated 31st January 2024
67. There was no recorded response(s) recorded from or for the Athlete according to records held at the Tribunal. The only evidence of existence of this Athlete was a copy of the Doping Control Form (DCF) attached by the Applicant in its Charge Document. The DCF indicates that a chaperone/DCO Trizzah Too assisted the Athlete fill his DCF with the Athlete commenting '*happy to go through the process*'. The Panel accepts that the Doping Control Form dated 8/10/2023 in the Charge Document presented by the Applicant indicates the existence of the Respondent Athlete named in this matter.
68. Consequently, the Panel is persuaded that a successful test was physically conducted as recorded in the DCF dated 8/10/2023 which appears to be a legitimate WADA document. Therefore, we conclude that it was more probable than not that there existed such a person as the Athlete named in this matter.
69. Further, the Respondent Athlete did not request for a Sample B analysis thus waiving his right to the same under WA rule 37.5 and in essence accepting the Test Results of his A Sample. As stated 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 to establish an ADRV*". Hence, we accept that the

Applicant has established to this Panel's comfortable satisfaction that the Athlete committed the ADRV as charged.

**ii. Was the violation committed by the Athlete intentional?**

70. On the issue of intention, the substances found in the Athletes body being Specified Substances, CAS case law places responsibility on the Athlete to disprove lack of intention to dope by a balance of probabilities. The Athlete is responsible for adducing evidence of how the prohibited substance got into his system. The Respondent Athlete in this matter, however, didn't provide an alternative explanation supported with concrete evidence of how the prohibited substance entered his system.
71. The Respondent when requested to respond to the charge presented instead steadfastly remained non-responsive; this was despite numerous notices served on him by the Applicant – as evidenced by the Affidavit of Service dated and filed on 26<sup>th</sup> February 2024. The Athlete did not respond to any communication up to the time of writing of this decision.
72. The WADA Anti-Doping Organizations Reference Guide under section 10.1 provides that:
- 'Intentional' means an athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk that the conduct might constitute an ADRV, and manifestly disregarded the risk.*
73. 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.

74. There being not a shred of controverting evidence from 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.
75. Additionally, the Panel finds that the above reasoning applies to No Significant Fault or Negligence.

#### **F. SANCTIONS**

76. It was the Applicant's submission that the Respondent Athlete did not meet the set threshold by ADAK rules and the WADC to warrant sanction reduction. Various, submitting on sanction, the Applicant stated 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 intentional". If Article 10.2.1 does not apply, the period of ineligibility shall be two years."*

This Panel reminds itself that the substances established in the Athlete's body were Specified Substances therefore ADAK ADR Article 10.2.1.1 was applicable in this matter.

77. The ADAK ADR provides under Article 10.2 Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method; The period of Ineligibility for a violation of Article

1.1, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

*Article 10.2.1 The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years where:*

*Article 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.*<sup>58</sup>

*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.]*

78. Article 10.6 provides that:

*10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence 10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6. All reductions under Article 10.6.1 are mutually exclusive and not cumulative*

79. Further Article 10.7 provides:

*10.7 Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault*

80. Suffice it to state here that the Athlete did not meet any of the provisions essential for mitigating the recommended sanction.

81. Further Code Article 10.10 provides:

*Article 10.10 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation;*

*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.<sup>73</sup>*

*73 [Comment to Article 10.10: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]*

**i. Credit for time served under the provisional suspension**

82. WADC's Article 10.13.2 provides that credit may be awarded for a provisional period of suspension served by the Athlete as against the period of ineligibility they are sanctioned for.
  
83. The Panel makes the following specific findings in regard to this matter:
  - a) There had been several attempts to have the Athlete appear before the Tribunal which he refused to acknowledge and/or attend;
  - b) Having found as above, the Panel holds that the Athlete intentionally committed the ADRV in question and further willfully and intentionally absconded the hearing process in terms of WADC's Article 3.2.5.

## **G. DECISION**

84. Consequent to the discussion on the merits of this case, the Panel orders:
85. The period of ineligibility shall be **four (4) years**;
86. The period of ineligibility shall be from the date of this decision for a period of four (4) years starting on 26<sup>th</sup> December 2023 to 25<sup>th</sup> December 2027;
87. Disqualification of any and/or all of the Athlete's competitive results from 8<sup>th</sup> October 2023.
88. Each party shall bear its own costs;
89. The right of appeal is provided for under Article 13 of the ADAK ADR and the WADA Code.

**Dated at Nairobi this 2<sup>nd</sup> day of May 2024**

*Shiveka*

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**Ms. Elynah Shiveka, Panel Chairperson**



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**Mr. Allan Mola, Member**



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**Mr. Peter Ochieng, Member**