

REPUBLIC OF KENYA



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IN THE SPORTS DISPUTES TRIBUNAL AT NAIROBI

SDTADK NO. E020 OF 2024

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

-VERSUS-

HEZRON KARANJA.....RESPONDENT

DECISION

PANEL:

- | | |
|--------------------------|---------------|
| 1. MRS. ELYNAH SHIVEKA | - PANEL CHAIR |
| 2. MR. ALLAN MOLA OWINYI | -MEMBER |
| 3. MR. GABRIEL OUKO | -MEMBER |

COUNSEL APPEARING:

MR. BILDAD ROGONCHO- COUNSEL FOR ADAK/ APPLICANT

NO APPEARANCE FOR THE RESPONDENT

1. ABBREVIATIONS AND DEFINITIONS

The following abbreviations used herein have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR- Anti- Doping Rule

ADRV-Anti- Doping Rule Violation

WA- World Athletics

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.

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2. 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 proceeding by Mr. Rogoncho Advocate
2. The Respondent is a male adult of presumed sound mind, a national and athlete, not represented in these proceedings

3. THE CHARGE

3.1 The Anti-Doping Agency has charged the Respondent as an athlete with the charge of; -

“Presence of a prohibited substance S9. Glucocorticoids triamcinolone acetonide ”

3.2. **S9. Glucocorticoids triamcinolone acetonide** is listed under S9 of WADA’s 2023 Prohibited List

4. BACKGROUND

4.1. On 26th November 2023, during a marathon competition in China, a CHINADA Doping Control Officer (“DCO”) collected a urine Sample from you. Assisted by the DCO, you split the Sample into two separate bottles, which were given reference numbers A 6541398 (the “A Sample”) and B 6541398 (the “B Sample”).

4.2. Both Samples were transported to the World Anti-Doping Agency (“WADA”) accredited Laboratory in France, Laboratoire AntiDopage Français (the “Laboratory”). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA’s International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding (“AAF”) for **S9. Glucocorticoids triamcinolone acetonide**.

4.3. The findings were communicated to the respondent athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and

mandatory Provisional Suspension dated 5th February 2024. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 25th February 2024.

4.4 On 28th February 2024 a notice of charge was presented to the Tribunal by Mr. Bildad Rogoncho, on behalf of the Applicant. The following were the Tribunal's directions dated the same day:

- i. The Applicant shall serve the notice to charge, the notice of ADRV, the Doping Control Form, this direction No.1, and all relevant documents on the respondent, by 21st March, 2024;
- ii. The Applicant shall engage with the Respondent for the purpose of establishing whether the respondent would require Pro bono counsel;
- iii. The panel constituted to hear this matter shall be as follows;
 - a. Elynah Shiveka, Panel Chairperson,
 - b. Gabriel Ouko, Member,
 - c. Allan Mola Owinyi, Member
- iv. The matter to be mentioned 28th March 2024 to confirm compliance and for further directions.

4.5. During the mention on 28th March 2024, Mr. Rogoncho informed the Tribunal that they had been unable to locate the Athlete and hence unable to serve. Mr. Rogoncho prayed for Fourteen (14) days to try trace the athlete. The Tribunal granted the request and set the next mention to be on 11th April 2024.

4.6. At the mention on 11th April 2024, Mr. Rogoncho informed the Tribunal that he was experiencing difficulties in contacting the athlete. He explained that the telephone contact provided on the Doping Control Form was registered to a different Kenyan individual in China. He requested for more time to engage Athletics Kenya to assist in providing contact details for the athlete. The Tribunal granted the request and set the next mention for 2nd May 2024.

4.7. During the mention on 2nd May 2024, Mr. Rogoncho for ADAK informed the Tribunal that despite seeking the assistance of Athletics Kenya to trace the athlete

the efforts had proved futile. He requested for one final adjournment to attempt at tracing the said athlete. The Tribunal granted the request for adjournment. Further, the Applicant was requested to file a Comprehensive Affidavit of Service on efforts made to trace the Athlete. The next mention was set for 23rd May 2024.

4.8. During the mention on 23rd May 2024, Mr. Rogoncho informed the Panel that the purpose of the mention was to confirm filing of a Comprehensive Affidavit of Service. He confirmed the Applicant had filed the same. He also informed the Panel that despite best efforts they had been unable to trace the athlete. He requested to be allowed to proceed under Article 3.2.5. of the ADAK ADR.

The Tribunal hereby directs and orders as follows;

1. The Applicant to file their written submissions as the matter will proceed under 3.2.5 of ADR;
2. That this matter will be mentioned on 13th June 2024 at 2:30 pm to confirm filing of submissions and set a date for decision.

4.9. At the mention on 13th June 2024, Mr. Rogoncho for ADAK confirmed that the submissions had been filed and was now seeking a date for the decision from the Panel. The Tribunal granted the date for rendering the decision as 25th July, 2024 at 2.30pm.

5. SUBMISSIONS BY ADAK

5.1. ADAK's submissions were filed on 11th June 2024. The Respondent is stated to be a national level athlete, and thus the WA Competition rules, the WADC and ADAK ADR apply to him.

5.2. ADAK submitted that they had met the requirements of Article 3.2 and had to the required standards and methods established the fact of an ADRV by the Respondent. That there was analytical proof of the presence of a prohibited substance in the Respondent's Urine sample.

5.3. ADAK further submitted that the Respondent under Article 2.1 had to take responsibility in context of Anti-Doping, for what he ingested and used.

5.4. It was ADAK's position that where use and presence of a prohibited substance has been demonstrated, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an ADRV.

5.5. ADAK further submitted that Article 10.2.1 shifts onus to the athlete to demonstrate no fault, negligence or intention, in order to be a beneficiary of reduction of the 4 years' ineligibility sanction set out in Article 2.1.

5.6. On origin, the Respondent didn't participate in these proceedings thus no explanation was provided for the origin of the prohibited substance and therefore the origin has not been established.

5.7. On intention, ADAK submitted that for an ADRV to be committed non-intentionally, the Respondent must prove on a balance of probability that the ADRV was not intentional. ADAK relied on **CAS 2019/A/6213 World AntiDoping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková** the panel in paragraph 2 asserted that:

5.8. "The athlete bears the burden of establishing that the violation was not intentional. Lack of intention cannot be inferred from protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete's clean record. The submissions, documents, and evidence on behalf of the athlete must be persuasive that the occurrence of the circumstances which the athlete relies on is more probable than their non-occurrence. It is not sufficient to suggest that the prohibited substance must have entered his/her body inadvertently from some supplements or other product. Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete, or that the specified product claimed to be taken, contained the substance in question. Absent any proof of purchase, information as to the specific type of supplement used, by whom it is produced, etc. and absent any disclosure of the food

supplement on the doping control form, there is no element substantiating the athlete's contention that s/he did use that product or that it was contaminated".

5.9. ADAK further submitted that since proof of source is a critical first step in exculpation of intent, the Respondent's inability to establish how the prohibited substance entered his body, raises questions regarding his intention when he was in contact with the prohibited substance.

5.10. ADAK submitted that the likelihood of the Respondent establishing a lack of intent without providing a source would be extremely difficult.

5.11. ADAK submitted that the respondent was duly notified of the procedural steps and his rights in accordance with ADAK rules and WADA code. However, the Respondent's non-participation in these proceedings means that he failed to provide an alternative plausible explanation disproving his intent when she ingested the prohibited substance.

5.12. ADAK submitted that in view of his nonparticipation in these proceedings the Respondent didn't discharge his burden on a balance of probabilities, moreover an athlete with clean hands who faces an imminent four-year ban would leave no stone unturned in his quest to prove his innocence and non-intention to dope. The Respondent in this case, however, chose not to participate, and many questions regarding his intention remain unanswered.

5.13. ADAK further submitted that the Agency's burden of proof is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids. If the Agency is successful in proving this requirement, there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such offence.

5.14. It was ADAK's submission that an offence has therefore been committed as it was established that a prohibited substance was present in the athlete's tissues or fluids. There is thus a legal assumption that the Respondent is responsible for the mere presence of a prohibited substance, regardless of the intention of the athlete to commit such an offence

5.15 On the question of fault/negligence ADAK placed reliance on ADAK ADR 2.1.1 & 2.1.3. The Respondent has responsibility to be knowledgeable and comply with the ADAK ADR but was negligent in discharging such responsibility.

5.16. ADAK urged this panel to apply the principle of strict liability in this instance placing reliance on **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.”

5.17. The applicant contends that the Respondent in this case fell short of the no fault or negligence threshold due to his failure to exercise a high level of diligence expected from an athlete to avoid taking a prohibited substance. The Respondent has also failed to show the steps he took to ensure that the prohibited substance wasn't found in his system.

5.18. ADAK considers that the following relevant issues have arisen and should be considered in setting the sanction.

- a) The ADRV has been established as against the athlete
- b) The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint herself with anti-doping policies.
- c) The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADVR was a result of his negligent acts.

5.19. Therefore, it was ADAK's submission that the panel should consider the sanction provided in Article 10.3.3 of the ADAK Rules and sanction the athlete to a period of ineligibility of four (4) years.

6. JURISDICTION

The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following laws

- a) Sports Act, No. 25 of 2013 under Section 58
- b) Anti-Doping Act, No. 5 of 2016, under section 31(a) and (b), (as amended from time to time).
- c) ADAK Anti-Doping Rules, under Article 8.

In the circumstances, the Tribunal assumes jurisdiction from the above-mentioned provisions of Law.

7. APPLICABLE RULES

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.

8. MERIT

8.1. In the absence of participation by the Athlete, the following issues are uncontested.

- a) That the urine sample was collected from the Athlete on the 31st of August 2023.
- b) That there is no indication of previous ADRV by the Athlete.
- c) That a notice of charge was issued by the Applicant's Chief Executive Officer, dated the 5th February 2024 and that in the said communication the

Athlete was offered an opportunity to provide an explanation for the ADRV by the 25th February 2024, but no response was received from the Athlete despite the said charge document having been sent to the Athlete's known E-mail address and telephone number as contained in the doping control form.

8.2. On the question; Did the Athlete commit the charged anti-doping rule violation? The Applicant's prosecution is based on the provisions of the act which is as follows; **"Presence of a prohibited substance S9. Glucocorticoids triamcinolone acetonide". D7 of the charge documents, Dated 25 March 2024.**

8.3. In the charge document, the Applicant has indicated that there was no known Therapeutic Use Exemption (TUE) recorded at the IAAF for the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards for Laboratories which may have caused adverse analytical findings. The Applicant further submitted that they failed to respond to charges within the specified time as set out in the notification of charge and also, upon the respondent being served with the charge document in the current proceedings.

8.4. This panel has reviewed the Affidavit of Service filed by the Applicant at the request of the Tribunal to confirm effective service of the charge document. Having done so, the Panel is satisfied that much effort was put in by the Applicant to contact the Respondent via all known means, including through the telephone number provided. The Affidavit in question is deepened by Mr. Stanley Mwakio and is deponed on the 23rd May 2024 and filed at the Tribunal on the 23rd May 2024.

8.5. The Applicant had also submitted that despite being notified of the adverse analytical finding by the Applicant, the Respondent did not request for the analysis of Sample B and therefore waved his right of analysis of the same.

8.6. Further, WC, WADC and ADAK ADAR articles 2.1.2 states as follows; Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following; Presence of a prohibited substance or its metabolites or markers in the Athlete's sample, A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or where the Athlete's B sample is analyzed and the analysis of the Athlete's B sample confirms the presence of the prohibited substance or its metabolites or markers in the Athlete's sample. Without a contrary analysis of the Athlete's A sample, then the presence of the prohibited substance in the Athlete's sample has been demonstrated by the Applicant as argued by the Applicant. Where use and presence of a prohibited substance has been demonstrated, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an ADRV.

8.7. The Panel is satisfied that proper service was effected on the Respondent who failed to respond. And in the circumstances, the Panel is comfortably satisfied that the Applicant has established that the Athlete in this matter has committed an ADRV.

8.8. On the question; Was the violation committed by the Athlete intentional (especially where an unspecified substance is involved)? The Code places the burden of proof upon the Athlete to rebut a presumption or establish specific facts or circumstances, and the standard of proof shall be by balance or probability. In the present circumstances, in the absence of the athletes' participation or any document to the contrary, the presumption would be that the specified facts and circumstances have not been controverted.

8.9. In the absence of any response from the Respondent, it would not be necessary to go into the issues of whether the ingestion of the substance was intentional or otherwise or whether to assess the degree of fault or not at all. It is the position of the Panel, therefore, that the existence of The ADRV has been sufficiently demonstrated to the required degree by the Applicant.

9. SANCTIONS.

9.1. It was the submission by the Applicant 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 committed intentionally. If Article 10.2.1 does not apply, the period of eligibility shall be two years. It was further submitted that Article 10.4 creates 2 conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an Athlete who is in breach of Article 2.1. These are; that the Athlete must establish how the specified substance entered his or her body, or that the Athlete did not intend to take the specified substance to enhance his or her performance. It is only if those two conditions are met that the Athlete can benefit from a reduction in the period of ineligibility.

9.2. The Applicant's position in the submissions is that the Athlete in the current case has not discharged the burden by any degree to warrant reduction of the sanction specified. And as a consequence of the Respondent's lack of participation in these proceedings, no explanation has been provided for how the prohibited substance got into his system and therefore, the first venue to warrant reduction of a sentence is excluded. The Applicant further submitted that on the second limb, the Respondent would also not in the absence of intentionally setting out intentions, have any ground to establish the level of degree of fault and that the same assessment is not applicable in the present circumstances. Therefore, at the end, the Applicant submitted that there are no grounds in the current proceedings to warrant any reduction of the sentence.


9.3. The Panel's position is that the breach of the relevant code requirements has been committed. There being no response by the Respondent to dispel that position, the Panel also considers that there is a duty upon the Respondent to acquaint themselves with the requirements of Anti-Doping Rule violations and to be responsible for what is ingested. It is the Panel's finding that in the absence of

a response, there are no circumstances to grant the Respondent any reduction in the specified period of ineligibility. The Panel also makes the following findings:

1. WADC's Article 10.13.2 provides that credit may be awarded for the Provisional period of suspension served by an Athlete as against the period of ineligibility that they are sanctioned.
2. The panel has not been informed that there has been any Breach of the period of mandatory suspension by the Respondent.

10. DECISION.

Consequent to the discussions on merits above, the Panel orders are as follows.

- a) The period of ineligibility shall be four (4) years;
- b) The period of ineligibility shall be from the date of the provisional suspension and therefore commences on the 25th February 2024 to the 24th February 2028;
- c) Any and or all competitive results by the Respondent effective the 26th of November 2023 are hereby disqualified;
- d) Each  shall bear its own costs;
- e) The right of Appeal is provided for under Article 13 of the ADAC, ADR and the WADA Code.

Dated at **Nairobi**, this 25th day of July 2024.

Signed:



Elynah Shiveka
Panel Chairperson

