

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. ADAK 14 OF 2017

IN THE MATTER BETWEEN

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

AND

FLORENCE JEPKOSGEI CHEPSOI.....RESPONDENT

DECISION

Hearing : 14th September 2017

Panel: Mr. John Ohaga - Chair

Ms. Elynah Sifuna - Vice Chair

Mr. Peter Ochieng' - Member

Appearances: Ms. Damaris Ogama from ADAK for the Applicant;
Mr. Allan Magero instructed by the firm of Mutuma Gichuru & Associate Advocates for the Respondent.

THE PARTIES

1. The Applicant is the Anti-Doing Agency of Kenya (hereinafter 'ADAK') a State Corporation established under Section 5 of the Antidoping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, a National Level Athlete whose address of service is through her advocates office.

THE CHARGE

3. The Anti - Doping Agency of Kenya is therefore preferring the following charge against the Athlete: -

Presence of a prohibited substance *Prednisone and Prednisolone* in the athlete's sample in violation of Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2(b) of the IAAF rules.

JURISDICTION

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

HEARING

5. At the hearing ADAK was represented by Ms., Damaris Ogama Advocate while the respondent was represented by Mr Allan Magero.

ATHLETE

6. Counsel for the Respondent submitted that the Respondent was prescribed some medication which she used for a period of time but the situation persisted. He argued that she thought that the problem was a climatic problem and as such she moved to Uasin Gishu District.

There she was prescribed other medicines. He directed the Tribunal to attached prescriptions in both cases.

7. He informed the Tribunal that the Respondent was to take the drugs for two weeks. On the 5th Day of November 2015 she was supposed to take part in a competition in China which was approximately 2 weeks after the completion of the dosage. As part of the requirement, she was to disclose any medication she may have taken any drug in the past 7 days. She disclosed that she had taken diclophenac. She won the race after which a test was taken. The test was found that there was a prohibited substance. The prize money won was 1.5 M shillings. He submitted that considering the kind of medication required to disclose was that of the preceding 7 days, she would have willingly revealed that she had taken the drug in question were it required for her to disclose more than 7 days.
8. He submitted that it should be noted that she is a 1st time offender.
9. With regard to the issue of costs, he submitted that each party be required to bear his own costs, that the suspension be lifted and the prize money released to the Respondent.

ADAK

10. In rejoinder, Ms Ogama submitted that the records confirm that there was an admission of the presence of the substance. She argued that the Respondent has a career for the past 10 years in races. She submitted that having as much experience in the career, she should have known better. She argued that there was no negligence with regard to the prescription of the drug. She argued that counsel has not argued that she took all steps to ensure that the drugs prescribed to her were not in the WADA watchlist.

11. She argued that the taking of the respondent took the drugs intentionally to enhance her performance. She also pointed out that there is no submission that there was anything that may have altered to find the Adverse analytical finding. She submitted that there was negligence on the part of the Respondent that she did not seek TUE with such long history in the career.
12. She said that she is cognizant of the pregnancy of the Respondent.
13. She argued that Prednisone is an S9 and has always been a prohibited substance.

THE RESPONSE

14. In response to Ms Ogama Mr Magero rebutted that on the presumption that the athlete was in the career for 10 years and so she should have known is unfounded. He argued that the Respondent cannot be faulted for the disease that came onto her later in life.
15. He argued further that the said prescription ended on the 18th October 2016 and therefore the form she filled requesting for drugs taken for the previous 7 days could not have compelled her to disclose.
16. On the concentration of the substance found in the Athlete's sample, he submitted that considering that the window period within which she had finished the drugs was 2 weeks, she could not have been held to have had the substance intentionally.

DECISION

17. Article 2 of the ADAK Rules 2016 stipulates definition of doping and anti-doping rule violations.
18. It provides as follows:

The following constitute anti-doping rule violations:

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

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's A Sample* where the *Athlete* waives analysis of the *B Sample* and the *B Sample* is not analyzed; 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* found in the *Athlete's A Sample*; or, where the *Athlete's B Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

19. Under these Rules, an anti-doping rule violation is committed under this Article without regard to an *Athlete's Fault*. This rule has been referred to in various CAS decisions as "Strict Liability". An *Athlete's Fault* is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS. Further, it is understood that The Anti-Doping Organization with results management responsibility

may, at its discretion, choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample.

20. We find Article 10.2 of the ADAK Rules relevant in determining the sentence to be imposed. It stipulates the sanction of Ineligibility where there is Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method. It provides as follows:

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 Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 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.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and ADAK can establish that the anti-doping rule violation was intentional.

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

10.2.3 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 *Used Out-of-Competition* in a context unrelated to sport performance.

21. Against this background, the Tribunal is cognizant of the submission both parties as well as the documentation filed by either to support their case.
22. The Tribunal considers the Respondent's plea that the drugs she took were meant for chest congestion and infections and were at the time of their consumption the WADA list of prohibited substance had not come into operation. We also note importantly that the requirement in the Brescia Art Marathon requested for a disclosure of any substance taken in the preceding 7 days, which did not encompass the date which the Respondent took the prescribed medicine. The Tribunal also considers that the Respondent is a first-time offender.
23. Looking at the prescription for a sanction for a violation under Article 10.2 as highlighted above, the law prescribes that the period of *Ineligibility* for a violation of Articles 2.1, 2.2 or 2.6 shall be as listed thereunder, subject to potential reduction or suspension pursuant to

Articles 10.4, 10.5 or 10.6. We therefore make reference to the said Articles 10.4, 10.5 and 10.6. The relevant provisions provide as follows:

10.4 Elimination of the Period of *Ineligibility* where there is *No Fault or Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.2 Application of *No Significant Fault or Negligence* beyond the Application of Article 10.5.1

If an *Athlete* or other *Person* establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person's* degree of *Fault*, but the reduced period

of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight years.

24. Under Article 10.4, we note that this Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor.
25. Conversely, it is instructive to note that No Fault or Negligence would not apply in the following circumstances:
- a) A positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);
 - b) The Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and
 - c) Sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence

26. Under Article 10.5.1.2, in assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.
27. We note that in this case the Respondent has made a compelling argument in that she was administered a set of drugs by the doctor in Uasin Gishu District Hospital and adduced as evidence FJ2 being receipts of the same. She also adduced as evidence a letter from the same hospital dated 28th August 2017 verifying that indeed she was prescribed the same drugs and indicating what the drugs were meant to cure.
28. The burden of proof in such case is the reasonable satisfaction by the Tribunal. In this case the Panel is satisfied that the Respondent was administered the drugs in terms of her testimony.
29. We also note that indeed the Respondent was expected to disclose any medication she was under 7 days preceding the race. According to her, since she had stopped taking the drugs prescribed to her more than 7 days before, she did not see the need to disclose the prescriptions. It would have been prudent on the part of the Respondent, however, out of abundance of caution, to disclose that she had taken prescribed drugs more than the 7 days as was strictly required.
30. Taking this into consideration, we find that there was No Significant Fault or Negligence on the part of the Respondent.
31. This being the case, we are inclined to reduce the Sanctions for Specified Substances for the Violation of Article 2.1 as prescribed in Article 10.5.1 of the Rules.

CONCLUSION

32. In these circumstances, the following orders commend themselves to the Tribunal:

- a. The period of ineligibility (non-participation in both local and international events) for the Athlete shall be for 2 years from 5th November 2016 pursuant to Article 10.2.1 and 10.11.2 of the ADAK Rules and the WADA code;
- b. Each party to bear its on costs;
- c. Orders accordingly.

33. The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of RADO rules.

34. And that is the decision of the Honorable Tribunal.

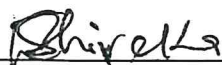
Dated at Nairobi this ^{5th} day of October 2017

Signed:

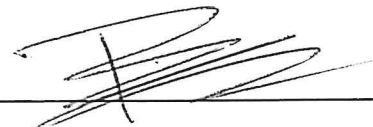
John M Ohaga, FCI Arb



Chairperson, Sports Disputes Tribunal



Elynah Sifuna (Vice Chair)



Peter Ochieng' (Member)