

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. ADAK CASE NO. 02 OF 2017

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

-versus-

SHIEYS CHEPKOSGEI..... RESPONDENT

JUDGEMENT

Hearing: 20th July, 2017

Panel: Elynah Shiveka Chairperson
Maria Kimani Member
Gabriel Ouko Member

Appearances: Mr. Erick Omariba for Applicant
Ms. Sarah Ochwada for Respondent
Shieys Jepkosgei the Respondent present

1. The Parties

1.1 The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016. Represented in this matter by Counsel Erick Omariba of Omariba & Company Advocates.

1.2. The Respondent is a female athlete competing in national and international events. She is represented by Counsel Sarah Ochwada of Centre for Sports Law (CSL) in this matter.

2. Background

2.1. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 2nd March, 2017.

2.2. The Applicant brought charges against the Respondent that on 8th of October, 2016 the Respondent was at the Hari Sukan Negara 21Km run in Kuala Lumpur, Malaysia when Anti-Doping Agency of Malaysia (ADAMAS), Doping Control Officers collected a Urine Sample. Aided by the Doping Control Officer, the respondent split the sample into two separate bottles, which were given reference numbers as follows; A 40579777 (the "A Sample") and B 4057977 (the "B Sample") under the prescribed World Anti-Doping Agency (WADA) procedures.

2.3 The sample A was subsequently analysed at the WADA accredited laboratory of New Delhi in India and an Adverse Analytical Finding (AAF) disclosed the presence of prohibited

substance Testosterone (T), Androsterone (A) and Etiocholanone (Etio) which are listed as Endogenous Anabolic Androgenic steroids (AAS) under S1 Anabolic Agents of WADA's 2016 prohibited list. This is according to the test report dated 24th November, 2016 and availed to this tribunal.

2.4. The findings were communicated to the Respondent athlete by one Japhter K. Rugut, EBS the Chief Executive Officer of Anti-Doping Agency of Kenya (ADAK) vide a notice of charge and and provisional suspension dated 19th December, 2016.

2.5. In response to the notice of Adverse Analytical Finding, the athlete through emails dated 26th December 2016 and 3rd January, 2017 addressed to Laura Gallo, Coordinator- Results Management IAAF Medical & Anti-Doping Department, indicated that she had only had a yellow fever vaccine and taken malaria drugs in addition to her regular medication of a condition she has.

3. Charges

3.1. Subsequently, ADAK preferred the following charges against the Athlete Respondent:

Use of Testosterone (T), Androsterone (A) and Etiocholanone (Etio) which are non-specified substances under class S1 are Anabolic Agents, of the 2016 WADA prohibited list and were of exogenous origin.

Under Article 4.1 of ADAK Anti-Doping Rules, as read

together with IAAF Rules 32.2(a) and Rule 32.2(b) the presence and use of prohibited substances or its metabolites or markers in an athlete's sample, constitutes an anti-doping rule violation (ADRV).

3.2. The Applicant further stated that the Respondent had no Therapeutic Use Exemption (TUE) recorded at the IAAF for to justify the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused the adverse analytical finding. Furthermore, the Applicant states that there is no plausible explanation by the respondent to explain the adverse analytical finding.

3.3. The Applicant contends that this Tribunal has jurisdiction to entertain the matter 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.

3.4. The Applicant prays that:

- a) The disqualification of the "*Hari Sukan Negara 21km run in Kuala Lumpur, Malaysia*" results and any subsequent event as per Article 10.1 of the WADA Code.
- b) Sanctions as provided by WADA Code Article 10
- c) Costs, as per WADA Article 10.10

4. The Respondent's Arguments/Submissions

4.1. The Respondent represented by Counsel Sarah Ochwada of Centre for Sports Law was present at the hearing and

requested to be heard '*viva voce*'.

- 4.2. The respondent's counsel allowed her client to give her historic background, whereby it was revealed that she was orphaned at a very early age but struggled through well wishers and brewing and selling of illicit brew to educate herself up to the level of Kenya certificate of secondary education where she attained a mean grade of B minus.
- 4.5. The Respondent further told the panel that she got pregnant at the age of 20 years and later gave birth to a baby boy who is currently 6 years old and added that she is a single mother. During this period also she developed a health condition which she has to deal with and thus permanently on medication.
- 4.6. The panel entertained the athlete respondent for the above disclosure to make her more comfortable, talk openly and freely and have trust, which the panel achieved for the purpose of the matter in question.
- 4.7. The respondent averred that while in Kuala Lumpur Malaysia she developed very strong pains below the abdomen and sought medication across the counter in one of the chemists.
- 4.8. The respondent shocked the panel when she proffered that before going to the chemist she googled to find out about her fellow athletes who had been sanctioned for doping and

what substances they had consumed.

- 4.9. The respondent posited that while at the chemist, she informed the attendant that she was an athlete and she was in severe pain and was looking for a strong pain killer to cure her.
- 4.10. The respondent resonated that, the attendant at the chemist told her that he will give her drugs that he often prescribes to the Malaysian athletes whom he attends to when they are in such severe pain.
kind of pain.
- 4.11. The respondent admitted that she was given a small tablet of Tribusteron which she took a day before the “Hari Sukan Negara” 21km run.
- 4.12. The respondent, revealed that she knew one of her friends athlete who had been banned for taking the same drug but through an injection. Therefore she thought a tablet was safe and didn't have the same effect or contain the banned substances.
- 4.13. The respondent further averred that the prize money for the race was very attractive amounting to Kshs. 400,000.00, which she believed would change her life completely.
- 4.14. Furthermore, the respondent admitted that she knew the drug would enhance her performance by enabling her win the race

by posting good times and this will open up doors for invitations for other international races, since this particular one was her first international event.

4.15. The respondent said she regretted taking the drug since this was really going to cost her a lot especially her career as an athlete.

4.16. The respondent proffered that she is aware of doping education since she has been tested more than three times in local events namely Kass 12 Km race, Discovery cross country championship, Kabarnet Half marathon and Kisumu Marathon.

4.17. In conclusion, the respondent said she was ready to give substantial assistance if she is accorded protection. The same sentiments were shared by her Counsel Sarah Ochwada.

5. Discussion

5.1. We have carefully considered the matter before us and the counsels' submissions and the athlete's and these are our observations;

5.2. Section 31 of the Anti-Doping Act states that;

“The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organizations. (2) The Tribunal shall be guided by the Code, the various international standards established under

the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency's Anti-Doping Rules, amongst other legal sources."

- 5.3. Consequently, our decision will be guided by the Anti-Doping Act 2016, the WADA Code, the IAAF Competition Rules and other legal sources.
- 5.4. The Athlete respondent has admitted beyond any reasonable doubt that the prohibited substance found in her sample was ingested intentionally and was to enhance her performance.
- 5.5. The applicant's counsel asserted that according to Article 2.1 and 2.1.1 of the WADA Code and as read together with ADAK rule 2.1 and 2.1.1, it is the athlete's responsibility to ensure what goes into her system is suitable for an athlete thus liable for the consequences in contrary.

6.1. Decision

- 6.1. WADA Code Article 10.2 'Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method' is applicable in this matter.
- 6.2. WADA Code Article 10.2.1 expressly states 'The period of Ineligibility shall be four years where Article 10.2.1.1 applies and I quote ' 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.' In this matter it, it is relevant.

6.3. The Athlete did not only admit committing the ADRV but also clearly stated during the hearing that it was indeed intentionally and therefore the full period of Ineligibility of four years comes to bear in this case, and commences from the date of the Provisional Suspension which was 26th December, 2016.

6.4. The disqualification of the Hari Sukan Negara 21km run in Kuala Lumpur, Malaysia of 8/10/2016 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;

6.5. Each party to bear its own costs.

Dated and delivered at Nairobi this 05 day of October, 2017.

Signed:
Elynah Shiveka

Shiveka.

Deputy Chairperson, Sports Disputes Tribunal

In the presence of:

1.  Omondi

2.  for MARY KIMANI