

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. E019 OF 2024

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

VERSUS

ALFRED BIWOTT CHEMEITOI ATHLETE

DECISION

Panel:

Mrs. Njeri Onyango, FCI Arb – Panel Chair

Mr. Peter Ochieng – Member

Ms. Mary Kimani – Member

Appearances:

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

Mr. Eric Kuria, Advocate from Kirogo Kuria & Co. Advocates for the Athlete.

Abbreviations:

ADAK – Anti Doping Agency of Kenya

ADAK ADR- Anti-Doping Rules 2016

WADA Code- World Anti-Doping Agency Code

DCO- Doping Control Officer

ADAMS- Anti-Doping Administration and Management System.

ISRM- International Standard for Results Management

ISTI- International Standard for Testing and Investigations

Contents

A.	Introduction	3
i.	Parties	3
ii.	Factual Background	3
B.	Parties' Submissions	6
i.	The Applicant's Submissions	6
ii.	The Athlete's Submissions	19
C.	JURISDICTION	19
D.	APPLICABLE RULES	19
E.	MERITS	20
i.	Did the Athlete commit the charged anti-doping rule violation?	20
ii.	Was the violation committed by the Athlete intentional?	20
F.	SANCTIONS	22
i.	Credit for time served under the provisional suspension	24
G.	DECISION	25

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 28th February 2024 presented to the Tribunal by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed 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 21st March 2024;
 - ii. The Applicant shall, at the time when it effects service upon the Respondent, or as soon thereafter as practicable, engage with the Respondent for the purpose of establishing whether or not the Respondent will require pro-bono Counsel;
 - iii. In the event that the Respondent expresses his desire to be represented by pro-bono Counsel, the Applicant will notify the Tribunal's registry and cooperate with the Tribunal in the allocation of pro-bono Counsel to facilitate the effective representation of the Respondent.
 - iv. The panel constituted to hear this matter shall be:
 - a. Mrs. J. Njeri Onyango - Panel Chair
 - b. Peter Ochieng - Member
 - c. Mary Kimani- Member

- v. The matter shall be mentioned on 28th March 2024 at 2.30pm via Microsoft Teams to confirm compliance and for further directions.
4. The matter was mentioned for the first time on 28th March 2024. Mr. Rogoncho was in appearance for the Applicant while the Athlete was absent. Mr. Rogoncho requested for 2 weeks to try get hold of the Athlete; the matter was slated for 11th April 2024 for further mention.
5. At the mention on 11th April 2024 Mr. Rogoncho appeared for the Applicant while the Athlete appeared in person. The Athlete requested for pro bono counsel whom the Secretariat undertook to provide within one week (7 days); ADAK would facilitate collaboration between the Athlete and designated counsel procured by the Tribunal. Matter was set for mention on 25th April 2024 for further directions.
6. During the mention on 25th April 2024, Mr. Rogoncho appeared for the Applicant while Mr. Kuria appeared for the Athlete on pro bono basis. Mr. Kuria informed the Tribunal that he had been served with the charge documents and evidences by the Applicant and he requested fourteen (14 days) to prepare and file responses. The matter was listed for mention on 9th May 2024 for further directions.
7. On 9th May 2024 Mr. Rogoncho appeared for the Applicant while Mr. Eric Kuria was in appearance for the Athlete. Mr. Kuria informed the court that he was yet to file his response as the Athlete's phone has always been on and off hence yet to get instructions; Counsel for the Athlete requested for fourteen (14) more days. There was no objection from Mr. Rogoncho and the matter was set for mention on 23rd May 2023 to confirm compliance.
8. At the mention on 23rd May 2024 Mr. Kuria appeared for the Athlete while Mr. Rogoncho was in appearance for the Applicant. Mr. Kuria informed the

Tribunal that he was yet to file his response; sadly, he said the Athlete was not cooperating therefore he was not in a position to compile and file the response. The Tribunal directed that the Athlete be served with notice to attend before it, purpose of the Athlete's attendance being for the Tribunal to assist pro bono Counsel obtain proper instructions. Mr. Kuria was to serve the Notice upon the Athlete. Next mention was on 30th May 2024.

9. Mr. Rogoncho appeared for the Applicant while Mr. Kuria was in appearance for the Athlete on 30th May 2024. Mr. Kuria tabled the Affidavit of service dated 29th May 2024 confirming the Athlete had been adequately served the Notice for his virtual appearance before the Tribunal on 30th May 2024. Mr. Kuria said that in the face of the Athlete's nonappearance and lack of cooperation he was not able to get instructions from him. Mr. Rogoncho said he would cooperate with Mr. Kuria to get more instructions and requested fourteen (14) days. The matter was listed for 13th June 2024 to establish the status of instructions to pro bono Counsel.
10. During the mention on 13th June 2024, Mr. Kuria appeared for the Athlete while Mr. Rogoncho represented the Applicant. The purpose of the mention was to confirm if the Athlete was cooperating; Mr. Kuria said the Athlete seemed to be taking the matter lightly. Mr. Rogoncho said the Applicant could serve the Athlete once again and then proceed under Code Article 3.2.5 if the Athlete did not attend as requested. The matter was listed for 20th June 2024 for confirmation of service of affidavit and for further directions.
11. On 20th June 2024 Mr. Rogoncho appeared for the Applicant while Mr. Kuria Kirogo appeared for the Athlete. Mr. Rogoncho

informed the court that the Applicant had been unable to serve the Athlete personally while Mr. Kuria said he was unable get any further instructions from the Athlete. The Applicant invoked Code Article 3.2.5. The Applicant was granted fourteen (14) days to file and serve their submissions. Mr. Kuria requested seven (7) days to do further response in case the Athlete did grant him further instructions. The Tribunal directed the matter be listed for 11th July 2024 for compliance.

12. On 11th July 2024 Mr. Rogoncho appeared for the Applicant while Mr. Kuria appeared for the Athlete. Mr. Kuria confirmed receipt of submissions from the Applicant and he said that he did not wish to file any submissions for the Athlete. Both parties requested for a judgment date. The Tribunal directed that the decision be rendered on 25th July 2024.

B. Parties' Submissions

i. The Applicant's Submissions

13. The Anti-Doping Agency of Kenya wished to adopt and own their Charge Document dated 25th March 2024 and the annexures thereto as an integral part of its submissions.
14. The Respondent herein is charged with an Anti-Doping Rule Violation of *Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone*, contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK ADR).
15. The Respondent is a National Level Athlete and therefore the Result Management authority rests 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.

16. The matter was set down for hearing. The Respondent however did not participate in the proceedings.
17. The matter came up for hearing, and the Respondent was 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)

18. The Respondent is a male Athlete hence the World Athletics (hereinafter WA) competition rules², WA Anti-Doping Regulations³ the World Anti-Doping Code (hereinafter WADC)⁴ and the Anti-Doping Agency of Kenya Anti-Doping Rules (hereinafter ADAK ADR) apply to him.
19. On 12th November 2023, a CHINADA Doping Control Officer ("DCO") collected a urine Sample from the Athlete during the Nanchang Marathon 2023. Assisted by the DCO, the Athlete split the Sample into two separate bottles, which were given reference numbers A 6540879 (the "A Sample") and B 6540879 (the "B Sample") in accordance with the Prescribed WADA procedures.
20. Both Samples were transported to the World Anti-Doping Agency - ("WADA") - accredited Laboratory in Belgium, DoCoLab Universiteit Gent-UGent (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*, which is listed as an exogenous Anabolic Steroids (AAS) under S1.1 of WADA's 2023 Prohibited List.

21. The findings were communicated to the Respondent Athlete by Peninah Wahome, for the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 5th February 2024. In the said communication the Respondent was offered an opportunity to provide an explanation for the same by 25th February 2024.
22. The same letter also informed the athlete of his right to request for the analysis of the B-Sample; and other avenues for sanction reduction including elimination of the Period of Ineligibility where there is No fault or Negligence, Reduction of the Period of Ineligibility based on No Significant Fault or Negligence, Substantial Assistance in Discovering or Establishing Code Violations, Results Management Agreements and Case Resolution Agreements.
23. 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.
24. 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.
25. 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.
26. A charge document was prepared and filed by ADAK's Advocates, and the Respondent failed to present a response thereto within the specified timeline of 25th February 2024.

27. The matter went through a 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 by the parties.

II. LEGAL POSITION

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

III. PRESUMPTIONS

29. 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

30. 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 and Anti- Doping rule violation within the previous 10 years,
- f. To cooperate with Anti-Doping organizations investigating Anti-Doping rule violations.

31. 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

32. 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

33. The Respondent is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. *S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone* is a Non-Specified Substance and attract a period of ineligibility of 4 years.

34. 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.

35. 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.

36. The Applicant urged the Tribunal to find that an ADRV has been committed by the Respondent Athlete herein.

VII. INTENTION

37. It was the submission of the Applicant that as used in clause 2.1 and 20.3 of the WADC 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."

38. The Applicant submitted that the evidential burden of proving intention is codified in the WADC by the comment to Article 10.2.1 which states: *"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."*
39. The Applicant submitted that the athlete has not established nor provided any evidential proof of the source of the prohibited substance. 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:

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".
40. 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.

41. It was 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.
42. The Applicant averred that the Respondent was duly notified of the procedural steps and his 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 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.
43. 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, did not prove beyond reasonable doubt that there was any form that there was a departure from the international standards for testing and investigations and the international standards for laboratories.

44. 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

45. The Respondent didn't participate in these proceedings thus no explanation was provided for how the prohibited substance *S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone* entered his system.
46. In that regard, we do submit that the origin of the prohibited substance has not been established.

IX. FAULT/NEGLIGENCE

47. 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.
48. The Applicant submits that the Respondent has a personal duty to ensure that no prohibited substance enters their body. In the instant case the athlete did not take any tangible precautions to ensure that whatever he

ingested did not contain any prohibited substance. He acted negligently and is therefore at fault.

49. It was the Applicant's argument that it was clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him as a national level athlete. He was grossly negligent.

X. KNOWLEDGE

50. 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 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.
51. It was the Applicant's submission that 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.
52. Further, the Applicant contended that the Respondent has had an expansive career in athletics participating at both the national and international level, and it is evident that (s)he has had exposure to the campaign against doping in sports.
53. The Applicant averred 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.

54. The Applicant submitted 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

55. 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.
56. 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.
57. 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”.

58. It was the Applicant’s 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.
59. 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”.
60. It was 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.

61. It was 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

62. 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.

63. The Applicant submitted that what they found were ideal considerations while sanctioning the Respondent namely:

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 his 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.

64. 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.

65. It was the Applicant's 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

66. The Athlete appeared in person only once; the Athlete stopped cooperating with the pro bono Counsel he had requested be appointed by the Tribunal to represent him before the it. In this regard, there were no responses and/or submissions tabled before the Panel on behalf of the Athlete.

C. JURISDICTION

67. 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.

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

D. APPLICABLE RULES

69. 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?**

70. The Applicant's prosecution is based on the charge of:

Presence of a prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone,

as outlined at para. D.10 of the Applicant's Charge Document dated 31st January 2024.

71. There was no response(s) recorded from or for the Athlete according to records held at the Tribunal. The Athlete did appear once on 11th April 2024 before the Tribunal. On that occasion the Athlete requested for and was granted pro bono Counsel. However, thereafter the Athlete did not give instructions to his Counsel who unable to file any response on behalf of the Athlete reported the state of affairs to the Tribunal.

72. Further, the Respondent Athlete did not request for a Sample B analysis thus waiving his right to the same under WA Anti-Doping Regulations 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. (Our Emphasis)

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

73. On the issue of intention, the substances found in the Athletes body being Non-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 of adducing evidence of how the prohibited substance got into his system. The Respondent Athlete in this matter, however, did not provide an alternative explanation supported with concrete evidence of how the prohibited substance entered his system.

74. The Respondent when requested to respond to the charge presented instead steadfastly remained non-responsive; this was despite numerous notices served on him including by his own Counsel – as evidenced by the Affidavit of Service dated 29th May 2024 filed by the pro bono Counsel at the Tribunal. The Athlete did not respond to any communication up to the time of writing of this decision.

75. 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.

76. 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.

77. 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.

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

F. SANCTIONS

79. Regarding sanction, 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." (Our Emphasis)

This Panel reminds itself that the substance established in the Athlete's body was a Non-Specified Substance therefore WADC/ADAK ADR's Article 10.2.1.1 was applicable in relation to the Athlete's ADRV and not Article 10.3.3 as pleaded by the Applicant in its para.53 of its written submissions.

80. The WADC & 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 2.1, 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.⁵⁸

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.]

81. 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

82. Further Article 10.7 provides:

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

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

84. 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.*⁷³

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

85. 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.

86. The aforementioned notwithstanding, WADC's/ADAK ADR's Article 3.2.5 stipulates:

The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.

87. 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 to answer questions from the hearing panel 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 wilfully and intentionally absconded the hearing process in terms of WADC's Article 3.2.5.

G. DECISION

88. Consequent to the discussion on the merits of this case, the Panel orders:
89. The period of ineligibility shall be **four (4) years**;
90. The period of ineligibility shall be from the date of the Provisional Suspension for a period of four (4) years starting **25th February 2024 to 24th February 2028**;
91. Disqualification of any and/or all of the Athlete's competitive results from **12th November 2023**;
92. Each party shall bear its own costs;
93. The right of appeal is provided for under Article 13 of the ADAK ADR and the WADA Code.

Dated at Nairobi this 25th day of July 2024



Mrs. Njeri Onyango FCI Arb, Chairperson



Mr. Peter Ochieng, Member



Ms. Kimani Mary, Member

