CAS 2017/A/5157 World Anti-Doping Agency v. Africa Zone V Regional Anti-Doping Organization & Anti-Doping Agency of Kenya & Athletics Kenya & Sharon Ndinda Muli

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Sole Arbitrator: Prof. Jens Evald, Professor in Aarhus, Denmark, Sole Arbitrator

in the arbitration between

WORLD ANTI-DOPING AGENCY, Montreal, Canada
Represented by Mr Ross Wenzel and Nicolas Zbinden, Attorneys-at-Law, Kellerhals Carrard, Lausanne Switzerland

Appellant

v.

THE AFRICA ZONE V REGIONAL ANTI-DOPING ORGANIZATION, Kenya
Represented by Mr Erick Gekonde Omariba and Ms Damaris Ogama Alukwe, Attorneys-at-Law, Nairobi, Kenya

First Respondent

and

THE ANTI-DOPING AGENCY OF KENYA, Kenya
Represented by Mr Erick Gekonde Omariba and Damaris Ogama Alukwe, Attorneys-at-Law, Nairobi, Kenya

Second Respondent

and

ATHLETICS KENYA, Kenya
Represented by Mr Elias J. Masika, Attorney-at-Law, Triple Ok Law, Nairobi, Kenya

Third Respondent

and

SHARON NDINDA MULI, Kenya

Fourth Respondent

I. PARTIES

1. The World Anti-Doping Agency (the "WADA" or the "Appellant") is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The Appellant is an international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.

2. The Africa Zone V Regional Anti-Doping Organization (the "RADO" or the "First Respondent") is the body charged with the implementation of the World Anti-Doping Code in the countries in Africa who are members of Zone V and undertakes the result management process on behalf of the Anti-Doping Agency of Kenya.

3. The Anti-Doping Agency of Kenya (the "ADAK" or the "Second Respondent") is the National Anti-Doping Organization of Kenya.

4. Athletics Kenya (the "AK" or the "Third Respondent") is the governing body for athletics in Kenya and it is a member of the International Associations of Athletics Federation (the "IAAF") and Confederation of African Athletics.

5. Ms Sharon Ndinda Muli (the "Athlete" or the "Fourth Respondent") is a Kenyan middle distance athlete affiliated to Athletics Kenya.

II. FACTUAL BACKGROUND

6. Below is a summary of the relevant facts and allegations based on the parties' submissions on the merits of this appeal. Additional facts and allegations found in the parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain its reasoning.

7. On 29 April 2016, the RADO undertook an in-competition doping control on the Athlete after she won the 400m race at the Kenya Defence Forces Championship in Nairobi, Kenya (the "Competition").

8. The analysis of the A Sample revealed the presence of 19-norandrosterone and its metabolite 19-noretiocholanolone in excess of the prescribed Decision Limit of 2.5 ng/mL.

9. 19-norandrosterone and its metabolite 19-noretiocholanolone are Endogenous Anabolic Androgenic Steroids prohibited under S1.1b of the 2016 World Anti-Doping Agency (the "WADA") Prohibited List.
10. The exogenous origin of the 19-norandrosterone was confirmed by Isotope-Ratio Mass Spectrometry ("IRMS") analysis.

11. The Athlete waived her right to the analysis of the B Sample and has not sought to deny or contest the Adverse Analytical Finding (the "AAF").

12. On 30 March 2017, the Sports Disputes Tribunal of Kenya rendered a Decision (the "Decision") pursuant to the RADO Anti-Doping Rules (the "RADO ADR") (i) imposing a one-year period of ineligibility starting on the date of the Athlete's provisional suspension *viz.* 6 December 2016 and (ii) disqualifying the Athlete's results (including prize money) at the Competition. In its Decision, the Sports Disputes Tribunal, *inter alia*, stated the following:

"9.9 Muli also elected to go for a hearing on consequence. She did not challenge the AAF but was not able to provide any adequate reason for the presence of the prohibited substance in line with applicable RADO ADR (or WADA Code). She has however been very cooperative with RADO in promptly admitting her guilt. Given her education level and lack of knowledge and exposure the panel is of the view this can be used or taken into account when considering her fault and determining the consequences of the ADRV.

9.10 In assessing the matter before the panel, and the RADO ADR, we find there is room for reduction in the period of ineligibility. As was held in ***CAS 2015/A/3979*** *[...], where there is no noted intentional use of prohibited substance, the circumstances through which the substances entered the body have been explained and there has been no attempt to hide and since this is a first time violation (Rule 40.4). Further, RADO did not adduce evidence to show that the Athlete's use of the Specified Substance was intentional. The athlete has fully cooperated with RADO and willingly submitted herself to the consequences.*

9.11 In the case [...] ***CAS 2009/1930*** *in Paragraph 2.36 the tribunal considered the consequences of a reduced sentence of one year for cocaine metabolites and found that with the evidence at hand, a very serious injustice would be done on the player if a period of one year imposed on the right to practice his profession. Similar to Muli, this would result in her sacking from the armed forces and loss of her only source of earning a living.*

9.12. In the case of [...] ***CAS 2013/A/3335*** *it was held under paragraph 107 that "...this is not a doping offence at the most serious end of the scale. But neither is it a venial offence." Weighing the factors tending to increase or decrease the degree of Muli's fault based on similar fact of self-prescribed medicine from pharmacy we have come to the conclusion that the appropriate period of ineligibility should be reduced.*

9.13 Consequently, the sanction applicable to Muli under Aticle 10.2.1 of the RADO ADR shall be a period of ineligibility of one (1) years with effect from the date of the Provisional Suspension which is 6th December 2016 [...]"

13. WADA was notified by the RADO with certain documents of the case file to the Decision on 9 May 2017.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 30 May 2017, the Appellant filed its Statement of Appeal against the Sports Disputes Tribunal Decision with the Court of Arbitration for Sport (the "CAS") in accordance with Article 47 et seq. of the Code of Sports-related Arbitration (the "Code"). The Appellant informed that the Statement of Appeal should be considered as the Appellant's Appeal Brief for the purposes of R51 of the Code. The Appellant requested that the present case be submitted to a Sole Arbitrator.

15. On 31 May 2017, the CAS Court Office acknowledged the receipt of the Statement of Appeal and invited the Respondents to submit to CAS an Answer within twenty days of receipt of the letter pursuant to Article R55 of the Code. In its letter of the same date, the CAS Court Office invited the Sports Disputes Tribunal of Kenya to file with the CAS an application within ten days of receipt of the letter if it intended to participate as a party in the present arbitration pursuant to Articles R52 para. 2 and R41.3 of the Code.

16. On 6 June and 8 June 2017, the Second Respondent and the Third Respondent, respectively, confirmed that they agreed to the appointment of a Sole Arbitrator. The Fourth Respondent did not comment in this regard.

17. On 15 June 2017, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator pursuant to Article R50 of the Code.

18. On 21 June 2017, the First and Second Respondent filed their Answer.

19. On 21 June 2017, the CAS Court Office noted that the Sports Disputes Tribunal did not wish to participate this procedure as a party and asked it to provide the CAS Court Office with an unmarked copy of the Decision.

20. On 26 June 2016, the Judiciary Office of the Sports Disputes Tribunal filed a complete copy of the Decision with the CAS Court Office and confirmed that it did not intend to participate as a party to this arbitration.

21. On 27 June 2017, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that the Panel had been constituted as follows: Mr. Jens Evald, Professor in Aarhus, Denmark.

22. On 30 June 2017, the Third Respondent requested an extension of seven days to file a late answer together with supporting documents, as the Third Respondent did not take part in the proceedings that was subject to the present appeal and therefore did not receive a copy of the Decision until 28 June 2017.

23. On 30 June 2017, the CAS Court Office reminded the Third Respondent that a copy of the Decision was attached the Appellant's Statement of Appeal/Appeal Brief which was served on the Third Respondent by courier on 2 June 2017. Notwithstanding, the other Parties were invited to state whether they agreed to the Third Respondent's request to file a late answer within three days and that a party's silence would be deemed acceptance of such request.

24. No party objected to the Third Respondent filing a late answer.

25. On 6 July 2017, the CAS Court Office received by email the Third Respondent's answer (without exhibits).

26. On 19 July 2017, the Parties were invited to inform the CAS Court Office within five days whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an Award based solely on the Parties' written submissions.

27. The Fourth Respondent did not submit an Answer.

28. On 22 July 2017, the First and Second Respondent informed the CAS Court Office that they preferred to have hearing in the present case.

29. On 24 July 2017 to the CAS Court Office, the Third Respondent stated that it *"is ready to proceed with the hearing herein in any such manner as the Court may direct"*.

30. On 24 July 2017 to the CAS Court Office, the Appellant noted that in view of the fact that the Athlete had failed to file an Answer and *"the three institutional respondents appear largely to support WADA's appeal",* WADA's preference was that this matter be decided on the basis of the Parties' written submissions.

31. On 31 July 2017, the CAS Court Office advised the Parties that the Sole Arbitrator, having considered the parties' submissions and their respectively positions on whether a hearing was needed, deemed himself sufficiently well informed to render a decision in this appeal without a hearing in accordance with Article R57 of the Code.

32. On 8 and 11 August 2017, the Appellant and Third Respondent, respectively, signed and returned the Order of Procedure. The First, Second, and Fourth Respondent did not return a signed Order of Procedure or otherwise object to its contents.

IV. PARTIES' SUBMISSIONS

A. The Appellant's submissions

33. The Appellant's submissions, in essence, may be summarized as follows:

- An anti-doping violation occurred on basis of Article 2.1 of the RADO ADR, which is not disputed by the Athlete.

- According to Article 10.2.1.1 of the RADO ADR, the period of ineligibility shall be four years.

- The anti-doping rule violation (the "ADRV") involves a non-specified substance prohibited at all times. In order to reduce the sanction, the Athlete must establish that the ADRV was not intentional and therefore follows that the Athlete must establish how the substance entered her body.

- Even if an Athlete in exceptional cases might be able to demonstrate a lack of intent when he/she cannot establish the origin of the prohibited substance, there are no exceptional circumstances in this case which show to the relevant standard of proof that the ADRV was not intentional.

- The Athlete is required to prove the origin of the prohibited substance on the "balance of probability" and it is clear from abundant CAS case law that an athlete must provide concrete evidence to demonstrate that a particular supplement, medication or other product that the Athlete took contained the substance in question.

- The Athlete's explanation that she had been taking, in the seven days before the doping control, a number of over-the-counter medications to treat a heel problem is unsubstantiated.

- The Sports Disputes Tribunal recognized that the Athlete had failed to even substantiate her claim that she was suffering from a heel problem. More fundamentally, none of the medications or products she disclosed on the Doping Control Form contain either of the prohibited substances detected in her Urine Sample.

- This notwithstanding, the Sports Disputes Tribunal imposed only a one-year period of ineligibility on the Athlete. The Panel did not even identify the provision in the

RADO ADR which was the basis for the reduction of the default four-year sanction but rather referred to a number of CAS decisions that are entirely irrelevant.

- As the Athlete has clearly failed to identify the origin of the prohibited substance in her system and there are no exceptional circumstances that might otherwise negate the presumed intentionality of the ADRV, she must be sanctioned with a four-year period of ineligibility.

- The Appealed Decision is manifestly flawed and so erroneous and ill-reasoned that WADA had no choice but to appeal it. RADO acted as the result management authority and prosecuted the case before the Sports Disputes Tribunal and the latter heard the case by delegation from the RADO, which itself was apparently undertaking the result management by delegation from ADAK. It is therefore ADAK and/or RADO that must bear the responsibility for the Appealed Decision and suffer the costs of these CAS proceedings in the event that WADA prevails.

34. The Appellant makes the following requests for relief, asking the CAS:

1. The Appeal of WADA is admissible.

2. The decision rendered by the Sports Disputes Tribunal on 30 March 2017 in the matter of Ms. Sharon Muli is set aside.

3. Ms. Sharon Muli is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Ms. Sharon Muli before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

4. All competitive results obtained by Ms. Sharon Muli from and including 29 April 2016 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

5. The arbitration costs shall be borne by ADAK and RADO jointly and severally or, in the alternative, by all the Respondents jointly and severally.

6. ADAK and RADO jointly and severally or, in the alternative, all the Respondents jointly and severally, shall be ordered to pay WADA a significant contribution to its legal and other costs in connection with these appeal proceedings.

B. The First and Second Respondents' submissions

35. The First and Second Respondents' joint submission, in essence, may be summarized as follows:

- The First and Second Respondents confirm and state, *inter alia,* the following:

  - Confirm the presence of a prohibited non-specified substance or its metabolites in the Athlete's Urine Sample, which constitutes an ADRV.

  - State that the Athlete did not have any record of a Therapeutic Use Exemption to justify the presence of the prohibited substance.

  - Confirm the statement that the period of ineligibility shall be four years where the ADRV does not involve a specified substance.

  - Note that as to the period of ineligibility best suited for the Athlete, Article 10.2.2 of the RADO ADR should apply instead of the sanction given by the Sports Disputes Tribunal.

  - State that they diligently and carefully discharged their respective responsibilities and should not be condemned to bear costs.

- As to the determination of the sanction to be imposed on the Athlete, the First and Second Respondents state as follows:

  - That the Sports Disputes Tribunal in its Decision held the Athlete *"did not challenge the AAF but was not able to provide any adequate reason for the presence of the prohibited substance in line with the applicable RADO ADR*".

  - The Sports Disputes Tribunal erred in not considering the nature of the substance as being non-specified thereby giving a sanction for a specified substance.

  - The Sports Disputes Tribunal further erred and misapplied itself by shifting the burden of proof from the Athlete to RADO against the express provisions of Article 10.2.1.1 of the RADO ADR.

  - That whereas the Athlete failed to identify the origin of the prohibited substances in her system and that there were no exceptional circumstances that would otherwise negate the intentionality of the ADRV, the Athlete promptly admitted the ADRV, which may lead to a reduction in the period of ineligibility pursuant to the RADO ADR Articles 10.6.3, 10.2.1 and 10.3.1.

- The First and Second Respondents state that the claims against them are incompetent and misconceived.

36. The First and Second Respondents make the following requests for relief, asking the CAS:

1. The appeal against them be dismissed with costs.

2. *Ms. Sharon Muli is sanctioned with not less than two years of ineligibility starting on the day on which the provisional suspension issued by the Respondents was entered into force.*

3. *The results of April 29, 2016 are disqualified.*

4. *All parties to bear its own legal and other costs in connection with these appeal proceedings.*

C. The Third Respondent's submissions

37. The Third Respondent's submissions, in essence, may be summarized as follows:

- The Third Respondent did not take part in the proceedings with the Sports Disputes Tribunal of Kenya, *"as its role was, at best, one of an Observer"*.

- The Third Respondent states that the Athlete's admission of the offence of doping and her waiver of the right to request the analysis of the B Sample is a sufficient proof of an ADRV under Rule 2.1.2 of the RADO ADR.

- In light of the Athlete's obligation under Rule 2.1.1 of the RADO ADR and the Athlete's admission, *"the burden of proof lay squarely upon the 3rd Respondent, as provided for under Rule 10.4 of the RADO Anti-Doping Rules, to establish that she bore No Fault or Negligence in order to have the period of Ineligibility set under Rule 10.2.1 eliminated"*.

- It is the Third Respondent's contention that the Athlete was grossly negligent in consulting a pharmacist across the counter to prescribe medicines as she stated herein.

- The Athlete should have exercised her right to apply for a Therapeutic Use Exemption *"to support her assertion that the prohibited substance was not intentionally taken to enhance her performance or violate the spirit of the sport of Athletics"*.

- The Third Respondent has not done or failed to do anything in regard to these proceedings and so there is absolutely no basis for the Court to find it liable for costs at all.

38. The Third Respondent makes the following request for relief, asking the CAS:

***WHEREFORE**: The 1st Respondent prays that the appeal herein be allowed but only to the extent that no order of cost should be made as against the 3rd Respondent [...]*

V. JURISDICTION

39. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

40. Pursuant to Articles 13.2.2 *cum* 13.2.3 of the RADO ADR, WADA has a right to appeal against the Appealed Decision to an independent and impartial Anti-Doping Appeal Panel at national level. But in accordance with Article 13.1.3 of the RADO ADR, WADA may side-step an appeal at national level and appeal directly to the CAS. Article 13.1.3 provides as follows:

Where WADA has a right to appeal under Article 13 and no other party has appealed a final decision within the RADO-member Signatory or its Delegate Organization's process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the RADO-Member Signatory or its Delegate Organization's process.

41. Hence, it follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

42. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

43. The Decision was served on the Appellant on 9 May 2017. The appeal was then filed on 30 May 2017. The appeal, therefore, was filed within the 21 days set forth in Article 13.7 of the RADO ADR. The appeal complied with all other requirements of Article R47 of the Code.

44. It follows that the appeal is admissible.

VII. APPLICABLE LAW

45. Article R58 of the Code provides the following:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body, which has issued the challenged decision is domiciled or according to the rules of the law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

46. In accordance with Article R58 of the Code, the applicable regulation to this case is the RADO ADR.

47. As the "seat" of this arbitration is Lausanne, Switzerland, Swiss Law governs all procedural aspects of this proceeding.

48. The Parties have not made any choice regarding which country's substantive rules of law *"subsidiarily"* apply in resolving the merits of this appeal. It is unnecessary for the Sole Arbitrator to make a decision regarding the applicable substantive law because the sole issue raised by this appeal can and will be determined solely with reference to the RADO ADR.

VIII. MERITS

49. The sole issue for determination by the Sole Arbitrator is the appropriate length of the Athlete's period of ineligibility under the RADO ADR. All factual determinations and rulings of the Sports Disputes Tribunal of Kenya that have not been contested by either party in these proceedings and therefore, the Sole Arbitrator treats them as uncontested facts.

50. The Sole Arbitrator will address the issues as follows:

A. The Occurrence of an ADRV and the Standard Sanction

B. Burden and Standard of Proof

C. Was the Athlete's ADRV intentional?

D. Reduction Based on the Athlete's Prompt Admission?

E. Sanctions

A. The Occurrence of an ADRV and the Standard Sanction

51. With regard to the Athlete's ADRV, the Sole Arbitrator notes that it is undisputed that the Athlete's A Sample revealed the presence of the non-specified substance 19-norandrosterone and its metabolite 19-noretiocholanolone in excess of the prescribed Decision Limit of 2.5 ng/mL, cf. the WADA's Prohibited List 2016, S1.1.b, known to be sport performance enhancing.

52. Furthermore, the Sole Arbitrator notes that the Sports Disputes Tribunal of Kenya ruled that an ADRV was established pursuant to Article 2.1 of the RADO ADR, which was not disputed by the Athlete, and is confirmed by the other Respondents in their Answers. This issue is not disputed.

53. With respect to the appropriate period of ineligibility, Article 10.2 of the RADO ADR provides that:

The period of ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional

...

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

54. The Sole Arbitrator notes that the standard sanction for an ADRV involving a non-specified substance is 4 (four) years, unless the Athlete (or other Person) can establish that the ADRV was not intentional.

B. Burden and Standard of Proof

55. In the present case, the burden of proof that the ADRV was not intentional bears on the Athlete, cf. Article 10.2.1 of the RADO ADR and it naturally follows that the Athlete must also establish how the substance entered her body.

56. Pursuant to Article 3.1 of the RADO ADR, the standard of proof is the balance of probabilities:

[...] Where these Anti-Doping Rules place 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, the standard of proof shall be by balance of probability.

57. The Sole Arbitrator notes that this standard requires the Athlete to convince the Sole Arbitrator that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51.

C. Was the Athlete's ADRV intentional?

58. The main relevant rule in question in the present case is Article 10.2.3 of the RADO ADR, that reads as follows:

As used in Articles 10.2 and 10.3, 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 or result in an anti-doping rule violation and manifestly disregarded that risk. 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 unrelated to sport performance.

59. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.

Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional. For specified substances, it is also four years if an ADO can prove the violation was not intentional.

***Note:** Specified substances are more susceptible to a credible, non-doping explanation; non-specified substances do not have any non-doping explanation for being in an athlete's system.*

60. The Sole Arbitrator in the present case aligns with the Panel in CAS 2016/A/4377 *that* the Athlete must establish how the substance entered her body *that* to establish the

origin of the prohibited substance it is not sufficient for an Athlete *"merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question"*.

61. In CAS 2014/A/3820, the Panel made the following comments:

In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide ***actual evidence*** *as opposed to mere speculation. In CAS 2010/A/2230, the Panel held that: [t]o permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body.*

62. In her undated letter to the First Respondent to the notice of an ADRV, the Athlete explains that, *"For a very long time I have experiencing very sharp pain at the bottom of my foot near the heel. Due to the said pain, I was advised to consult a professional for medication. I decided to consult a pharmacist over the counter who prescribed some medicines that will reduce the pain and further lead to full recovery, which medicines were disclosed in my* ***DOPING CONTROL FORM*** *dated 29th April 2016"*.

63. As to the disclosure on the Doping Control Form, the Sole Arbitrator observes, that the Athlete disclosed medication (Amoxyl, Diclomol, PDL, Hydrocortisone injection, X-PEN injection, Tricoff Syrup, Amino, Creatine and Iron Pump) unrelated to the prohibited substance found in the Athlete's A Sample.

64. The Sole Arbitrator notes that the Athlete did not provide any documentation that (i) she suffered from a heel injury, (ii) the heel injury necessitated any particular medication, and (iii) she in fact bought and consumed over-the-counter medication at the relevant time. The Sole Arbitrator holds that the Athlete's explanations are unsubstantiated as they have virtually no evidentiary basis supporting them. The Sole Arbitrator finds, that the Athlete did not prove on the balance of probability how the prohibited substance entered her body or the origin of the prohibited substance.

65. The Sole Arbitrator is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the Panels considered that an Athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. In CAS 2016/A/4676, at para 72, is, *inter alia*, stated that *"the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character*

and history, even if such a situation may inevitably be extremely rare". The Sole Arbitrator finds, however, that there are no exceptional circumstances in the present case which show on the balance of probability that the ADRV was not intentional (without the Athlete having to establish the origin of the prohibited substance).

66. Accordingly, the Sole Arbitrator finds that the Athlete has not met her burden of proof, and the ADRV must be deemed to be intentional. The Athlete must therefore be sanctioned with a four-year period of ineligibility under the RADO ADR.

67. As the Sole Arbitrator has established that the Athlete's ADRV was intentional, the Sole Arbitrator cannot consider the application of Articles 10.2.2 or 10.5.2 of the RADO ADR.

D. Reduction Based on the Athlete's Prompt Admission?

68. The First and Second Respondents contend that the Athlete's four-year period of ineligibility may be reduced as the Athlete promptly admitted to the ADRV. The First and Second Respondent base their contention on the Athlete's response to the First Respondent to the notice of an ADRV: *"This is an unfortunate offence and intended mistake that I am very remorseful for. I am a first time offender and I undertake by stating the mistake shall not be repeated again."* The First and Second Respondents rely on Article 10.6.3 of the RADO ADR, that reads as follows:

10.6.3 *Prompt Admission of an Anti-Doping Rule Violation after being confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1*

An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 [...], by promptly admitting the asserted anti-doping rule violation after being confronted by the RADO-Member Signatory or its Delegate Organization, and also upon approval and at the discretion of both WADA and the RADO-member Signatory or its Delegate Organization, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.

69. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.2 "Prompt admission", p. 24) provides the following guidance:

"Under Article 10.6.3, 'prompt admission' no longer automatically reduces a potential four-year ADRV for an AAF to two years. Now, both WADA and the ADO with results management authority (RMA) must approve a reduction."

70. The Sole Arbitrator notes that WADA has not approved a reduction of the Athlete's four-year period of ineligibility and therefore follows that the Sole Arbitrator cannot consider the application of Article 10.6.3 of the RADO ADR.

E. Sanctions

1. Disqualification

71. Article 10.8 of the RADO ADR reads as follows:

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 the resulting Consequences including forfeiture of any medals, points and prizes.

72. The Sole Arbitrator rules that pursuant to Article 10.8 of the RADO ADR, all competitive results obtained by the Athlete from and including 29 April 2016 (i.e. the date of sample collection) are disqualified, with all resulting consequences, including forfeiture of medals, points and prizes.

2. Period of Ineligibility Start and End Date

73. With respect to the sanction start date, the Sole Arbitrator is guided by Article 10.11 of the RADO ADR which provides as follows:

Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

74. Article 10.11.3 of the RADO ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.

75. In this case, the sample collection was made on 29 April 2016, and according to the Sports Disputes Tribunal Decision, the Athlete was provisional suspended on 6 December 2016. It follows, therefore, that the Appellant should receive "credit" for the period of ineligibility already served. In this regard, the Sole Arbitrator determines that

the Appellant's four-year period of ineligibility shall commence as from the date of her provisional suspension (i.e. 6 December 2016), thus giving her full credit for time already served in accordance with Article 10.1.3 of the RADO ADR.

IX. COSTS

76. Article R64.4 of the Code provides:

At the end of the proceedings, the CAS Court Office shall determine the final amount of the costs of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters.

77. Article R64.5 of the Code provides:

In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.

78. The Sole Arbitrator notes that the First Respondent as a Regional Anti-Doping Organization is responsible for the implementation of the WADA Code in the countries who are members of Africa Zone V, including Kenya. As the National Anti-Doping Organization of Kenya, the Second Respondent is responsible for the results management under the WADA Code and is the only organization permitted to carry out anti-doping activities in Kenya. It follows that the First and Second Respondents are the WADA Code "watchdogs" in Kenya. In the present case, the First Respondent by delegation from the Second Respondent acted as the result management authority and prosecuted it before the Sports Disputes Tribunal. The Sports Disputes Tribunal heard this case by delegation from the First Respondent. Based on the above, the Sole Arbitrator holds that the First and Second Respondents bear the responsibility for the Decision, and ensuring that legally proper and justified decisions are rendered.

79. Considering the outcome of this case (the Appellant's appeal is upheld and the Decision is set aside) as well as the facts set out in the above paragraph, the Sole Arbitrator determines that the costs of this arbitration, to be calculated by the CAS Court Office and communicated to the Parties, shall be borne 40% by the First Respondent, 40% by the Second Respondent, and 20% by the Athlete.

80. For the same reasons, the Sole Arbitrator further determines that the First, Second, and Fourth Respondents shall pay jointly and severally a total amount of CHF 3,000 (three thousand Swiss francs) to the Appellant as contribution for the legal costs and other expenses incurred by the Appellant in these arbitration proceedings.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 30 May 2017 by the World Anti-Doping Agency against the 30 March 2017 Decision rendered by the Sports Disputes Tribunal of Kenya is upheld.

2. The 30 March 2017 Decision by the Sports Disputes Tribunal of Kenya is set aside.

3. Ms Sharon Ndinda Muli is sanctioned with a four-year period of ineligibility starting the date of her provisional suspension (i.e. 6 December 2016).

4. Ms Sharon Ndinda Muli is disqualified from the Kenya Defence Force Championship on 29 April 2016 with all the resulting consequences including forfeiture of any medals, points, and prizes.

5. All results earned by Ms Sharon Ndinda Muli after 29 April 2016 are disqualified, with all resulting consequences.

6. The costs of arbitration, to be determined and notified to the parties by the CAS Court Office, shall be borne by the 40% by Africa Zone V Regional Anti-Doping Organization, 40% by the Anti-Doping Agency of Kenya, and 20% by Ms Sharon Ndinda Muli.

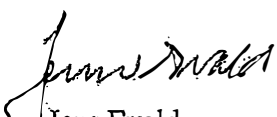
7. The Africa Zone V Regional Anti-Doping Organization, the Anti-Doping Agency of Kenya, and Ms Sharon Ndinda Muli shall pay jointly and severally a total amount of CHF 3,000 (three thousand Swiss franc) to the World Anti-Doping Agency as contribution to its legal costs and other expenses that it has incurred in these proceedings.

8. All further and other requests for relief are dismissed.

Seat of arbitration: Lausanne

Date: 10 October 2017

THE COURT OF ARBITRATION FOR SPORT



Jens Evald
Sole Arbitrator