

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ADAK CASE NO. E016 OF 2023

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

VERSUS

ISGAH CHERUTO..... ATHLETE

DECISION

Hearing: Parties agreed to rely on written submissions

Panel:

Ms. Elyna Sifuna - Deputy Chairperson

Mr. Allan Owinyi- Member

Mr. Peter Ochieng- Member

Appearances:

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

Mr. Ng'ang'a for the Respondent.

Abbreviations:

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 Disputes Tribunal

WADA- World Anti-Doping Agency

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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 female adult of presumed sound mind, a National Level Athlete, athletics, (hereinafter referred to as **the Athlete**).

ii. Background

1. The matter having been reopened. came up for mention on 29th February 2024. Mr. Rogoncho for the Respondent, informed the Tribunal that the purpose of the mention was to confirm filing of Affidavit of Service by the Applicant and for further directions. He confirmed to the Tribunal to have complied with the same.
2. He requested the Tribunal for a further mention to allow the Respondent to appear before the Tribunal. The Tribunal directed the matter to be listed for mention on 7th March 2024 at 2:30p.m via Microsoft Teams.
3. On 7th March 2024, Mr. Rogoncho informed the panel that the matter was coming up for mention. He further stated that the matter came up on 15th April 2023 for hearing but the counsel for the respondent objected on the issue of service of the hearing notice. The affidavit of service was thereafter filed and the matter listed for hearing but the respondent had failed to appear.

4. Mr. Rogoncho further stated that the respondent had since made an application for the matter to be reopened and to access representation. He then requested the panel to issue a final adjournment.
5. The Tribunal directed the matter to be listed for a further mention on 21st March 2024, at 2.30pm via Microsoft Teams and the applicant to serve a mention notice on both the respondent and her counsel.
6. The matter came up for mention to confirm for filling of submissions on 4th April 2024. Mr. Ng'ang'a informed the tribunal that he had been unwell and was still in the process of compiling submissions. He sought seven (7) more days to file submissions on behalf of the Athlete. Mr. Rogoncho confirmed that he had filed his submissions and had no objection.
7. The Tribunal granted the Respondent an additional seven (7) days to file submissions and listed the matter for mention on 11th April 2024 at 2:30 p.m. via Microsoft Teams.
8. The matter came up for Mention to confirm for filling of submissions on 11th April 2024. Mr. Ng'ang'a confirmed that he had filed the submissions although Mr. Rongoncho informed the tribunal that he had not received the said submissions.
9. The Tribunal directed the Respondent to file and serve the submissions within twenty-four (24) hours and the registry to ensure each panel has the full file. The matter was listed for Decision on 9th May 2024 at 2:30pm.
10. The panel constituted to hear this matter included:

- a. Ms. Elyna Sifuna
- b. Mr. Allan Owinyi
- c. Mr. Peter Ochieng

B. PARTIES' SUBMISSIONS

i. The Applicant's Submissions

11. The Applicant adopted and owned its charge documents dated 25th April 2023 and the annexures thereto.
12. The Applicant submitted that the Athlete was a National-Level-Athlete, hence the World Athletics (hereinafter WA) Competition Rules, WA Anti-Doping Regulations, the World Anti-Doping Code (hereinafter WADC) and the Anti-Doping Agency of Kenya Anti-Doping Rules (hereinafter ADAK ADR) applied to her. The Applicant charged her with the Anti-Doping Rule Violation of the presence of a **prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and its metabolite 19-noretiocholanolone.**
13. The Applicant submitted that on 8th January 2023, an ADAK Doping Control Officer ("DCO") collected a urine sample from the respondent. Assisted by the DCO, you split the Sample into two separate bottles, which were given reference numbers A 7125715 (the "A Sample") and B 7125715 (the "B Sample") in accordance with the Prescribed WADA procedures.
14. Both Samples were transported to the Qatar Doping Control Laboratory - Qatar an Anti-Doping Laboratory ("WADA") - accredited Laboratory in Qatar, (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 substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and its metabolite 19-noretiocholanolone which are listed as an exogenous Anabolic Androgenic Steroids (AAS) under S1.1 of WADA's 2023 Prohibited List.

15. The findings were communicated to the Athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 29th March 2023. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 18th April 2023.
16. The Respondent, responded to the charges vide WhatsApp. In her communication she stated that she had travelled overseas to participate in a Competition where she suffered hormonal imbalance and proceeded to purchase norethindrone pills to aid her condition. However, she did not attach any supporting evidence
17. The Respondent athlete's AAF was not consistent with any applicable TUE Recorded at the WA for the substances in question and there is no apparent departure from the WA Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings

18. Further the Athlete did not request a Sample B analysis thus waiving her right to the same under WA Rule 37.5 and confirmed that the results would be the same with those of Sample A in any event.
19. 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.
20. A charge document was prepared and filed by ADAK Advocates and the Athlete presented a response thereto.
21. The matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules resulting in request for submissions from the parties.
22. On legal position it was the Applicant's submission that under Article 3 of the ADAK ADR and WADC, the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.
23. The Applicant submitted that the presumptions at Article 3.2 were applicable:
 - 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 to those facts unless the athlete or other person establishes that the decision violated principles of natural justice.*
- e. *The hearing panel in a hearing*

24. The Applicant added that under Article 22.1 the Athlete had 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/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;*

In addition, the Athlete was also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping Rules.

25. On the burden of proof of the ADRV the Applicant reiterated that the Athlete was charged with presence of Prohibited Substance, a violation of Article 2.1 of ADAK ADR. *S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and its metabolite 19-noreticholanolone was a Non-Specified Substance and attracts a period of ineligibility of 4 years.*
26. Further Applicant submitted that *“where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete’s part be demonstrated to establish an ADRV. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction and therefore the Applicant urged the Tribunal to find that an ADRV had been committed by the Athlete”.*
27. On intention the Applicant relied on Rule 40.3 of the WA Rules stating 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 there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk”.*
28. The Applicants quoted: *“CAS 2019/A/6213 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková”*

Where 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".

29. It was the Applicant's submission 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 her system." The Applicant contended that "The Respondent in this matter, however, didn't provide an alternative explanation supported with cogent evidence of how the prohibited substance entered her system."

30. The Applicants submitted that an athlete cannot simply plead her lack of intention to dope instead she 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
31. The Applicants averred that the Respondent was duly notified of the procedural steps and her rights in accordance with ADAK rules and the WADA code. Moreover, the Respondent was afforded a platform to provide specific, objective, and persuasive evidence with a view to disproving hers lack of intention to dope. However, the Respondent's non-participation in the proceedings meant that she failed to provide an alternative plausible explanation disproving her intent when she ingested the prohibited substance
32. Further the Applicant said, *"The Respondent's intention cannot be inferred; instead, she must adduce concrete evidence that seeks to absolve her of these charges. It's the Applicant's submission that the Respondent didn't discharge her 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 her quest to prove her innocence and non-intention to dope.*
33. The Applicant added that, *"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."

34. The Applicant argued that the origin of the Prohibited Substance had not been established as *"The Respondent didn't provide concrete evidence in support of her claims for how the prohibited substance the prohibited substance **S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and its metabolite 19-noreticholanolone** entered her body."*

35. In regard to Fault/Negligence the Applicant contended that *"the Respondent is charged with responsibility to be knowledgeable of and comply with 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 23.1.3 of ADAK ADR"*.

36. The Applicant further stated that *"the athlete has a personal duty to ensure that no prohibited substance enters their body."* The Applicant relied 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."*

37. The Applicant contended that the Respondent in this case fell short of the no fault or negligence threshold due to her failure to exercise a high level of diligence expected from an athlete to avoid taking a prohibited substance and also failed to show the steps she took to ensure that the prohibited substance wasn't found in her system
38. Further the Applicant submitted that, *"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 her calibre and experience is high. It's the Applicants submission that the respondent was negligent due to her failure to exercise caution to the greatest possible extent and her conduct doesn't warrant a finding of no fault and negligence."*
39. Submitting on knowledge, the Applicant *"contended 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 specimens, and that an ADRV occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimens, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault"*.
40. The Applicant held that *"an athlete competing in national and international competitions and who also knows that she is subject to doping controls because of her participation in the national and/or international competitions cannot simply assume as a general rule that the products she ingests are free of prohibited/specified substances."*, submitting that *"it cannot be too strongly emphasized that the 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 athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product."

41. Submitting regarding sanctions, the Applicant stated *"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"*.

42. Further the Applicant said *"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"*.

43. The Applicant then quoted **"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"**

44. It was the Applicant submission that the Respondent hasn't discharged her 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 her system thus the first avenue to warrant sanction reduction was closed off.
45. Placing reliance on **"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.**
46. The Applicant reiterated 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 she didn't intentionally use the prohibited substance means that her level of fault was high as there has been no other explanation stating otherwise, and thus she hasn't demonstrated no fault or negligence to warrant sanction reduction"*.
47. The Applicant concluded by submitting that, *"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".

48. The Applicant summed up by urging the Panel to consider the sanction provided for in *Article 10.3.3* of ADAK Rules and sanction the athlete to 4 years' ineligibility stating:

- 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 her 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

ii. Respondent's Submissions

49. The Respondent submitted that as per her response to charge, she struggled for long with imbalance/irregular menstrual period before her race and before her sample was taken for tests and in an attempt to regularize the said imbalance, she sought medication and since she was overseas/foreign

country, she sought medication online on a drug store to help her ease the pain and cure the menstrual irregularity.

50. That upon conducting an online search she identified and purchased medicine whose diagnosis matched her condition, and ingested the same as per prescription.

51. The Respondent athlete in her list of documents went ahead to provide the link of the website where the said medicine was purchased and further to the link expounded in details the reason for purchasing the medicine

52. The Respondent athlete suspected that it might have been the use of the above stated medicine that might have resulted in the finding arrived at by the laboratory tests done by the Applicant.

53. The Respondents contended that the Tribunal was tasked to determine the following issues in the cause herein;

i. Whether the acts of the Athlete were intentional.

ii. Whether the Athlete was negligent.

iii. Whether the Athlete was at fault

iv. Whether the Athlete should be sanctioned

54. The Respondent submitted that the Athlete took medication designed to aid her deal with prolonged/irregular menstruation which she was experiencing during her menstrual cycle and merely sought to address a medical issue that unfortunately might have led to the anti-doping finding; This confirms that the supposed violation was not intentional, negligent or the Athletes fault.

55. The Respondent further stated that in order for a violation to be deemed intentional, the conduct of the Athlete must be such that they intended to cheat, had knowledge that the ingestion they were taking would have resulted in the breach of Anti-Doping rules and they totally disregarded the risk.
56. They placed reliance on Article 10.2.1.2 of the Code of the Athlete requiring a violation to be demonstrated to be intentional in order for a sanction of 4 years to be applied.
57. The Respondent submitted that the Athlete during the sample taking expressly informed the Applicant of the medicine she had ingested and the reason for the same as captured in the sample taking form, showing the athlete's sincerity as to what she had used and the reason for the same.
58. At no point in time did the Athlete try to hide and/or conceal any information as regards the medicine that she had used because she was genuine and innocent on the reason she had used the medicine. The Athlete had no ill motive and never knew that whatever she took as medicine might have contained prohibited substances.
59. The Respondent averred that under Article 3 of the Code, the Applicant bears the burden of demonstrating that the Respondent's action was intentional and that the high yet succinct test for proving intention was not satisfied by the Applicant as the facts provided by the Athlete demonstrated that there was no intention to cheat and that the medicine she took was purely for medical purposes to cure a problem she was experiencing.

60. The Respondent submitted that the evidence put forward by the Applicant and the response of the Athlete point to only one outcome. The anti-doping finding was not a product of an intentional process designed to circumvent the anti-doping rules. The intention was not established by the Applicant and hence the sanction proposed cannot be sustained.
61. The Respondent stated that based on a balance of probabilities, the Athlete took medication to attempt to cure a medical challenge she was encountering as It is a medical issue that many people face and attempt to cure the same through hospital visits and over the counter medication.
62. The Respondent stated that the question that arose was 'can this really be deemed to be an intentional breach of the Code?' and humbly submitted that the answer is in the negative.
63. Referring to Article 10.2.3 the Respondent stated that an anti-doping violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be 'not intentional' if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition."
64. Further, the Respondent averred that the tribunal was required to make a fair legal presumption of no intention if the Athlete established that the prohibited substance was used out of competition, despite the prohibition being an in-competition prohibition.
65. The Respondent submitted that the reasons for why the anti-doping findings were arrived at has been provided. Equally the Athlete submitted

that she had no fault or negligence on her part leading to the doping finding stating.

66. The Athlete was on medication to cure a significant ailment or discomfort. There were limited alternatives available to the Athlete in seeking to remedy the ailment she was facing as she was overseas.

67. The most prudent person in the Athlete's situation, considering her economic realities, being in a foreign country, being in pain and waiting for a race, would have ended up in the very similar situation the Athlete herein found herself in

68. The Respondent further stated that even if there was a finding that she was at fault and/or negligent this was not significant. The Athlete's pursuit to get care and redress (of) a medical challenge significantly mitigated any fault or negligence on her part as she reacted in a manner anyone in her situation would have reacted.

69. The Respondent submitted that she should not be sanctioned for the period of four years, there being no basis for this sanction for the reason that, Article 10 of the Code in respect to sanction requires the penalty of 4 years to be meted out if it is established that the breach by the athlete was intentional.

70. The Respondent contended that the proportionality test ought to be applied in this case as the principle of proportionality dictates that the punishment ought to be proportionate with the offense committed and that the individual situation of this case warrants a proportionate punishment to be applied.

71. The Respondents relied on CAS 2005/A/830S V Fina the athlete stated;

'...that where a sanction would be tantamount to attacking an athlete's personal rights, the proportionality test ought to be applied. Further the athlete averred that she simply sought medical treatment which eventually resulted in the unfortunate doping violation outcome ..'

72. The Respondent stated that the right to health was well set and safeguarded and humbly submitted that the pursuit of this right by the athlete should be considered in determining any punishment against her.

73. The athlete had never in her life committed a sporting violation and that since she was suspended, she never engaged in any other form of athletics to try and circumvent the ban.

74. The athlete further variously prayed that if the panel was to find any violation on her part, a reprimand should suffice in the circumstances on the grounds that;

- a. the ADVR was not intentional was not the athlete's fault or negligence and if any fault or negligence was found it was not significant
- b. the sanction sought by the applicant be rejected in its entirety
- c. and where a period ban is to be considered by the Tribunal then there should be a reduction in the period of ineligibility based on no significant fault or negligence on the part of the respondent to a ban of no more than 12 months

JURISDICTION

75. 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
76. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

C. APPLICABLE LAWS

77. 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.**

D. MERITS

78. Uncontested facts

- a. The Athlete's urine samples were collected on 8th January 2023 by a Doping Control Officer (DCO) as per the Doping Control Form (DCF) numbered 8 in the Applicant's Charge Document.
- b. The Test Report numbered 9, attached in the Applicant's Charge Document also remains unchallenged.

79. The Panel shall examine the following:

- i. Whether the Athlete committed the charged anti-doping rule violation (ADRV);
- ii. If the finding in (i) is in the affirmative, whether the violation committed by the Athlete was intentional;
- iii. No Fault/Negligence & No Significant Fault/Negligence – Origin – Knowledge;
- iv. Sanction.

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

80. The Applicant's prosecution was based on the charge of presence of a **prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and its metabolite 19-noretiocholanolone** as outlined at paragraph 10 of its charge document dated 25th April 2023.

81. Article 2.1 of the ADAK ADR and similarly Article 2.1 of the Code provide the charge to be determined as follows:

'2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample'

82. Article 3.1 of WADC/ADAK ADR provides the Burden and Standard of Proof: *'The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made'.* (Our Emphasis)

83. In all her responses including in her E-mail the Athlete did not deny the presence of the prohibited substance in her Sample A (Urine Sample)

collected on 08/01/2023 as per her Doping Control Form (DCF) and as further duly reflected in the subsequent Test Report both attached in Applicant's Charge Document and numbered 8 & 9 respectively.

84. World Anti-Doping Code (WADC)'s/ADAK ADR's Article 3 ***Proof of Doping*** postulates at ***Article 3.2.1*** that '*Analytical methods or Decision Limits approved by WADA after consultation within the relevant scientific community or which have been the subject of peer review are presumed to be scientifically valid.*', as submitted by the Applicant. (Our Emphasis)
85. Further WADC's/ADAK ADR's Article 2.1.2 states that '***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***'; (Our Emphasis)
86. The Applicant asserted that the Athlete did not request for a Sample B analysis thus waiving her right to the same under World Athletics (WA) Rule 37.5, a claim that was unchallenged by the Athlete who did not dwell on the issue of the occurrence of the ADRV delving instead into the matters of intentional, negligent, fault and sanction.
87. As observed by the Applicant in its submissions, '*where use and presence of a prohibited substance has been demonstrated*' – in the relevant Test Report of the Athlete's Urine Sample from the Accredited Laboratory tabled (No. 9 attachment in the charge document) by the Applicant – '*it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated to establish an ADRV*'. (Our Emphasis)

88. Therefore, it is this Panel's finding that the Applicant had established the Athlete's anti-doping rule violation (ADRV) to its comfortable satisfaction.

II. Was the violation committed by the Athlete intentional?

89. Article 3.1 of WADC/ADAK ADR's provides the Burdens and Standards of Proof: *'Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability'*. (Our Emphasis)

90. For 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 2.1, [...] shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:*

Pursuant to WADC's & ADAK ADR Article 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.]

91. Further, WADC's & ADAK ADR's Article 10.2.3 provides:

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.⁵⁹ An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance. (Our Emphasis)

59 [Comment to Article 10.2.3: Article 10.2.3 provides a special definition of "intentional" which is to be applied solely for purposes of Article 10.2.] (Our Emphasis)

92. Consequently, in determining whether there was intention to commit the violation, the first aspect to be reviewed in this case is **if** under Article **10.2.1.1, the Athlete can establish that the anti-doping rule violation was not intentional.** (Our Emphasis)

93. The Applicant in its submissions referred to the Athlete's written explanation which it attached in its Charge Document. In her email dated August 29th 2023 the Athlete wrote,

"Honestly, as with my actions I regret and apologize for everything that I did innocent without any evidence as I said at first, Honestly, I can say I didn't use any prohibited substance to run, only for the problems I face during the race. I request for forgiveness for that I have learned my lesson and if given a second chance to run and provide for my family. I believe I will obey the ADAK rules and never to repeat again such mistake. As I say, Kufanya kosa sio kosa, kurudia kosa ndo Kosa, Yours Sincerely Isgah Cheruto,"

94. Further to this, it is noted that in her subsequent communication via Whatsapp to Mr. Mwakio, the Athlete reiterated that she had been taking unprescribed medication from overseas designed to aid her deal with pain she was experiencing during her menstrual cycle and named those drugs as Norethrine pills.

95. The Applicant relied on *CAS 2019/A/6213 World Anti-Doping Agency WADA v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Katerina Kašková*. We note that the panel in *Kašková* correctly called the burden to fall on the Athlete by first observing in their **para.64** that, *'The Sole Arbitrator accepts the submissions of WADA and, having regard to and fully considered the Answer filed by the First Respondent and by the Second Respondent, and all of the documentation, evidence and submissions on the file, considers that the appeal should be upheld. Article 10.2.1.1 CADC ADR provides the period of ineligibility shall be four (4) years where the anti-doping rule*

violation does not involve a specified substance unless the athlete can establish that the violation was not intentional'. Please note the article relied on herein mirrors WADC's Article 10.2.1.1.

96. Having called the rightful party to its respective burden, the panel in the *Kašková* case proceeded to sum up thus, '[...] *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... Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete.... contained the substance in question. Absent of any proof of purchase... absent of disclosure in the doping control form, there is no element substantiating the athlete's contention that she did use that product [...].* (Our Emphasis)

97. In her explanation the Athlete said that '[...I had no prescription because during that time, I was in a race overseas and my period was acting abnormal for a long time and it was expensive to get medical attention. I went online to search for an easier tablet since it was an option. As being honest and explained during my test and as mentioned earlier again with my ignorance I didn't know that such tablets may last in my body for so long. I still regret and apologize for my actions. Attached is a link of the Norethindrone pills I purchased,' but no other painkiller(s) was cited and/or proof of purchase attached for perusal by this Panel. The Test report stated that ..."The 19-NA finding is not consistent with the use of

norethisterone. The 19-NA finding is not consistent with pregnancy or the use of norethisterone..." The drug Norethindrone identified by the Athlete was not demonstrated to the Panel by the Respondent as to which active ingredients in it gave rise to the Adverse Analytical Finding (AAF) in her Urine Sample.

98. The Panel notes that while a chronological history is provided by the Athlete, the history does not succinctly cite/name the entirety of 'any drug she took purely for medical purposes to cure a problem she was experiencing'. Additionally, while the Athlete commenced her explanation with reference to a link of the purchased drug, no authenticated medical records were provided as concrete proof of her ailments or where she purchased the drug from.

99. This Panel is guided by WADC's/ADAK ADR's Article 10.2.1.1's 58 [Comment to Article 10.2.1.1:

*58 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.***] (Our Emphasis)

100. We acknowledge the Athlete's submissions that she "took medication to cure a medical issue of imbalanced menstrual periods and chronic injuries she got in early 2022 and that her intention was to find a way to heal faster". It is this Panel's opinion though, that the Athlete's protestations were critically

curtailed by her lack of specific demonstration of for example origin and/or concrete medical documentation/evidence in light of WADC/ADAK ADR's Comment No. 58

101. In the circumstances, it is our considered opinion that by a balance of probability the Athlete did not establish that the anti-doping rule violation was not intentional.

III. No Fault/Negligence & No Significant Fault/Negligence – Knowledge

102. Having found the Athlete was unable to establish lack of intention 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. Additionally, the Panel finds that the above reasoning applies to No Significant Fault or Negligence.

103. On knowledge the Applicant upheld the principle of strict liability submitting that ignorance is no excuse. Some of the core competencies the Applicant ought to be delivering to its stakeholders, one of whom is the Athlete, is enumerated under ISE's Article 3.3 Anti-Doping Education: *'Delivering training on anti-doping topics to build competencies in clean sport behaviors and make informed decisions'* and 5.2 • *Use of medications and Therapeutic Use Exemptions.* (Our Emphasis)

104. The applicant stated that she researched online for the drugs and that due to her ignorance she purchased them just as a way to heal. The

Panel believes that the Athlete had not received any formal anti-doping education from the Applicant's Agency.

105. Arising therefrom it behooves the Panel to quote WADA's International Standard for Education (ISE) 2021 Article 7.2.1 which provides: 'Each National Anti-Doping Organization shall be the authority on Education as it relates to clean sport within their respective country. National Anti-Doping Organizations **should** support the principle that an Athlete's first experience with anti-doping should be through Education rather than Doping Control' (Our Emphasis)

106. The athlete's age, level of formal education, and length of athletic participation were not disclosed to the panel, but suffice it to say that she requires all anti-doping training in order to develop her skills in ethical behavior in sports and her capacity for making informed decisions. The Applicant should fill in the obvious gaps that still exist for athletes like the Respondent who practice their individual sports largely unsupervised and may face difficulties getting access to reliable, simple-to-understand, and practical clean sport anti-doping information from legitimate doping authorities. (Our Emphasis)

IV. Sanctions

107. 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*"

108. 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.

109. Therefore, the relevant WADC/ADAK ADR Article/Rule 10.2.1 is to be applied as is, unencumbered by the Article 10.2.1.1's proviso whose conditional requirement to prove lack of intention was not achieved by the Athlete in the instant case. In other words, failure by the Athlete to establish lack of intention for presence of the prohibited substance in her system constrained the rules to not afford her any reductions including the *No Significant or Negligence* considerations. (Our Emphasis)

110. 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. (Our Emphasis)

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.]

E. DECISION

111. Consequent to the discussion on merits of this case, the Panel finds:
- a. The applicable period of ineligibility of (4) years is hereby upheld.
 - b. The period of ineligibility shall be from the date of the Athlete's provisional suspension which was on **18th April 2023** for a period of (4) years: (18th April, 2023 to 17th April, 2027).
 - c. Disqualification of any and/or all of the Athlete's competitive results from **8th January 2023**
 - 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 __30th__ day of May 2024

Ms Elyna Shiveka

Mr. Allan Owinyi

Mr. Peter Ochieng'