

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
SDTADK NO. E045 OF 2023

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

Versus

JOAN JERUTO..... RESPONDENT

DECISION

PANEL:

MRS. NJERI ONYANGO	-MEMBER
MR. PETER OCHIENG'	-MEMBER
MR. ALLAN OWINYI	-MEMBER

COUNSEL APPEARING;

MR. BILDAD ROGONCHO- COUNSEL FOR ADAK/APPLICANT

NO APPEARANCE FOR THE RESPONDENT

A. ABBREVIATIONS AND DEFINATIONS

The following abbreviations used herein have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR- Anti- Doping Rule

ADRV-Anti- Doping Rule Violation

AK-Athletics Kenya

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

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

B. PARTIES

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

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C. THE CHARGE

3. The Anti-Doping Agency has charged the Respondent as an Athlete with the charge of; -

Evading, Refusing or failing to submit to Sample Collection

S2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection. under S2.3 of WADA Code (2021)

D. BACKGROUND FACTS

4. On 23rd August 2023, ADAK Doping Control Officers notified the Athlete to undergo a doping control process. The Athlete however evaded, refused and failed to give her sample collection for testing.

5. The failure to submit to sample collection by the Athlete resulted to the commission of an Anti-doping rule violation(ADRV) of Evading, Refusing or Failing to submit to Sample collection under S2.3 of the WADA code (2021).

6. The ADAK Chief Executive Officer, Sarah I. Shibusse, through a Notice of Charge and Mandatory Provisional Suspension dated 2nd November 2023 communicated the findings to the Athlete who was then offered an opportunity to provide an explanation for the same by 22nd November 2023.

7. The Athlete was also informed of her rights and other avenues for sanction reduction.

8. On 18th December 2023, the Athlete, vide WhatsApp, responded to the charges by stating that she had been experiencing marital problems on the day when the ADAK DCOs knocked on her door and failed to identify themselves she felt threatened and unsafe and decided to walk away from the scene.

9. 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.

10. A charge document dated 31st January, 2024 was prepared and filed by ADAK's Advocates.

11. The Athlete did not file a response to the charges.

12. On 15th February 2024, the Athlete affirmed her decline for legal representation by Mr. Njuguna who was to act on a Pro-bono basis. The Panel directed the registry to advise the Athlete on how to file a Statement of response to the Charge.

13. The Athlete on her Affidavit dated 27th February 2024 and filed o 29th February 2024 stated as follows;

- a) That she was attached to the Kenya Police as an upcoming Athlete who had never attained any National level performance.
- b) That she is not a National Level Athlete as alleged by the Petitioner. Further that, she is not in the radar of Anti-Doping pool or AIU.
- c) That at no time had she been subjected to any tests since her performance had not demanded for it.
- d) That at some point people had raided into her house who had claimed to be ADAK Officers but they failed to identify themselves. Further that she got lots of fear because she had received threatening messages few days before the raid and was feeling unsafe thus she asked them to leave her house and walked away.
- e) That she cannot be held responsible for other people's affairs at any given time

14. On 29th February 2024, the Athlete also filed her written submissions.

15. On the mention of 29th February 2024, the Athlete was absent and the Panel directed that the Applicant serve the Respondent the Notice for the Hearing of the matter that was scheduled for the 21st March 2024.

16. On 21st March 2024, the hearing was adjourned to the 11th of April 2024 since the Athlete was absent.

17. On 11th of April 2024 the Applicant's Advocate informed the Tribunal that he had tried to contact the Athlete and was not successful. The hearing was adjourned to the 9th of May 2024.

18. On the 9th of May 2024 the Applicant's Counsel requested the Panel time to serve the Respondent a Hearing Notice.

19. On 29th of May 2024, the Applicant's Advocate filed an Affidavit of service of the Hearing Notice received from ADAK dated 14th May 2024 for the hearing of 13th June 2024.

20. On 13th June 2024, ADAK's Advocate filed an Affidavit of service to affirm service of the Hearing Notice received from ADAK on the 10th June 2024.

21. On 13th June, 2024, the matter went through a viva voce hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules. The Respondent did not participate in the hearing proceedings.

22. On the hearing of 13th June 2024, Counsel for the Applicant called two (2) Prosecution Witnesses (PWs) namely:

- I. Malachi Otieno Odhiambo (PW-1)
- II. Maureen Cherotich (PW-2)

I. Prosecution Witness 1.

23. PW-1 Malachi Otieno was sworn by the Secretariat. He submitted that his witness statement filed on 11th April 2024 be adopted. He stated that he was a Doping Control Officer.

24. He stated that, on 23rd August 2023, he was part of a mission of Sample Collection together with his colleague Maureen Cherotich. That upon arrival at a training camp in Iten the first met coach Joseph Cheromei. That, they then began notifying Athletes present.

25. Further that he notified Joan Jeruto and instead of complying the Athlete ran away from the camp. That, later that day at around 1620hrs, accompanied by Maureen and two coaches; Joseph Cheromei and Peter Chesang who showed them the direction to the Athlete's house. That, upon arrival they found the gate open and drove into the property.

26. Further that they knocked the Athlete's door severally who did not open but since food was cooking on a Jiko outside, they thought she was inside and they waited for her at the door while coach Joseph called the landlord to inform her that they were outside waiting. The landlord informed Joseph that that she was not answering the Landlord's calls either. Further that he together with Coach Joseph then proceeded to Iten Police Station to report the matter.

27. That, around 1720hrs, Maureen called him to inform him that the Athlete had opened the door and they then went back to the Athlete's house. That when Maureen asked the Athlete why she ran away that morning, the Athlete said that she was not

among the Athletes that had been notified since she had gone to her home in Kapsabet, Nandi to drop her children at around 6am and she went for training there and came back at around 11am.

28. That the Athlete then told them to hurry since she had a place she was to go at that time. Further that him and Coach Peter stayed outside the Athlete's house while the Athlete led Maureen into the room. Also that he noticed that the clothes he had seen the Athlete wearing at the camp that morning had been washed and were hanging on the washing line outside the Athlete's house. He stated that, a few minutes later he noticed the Athlete had stepped outside the house and was talking on her phone.

29. Further that Maureen followed the Athlete outside. That the Athlete talked on her phone for about thirty (30) minutes and when she was done, she said she wanted to put on a sweater. In less five (5) minutes, the Athlete came out the door, closed it with a padlock and then headed the direction of the gate. Also that, they asked her where she was going but she did not respond. Further that he followed her but she ran away. He averred that he took photos of the Athlete as she was running away.

II. Prosecution Witness 2.

30. PW-2 Maureen Cherotich was sworn in by the Secretariat. She submitted that her witness statement filed on 11th April 2024 be adopted. She stated that she was a Doping Control Officer.

31. She averred that, on 23rd August 2023, she was part of a mission of Sample Collection together with his colleague Maureen Cherotich. That upon arrival at a training camp in Iten the first met coach Joseph Cheromei. That, they then began notifying Athletes present. Further that after they finished sample collection of Athletes that had complied, her and Malachi at around 1620hrs, accompanied by two coaches; Joseph Cheromei and Peter Chesang who showed them the direction to the Athlete's house proceeded to the Athlete's house.

32. She stated that, upon arrival they found the gate open and drove into the property. Further that they knocked the Athlete's door severally who did not open but since food was cooking on a Jiko outside, they thought she was inside and they waited for her at the door while coach Joseph called the landlord to inform her that they were outside waiting. That, around 1720hrs, the Athlete opened the door, they introduced themselves to her and notified her once again.

33. Further that she asked the Athlete why she ran away that morning and the Athlete said that she was not among the Athletes that had been notified since she had gone to her home in Kapsabet, Nandi to drop her children at around 6am and she went for training there and came back at around 11am. That the Athlete then told them to hurry since she had a place she was to go at that time. Further that Malachi and Coach Peter stayed outside the Athlete's house while the Athlete led her into her house.

34. She stated that she requested the Athlete to show her a photo identification and the Athlete gave her, her national identity card. That she read to the Athlete her rights and responsibilities and also asked the Athlete to go through them and the Athlete said she understood everything and also signed the Athlete's consent form. Further that, as they were filling the Athlete's details on the Doping Control Form on the iPad, the Athlete received a phone call and said it was his husband calling. The Athlete stepped outside to talk and she followed her and stood at the door patiently waiting for her to finish her call.

35. That, the Athlete talked over the phone for almost thirty (30) minutes and when she was done, she said she wanted to put on a sweater. That PW-2 followed her inside to the bedroom but the Athlete said she was not comfortable with stating she was not going anywhere. Further that she reminded the Athlete that she was to be in her sight until the Sample Collection Process was complete. That the Athlete headed to the door and seemed to leave and she asked her to let her remove her materials first and place outside and they would continue with the process after the Athlete was through with her phone call.

36. That, once outside the Athlete closed her door with a padlock and started heading to the direction of the gate. Further that they asked her where she was going but she didn't respond. That, Malachi followed her but the Athlete closed the gate and ran away. She then submitted that Malachi took a photo of the Athlete running.

37. On 25th June 2024 the Applicant filed its written submissions.

E. SUBMISSIONS BY ADAK

38. It was ADAK's submission that the burden of proof expected to be discharged by the Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

39. On Athlete's intention to evade Sample Collection, ADAK submitted that based on the evidence and testimonies of the Applicant's witnesses, the Respondent intentionally evaded and failed to submit to sample collection without compelling justification after notification by a duly authorized person.

40. ADAK referred to Article 2.3 of the Code, which is reads: *"For example, it would be an anti-doping rule violation of 'evading sample collection' if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or testing. A violation of 'failing to submit to Sample collection' may be based on either intentional or negligent conduct of the Athlete, while 'evading' or 'refusing' Sample collection contemplates intentional conduct by the Athlete."*

41. The Applicant submitted that evading and refusing to submit to Sample Collection contemplates intentional conduct by the Respondent. Further that, the Athlete had been informed about the coming doping control when she ran away from the training camp in Iten on the afternoon of 23rd August, 2023.

42. ADAK referred to Court of Arbitration for sport in sanctioning the Athlete charged with evasion in the case of **William Brothers v. Fédération Internationale de Natation (FINA) CAS 2016/A/4631** where it was held that: *"It would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or refusing" Sample collection contemplates intentional conduct by the Athlete."*

43. ADAK referred to the circumstances of the case stating that the Respondent physically fled from the training camp upon notification that she had been selected for doping control. The DCOs located the Respondent in her home with the assistance of the coaches present during the mission. The Respondent refused to answer the door. With the intervention of the Respondent's landlord, the Respondent finally opened the door. The intention to evade and refuse to submit to sample collection was evident in the subsequent turn of events. The officers initiated the doping control process but she ran off locking the door with a padlock after excusing herself to receive a phone call alleged to be by her husband.

44. The Applicant also submitted that there was no compelling justification for the Athlete to evade sample collection. That, the Athlete herself did not give any reason why she evaded the test despite two attempts by the DCOs to have her undertake the

doping control process. Further that, the reason advanced by the Athlete in her response of 18th December 2023 about having marital issues is not substantiated by any evidence whatsoever. Also that the factual scenario as presented by the Athlete leaves doubt as to whether she felt unsafe at the time when the DCOs began the doping control process because she had already been taken through her rights and responsibilities which she acknowledged.

45. The Applicant averred that the Respondent was duly notified of the procedural steps and her rights and responsibilities in accordance with ADAK rules and the WADA code by the DCOs. Further that the Respondent was afforded a platform to provide specific, objective, and persuasive evidence with a view to disproving her lack of intention to evade sample collection. And that she however failed to provide an alternative compelling justification disproving her intention to evade sample collection.

46. ADAK further averred that the Respondent's intention could not be inferred and instead she had to adduce concrete evidence that sought to absolve her of the ADRV charges. It is the Applicant's submission that the Respondent did not discharge her burden by a balance of probabilities. Further that 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 evade sample collection.

47. On fault/negligence ADAK referred to the established case-law of **Maxim Simona Raula v. Romanian National Anti-Doping Agency (RADA) CAS 2014/A/3668** where the panel held that: *“Fault is generally defined as an error or defect of judgment or of conduct respectively or as a breach of duty imposed by law or by contract. Here, the Athlete knowingly hid from the DCOs in order to avoid sample collection....”*

48. The Applicant submitted that the Athlete was significantly at fault when she ran away from doping control and later on taking off from her house in a bid to evade sample collection. Also that, the Respondent breached her duty expected of every national-level athlete as she was well informed about the doping control process and therefore, it is evident that she should have taken utmost caution before evading sample collection. It was therefore their submission that the Athlete ought to have known better the responsibilities bestowed upon her as a national level Athlete and that she was therefore grossly negligent.

49. It was ADAK's prayer that the Respondent having failed to give any compelling justification for evading, refusing or failing to submit to sample collection

committed an ADRV and that the Tribunal sanction him to the maximum sanction of four (4) years ineligibility.

F. SUBMISSIONS BY ATHLETE

50. The Athlete submitted that she was attached to the Kenya Police as an upcoming Athlete who had never attained any National level performance.

51. The Respondent also averred that she is not a National Level Athlete as alleged by the Petitioner. Further that, she is not in the radar of Anti-Doping pool or AIU.

52. The Athlete also stated that at no time had she been subjected to any tests since her performance had not demanded for it.

53. The Athlete further averred that at some point people had raided into her house who had claimed to be ADAK Officers but they failed to identify themselves. Further that she got lots of fear because she had received threatening messages few days before the raid and was feeling unsafe thus she asked them to leave her house and walked away.

G. JURIDICTION

54. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti- Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

H. APPLICABLE LAW

55. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

56. The following constitute anti-doping rule violations:

Article 2.3 Evading, Refusing or Failing to Submit to Sample Collection. Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification as authorized in applicable anti-doping rules.

[Comment to Article 2.3: For example, it would be an anti-doping rule violation of “evading Sample collection” if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of “failing to submit to Sample collection” may be based on either intentional or negligent conduct of the Athlete, while “evading” or “refusing” Sample collection contemplates intentional conduct by the Athlete.]

I. ISSUES TO BE DETERMINED

- a) Who is a National Athlete and if the Athlete was subject to being tested?
- b) Whether testing can only be conducted within a testing Pool;
- c) Whether there was an occurrence of an ADVR, the Burden and Standard of proof;
- d) Whether, if the finding in (a) is in the affirmative, the Athlete’s ADVR was intentional;
- e) Reduction based on No Fault;
- f) The Standard Sanction and what sanction to impose in the circumstance;

J. MERITS

- a) **Who is a National Athlete and if the Athlete was subject to being tested?**

57. Section 2 of the Anti-Doping Act describes National Level Athletes to mean Athletes who compete in sport at the national level, as defined by each National Anti-doping Organisation, consistent with the International Standard for Testing and Investigations. In Kenya, national level Athletes are defined as any athletes who;

- i. Participate in the national leagues, county leagues, events or competitions organized by their federations or by any sports organisation or club;*
- ii. Are affiliated to a federation, national league, county league, sports organisation or club; or*

iii. Participate in competitions or events organized by schools, colleges or other institutions

58. The Athlete stated in her submissions that she is attached to the Kenya Police as an upcoming Athlete who had never attained any national level performance. From her sentiments, the Athlete is affiliated with the Kenya Police which is a Club that is affiliated to Athletics. Therefore, the Athlete is subject to the Anti-Doping Rules subject to Section 2(ii) of the Anti-Doping Act.

b) Whether testing can only be conducted within a testing Pool;

59. The 2021 ADAK Anti-Doping Rules 5.2.1 provides that; *Subject to the limitations for Event Testing set out in Article 5.3, ADAK shall have In-Competition and Out-of-Competition Testing authority over all Athletes specified in the Introduction to these Anti-Doping Rules.* Further, Article 5.2.2 of the rules stipulates that; *ADAK may require any Athlete over whom it has Testing authority (including any Athlete serving a period of Ineligibility) to provide a Sample at any time and at any place.*

60. Therefore, it was in order for the Doping Control Officers to collect a doping Sample from the Athlete both at the training Camp and also at the Athlete's house.

c) Whether there was an occurrence of an ADVR, the Burden and Standard of proof;

61. Subject to WADC's Article 3.1: 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. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

[...]. Where the Code places the burden 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, the standard of proof shall be by a balance of probability.

62. As stipulated in WADC's Article 3.2, Methods of Establishing Facts and Presumptions related to anti-doping rule violations may be established by any reliable means, including admissions. The Athlete in her submissions;

- a) Admitted to being approached and requested to provide his urine sample at his house;
- b) Admitted that he disregarded the request to provide his sample as he was feeling unsafe having received threatening messages few days before the visit;

63. Therefore, the Athlete having failed to submit to sample collection from both her confession in her Affidavit and Written Submission both dated 27th February 2024 and from the witness statements of both Malachi Otieno and Maureen Cherotich committed an Anti-Doping Rule violation.

64. On intention, In **World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Remigius Machura CAS 2015/A/4063**, the panel in paragraph 4 asserted that, *"A refusal to submit to sample collection is presumed to have been committed intentionally and the burden of proving that the violation was not committed intentionally lies with the Athlete. A refusal to submit to sample collection cannot be considered to have happened unintentionally when, after a first notification of the obligation to comply with out-of-competition control by the DCO in front of his house, the Athlete returns into his/her house and fails to respond to repeated active attempts by the DCO to re- establish the contact"*.

65. The Athlete, both in her Affidavit and Written Submission both dated 27th February 2024, submitted that she disregarded the request to provide her sample as she was feeling unsafe. In the Witness statement of Maureen Cherotich once the Athlete opened the door, they introduced themselves and notified her once again. Further, from the witness statements of both Malachi Otieno and Maureen Cherotich, they were accompanied by two coaches; Joseph Cheromei and Peter Chesang' who showed them the Athlete's residence. Therefore, the averments by the Athlete of feeling unsafe are unreasonable since the DCOs introduced themselves and the Athlete was also familiar with the coaches and the coaches' presence could then have allayed any doubts to the legitimacy of the DCOs.

66. From the witness statement of Maureen Cherotich, he had requested the Athlete to give her a photo identification and the Athlete showed her, her national identity card. She also read to the Athlete her rules and responsibilities and asked the Athlete to sign the consent form, which she did sign. The evidence contained in the

statements of both Malachi Otieno and that of Maureen Cherotich clearly show above mere balance of probability that the Athlete was: -

- i) Properly identified and notified of the process of sample collection
- ii) Availled ample opportunity and time to provide sample.
- iii) Failed or refused to provide or submit to sample collection.
- iv) There was no compelling reason for the failure/refusal to provide a sample.

67. In “CAS 2016/A/4631 William Brothers v. Fédération Internationale de Natation (FINA), the panel provided that, *“If an Athlete can prove on the balance of probability that his/her act of refusing to submit to a collection of blood sample was compellingly justified, his/her rejection of the test will be excused. If it remained physically, hygienically and morally possible for the sample to be provided, despite objections by an Athlete, the refusal to the test cannot be deemed to have been compellingly justified. Situations in which it is established that an Athlete is deprived of his/her rationality and cognitive senses will, in most cases, be sufficient to ground the excuse of “compelling justification”.*

68. Inferring from the above, it is found that the Athlete, from both the witness statements of Malachi Otieno and Maureen Cherotich and also from the Athlete’s admission in both her Affidavit and Written Submission both dated 27th February 2024, refused or failed to submit to Sample Collection during the 23rd August 2023. This Honourable Tribunal finds no physical, hygienic or moral circumstances which would have justified the Athlete’s refusal to provide her blood sample and thus makes a finding that the Athlete had every intention to cheat and subvert the doping control process”.

69. Therefore, it is the finding of this Tribunal that the Applicant having proved its case to the comfortable satisfaction of the bench and the failure of the Athlete to provide a compelling reason for evading, refusing or failing to submit to sample collection, that the Athlete committed an Anti-Doping Rule Violation.

K. SANCTIONS

70. For an ADRV under Article 2.3, Article 10.3.1 of the ADAK ADR provides for *a regular sanction of a four-year period of ineligibility except in the case of failing*

to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years. The rule further provides that in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person's degree of Fault.

71. It is however this Honourable Jurisdiction's finding that the Athlete has not discharged her burden by a balance of probability to warrant reduction of a sanction. Consequent to the Respondent's non-participation in the hearing proceedings, no compelling justification disproving her intention to evade sample collection has been established.

72. The Respondent's intention and level of fault when evading sample collection cannot be inferred and must be supported with concrete evidence. The Respondent's failure to participate in the hearing proceedings and inability to provide any cogent evidence highlighting that she did not intentionally evade, refuse or fail to submit to sample collection means that her level of fault was high. Therefore, she has not demonstrated no fault or negligence to warrant sanction reduction.

L. DECISION

73. This Honourable Tribunal having considered the written submission from the Parties and also the evidence placed before it hereby orders as follows;

74. That the Anti-Doping Rule Violation has been established as against the Athlete;

75. That the Athlete is hereby sanctioned to four (4) years ineligibility subject to Article 10.3.1 as no plausible explanation has been advanced for the ADRV; The period of ineligibility shall be from the date of the Mandatory Provisional Suspension, 22nd November 2023 to 21st November 2027;

76. All results obtained by the Respondent from the date of Evading, Refusing or failing to submit to Sample Collection, 23rd August 2023, inclusive of points and prizes if any awarded, are hereby disqualified;

77. The Athlete has the right of Appeal as provided under Art. 13.2.1 WADC and Art. 13 ADAK Rules;

v. Each party shall bear its own costs

DATED at **NAIROBI** this 25th day of July 2024



Signed:



Njeri Onyango, FCI Arb
Member, S. D.T.

Signed:

Signed:



Allan Owiny
Member, S. D.T.

Peter Ochieng'
Member, S. D.T.