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

-versus-

JEMIMAH JELAGAT SUMGONG..... ATHLETE

DECISION

Hearing : 18th October, 2017

Panel :

Mr. John M Ohaga	-	Chair
Ms. Mary N Kimani	-	Member
Mr. Robert Asembo	-	Member

Appearances: Mr. Erick Omariba, Advocate for the Applicant;

Mr. Wahome Ngugi, Advocate instructed by the firm of W M Njagi & Associates for the Athlete.

I. The Parties

1. The Applicant is the Anti-Doing Agency of Kenya (hereinafter **'ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, an Elite and International Level Athlete whose address of service is through the Advocates on record for her (hereinafter **'the Athlete**').

II. Factual Background

3. The thlete works in the Kenya Defense Force as an officer; as an Elite and International Level Athlete, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.
4. On 28th February, 2017, IAAF Doping Control Officers in an out-of-competition testing collected a urine sample from the Athlete. These were split into two separate bottles in accordance with the prescribed procedure, were given reference numbers A 3089085 (the "**A Sample**") and B 3089085 (the "**B Sample**").
5. The Samples were sent to a WADA accredited Laboratory in Lausanne, Switzerland. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance recombinant erythropoietin (r-EPO)
6. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.

7. The findings were communicated to the Athlete by Thomas Capdevielle the IAAF Anti-Doping Administrator through a Notice and probable Provisional Suspension dated 3rd April, 2017. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 10th April, 2017and the option for Sample B analysis (see page 12-15 of the Charge Document).
8. The Athlete responded to the Notice from IAAF stating that she had consulted an unnamed doctor at the Kenyatta National Hospital on 23rd February 2017 for severe bleeding resulting from a previous night travel and that she was given a blood transfusion in addition to other unknown medication, information that she had not disclosed in the Doping Control Form dated 28th February, 2017. She also stated that it was an unfortunate offence and unintended mistake.
9. The Athlete did not request a Sample B analysis thus waiving her right to the same under IAAF Rule 37.5 and confirmed that the results would be the same as those of sample A in any event.
10. The response and conduct of the Athlete was evaluated by IAAF and it was deemed to constitute an Anti-Doping Rule violation and referred to ADAK for Results Management.
11. A Charge Document was duly prepared and filed by ADAK's Advocates and the Athlete presented a response thereto.

III. The Hearing

12. The matter came up for hearing and the parties presented their respective submissions and laid before the Panel evidence and documents in support of their respective cases for consideration.

13. At the hearing ADAK was represented by Mr. Erick Omariba Advocate while the Athlete was represented by Mr Wahome Ngugi, Advocate.

14. ADAK has preferred the following charge against the Athlete: -

> **Presence of a prohibited substance *recombinant erythroprotein (r-EPO)* or its metabolites or markers 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.**

IV. Submissions

A. Applicant's Submissions

15. Mr. Omariba, Counsel for the Applicant, informed the Panel that the Agency had preferred charges against the Agency and he would adopt the charge as presented.

16. He submitted that the Athlete is an international level athlete; the Notice of ADRV had been presented by IAAF and the notice of AAF was communicated by the IAAF Antidoping Administrator. She was informed vide the letter appearing at page 12 of the Charge Document. He highlighted the Athlete's response which appears from Page 16 of the Charge Document.

17. In ADAK's submission, the facts as set out in the charge document are relatively straight forward. They are that on 28th February 2017, IAAF Doping Control Officers in the course of out of competition testing collected a urine sample from the athlete. The samples were sent to a World Anti-Doping Agency(WADA) accredited laboratory in Lausanne, Switzerland and after analysis of the A sample, the result was positive for the presence of a prohibited substance.

18. The Athlete upon learning of the result, alleged that she had consulted a doctor at the Kenyatta National Hospital on 22nd February 2017 for severe

abdominal pain and that the doctor had given her blood transfusion in addition to other un-identified medication. This had not previously been disclosed in the Doping Control Form. The Athlete further stated that she had not disclosed this information to her husband who is also her coach and manager nor to any other person. She alleged that this was because of the taboo associated with her condition which was as a result of an ectopic pregnancy and which information would have caused her to be shunned within her community.

19. The Athlete also furnished the Agency with treatment sheets issued by the Hospital in support of her assertion that she had undergone certain treatment at the facility. She consented to the Agency conducting further investigations on her medical records. Upon undertaking these investigations, the Hospital, in answer to the Agency's inquiry, denied that the Athlete had been treated at the facility on 22nd February 2017 or any date prior thereto but confirmed a subsequent consultative visit. This response is contained in a detailed letter from the Hospital dated 9th June 2017 in which the Hospital sets out in some detail the procedure for record keeping and retrieval and asserts quite emphatically that the medical sheets provided by the Athlete were not authentic.

20 Beyond merely stating that the records were not authentic, the Hospital further asserts that ectopic pregnancy is a gynaecological emergency that would have been managed through the Hospital's theatre and would therefore would have been manually recorded in a serial register which the Hospital keeps in relation to the use of these theatres. The Hospital states further that all patients with ectopic pregnancy managed at the facility are admitted to the acute gynecological ward for at least four days and each such admission is recorded manually. Further, that upon discharge, the

patient is issued with a discharge summary which would indicate the date of admission, date of discharge, diagnosis, the treatment prescribed, the medication and the date scheduled for the next appointment. The Athlete had not presented any of these documents.

21. The Hospital does not stop there; It goes on to say that the purported use of Erythropoietin injection is not a standard practice in the management of ectopic pregnancies at the facility and there was no record of the Athlete receiving any such injection at the Hospital for whatever ailment.

22. The Hospital therefore concluded that the author of the note dated 22nd February 2017 purportedly issued by the Hospital could only be an impostor.

23 The Hospital, however, acknowledges that the Athlete attended at the Accident and Emergency unit on 18th April 2017 but that the visit was to seek a second opinion concerning treatment for ectopic pregnancy in connection with a surgery that the Athlete had undergone in Rwanda in 2009. However, as this visit was not a medical emergency, the Athlete had been advised to seek a follow up through the Hospital's gynaecology outpatient clinic and had therefore not been prescribed any medication or undergone any procedure on this occasion. The hospital had no other record of the athlete attending at the facility.

24. n response to the detailed position set out by the Hospital, the Athlete merely restates at paragraph 9 of her statement of defense that she attended at the hospital. In further response to the position set out by the hospital, the Athlete's Advocate also suggested in his oral submissions, that perhaps the doctor who attended to the Athlete on 22nd February 2017 was indeed an mpostor because it was a notorious fact that there had been a doctors' strike

during the period in question and it may well be therefore that this is what led to the lack of a proper record of the Athlete's visit.

25. The Athlete also puts forth the position that the condition resulting in the ectopic pregnancy was one which was taboo within her community which would explain the failure to inform her husband and manager regarding the treatment sought and the Panel should take consideration of this peculiar cultural issue which was also to blame for her not having sought a Therapeutic Use Exemption(TUE)

26. In ADAK's view, as the Athlete works with the KDF, she had access to the Armed Forces Memorial Hospital which was a short distance from KNH and no explanation had been given for the Athlete's decision to seek medical attention at KNH rather than the medical facility available to the Athlete by virtue of her employment.

27 Counsel for ADAK submitted that in the year 2012 the Athlete had faced a ban of 2 years which sanction had been lifted by Athletics Kenya (AK) after the intervention of the IAAF. He referred the Tribunal to a document annexed and filed on the 24th July 2017 from one Mr. Okeyo lifting the suspension. He submitted that in light of this, the Athlete was aware of the issues of anti-doping and the likely consequences. Further, as demonstrated at paragraph 22 of the charge document and page 30-33 of the bundle of document, the Athlete has taken part in a number of high profile races and accordingly, the ADRV would injure the reputation of the country and the Athlete.

28. ADAK also submitted that on 16th January 2016 AK organized an anti-doping training for athletes at which the Athlete was present. Therefore, he submitted that it cannot be possible that the narrative by the Athlete can be correct. He indicated that the substance found was a non-specified

substance and that those are the charges preferred against the athlete. He indicated that the agency reserved the right to prefer the charges of tampering as well.

29. It was ADAK's position that the substance was being used for the preparation of the London Marathon and asked for the maximum sanction under Article 10.2 available to be imposed.

B. Athlete's Submissions

30. The Athlete has filed a Statement of Defence and list of documents which Mr. Wahome relied on. He submitted that the Athlete did not contest the ADRV.

31. According to the Athlete, she had attended at the KNH where she had undergone a procedure but could not recall the name of the attending surgeon or physician. She blamed this on the fact that there had been a countrywide doctors' strike at the time and it was possible that the person who had attended to her was an imposter.

32. Mr. Wahome submitted that the Respondent had given the statement annexed at page 16 of the Charge. With respect to the issue of the allegation of doping in 2012, the letter dated 27th August 2012 annexed to the supplementary list, AK had absolved the Athlete from any culpability. Counsel emphasized that the Athlete has been competing at the top since 2004 and has never tested positive for any prohibited substance until the out of competition testing which is the subject of this matter. She has always competed clean. He stated that the submission that the Athlete intended to use the prohibited substance for the London Marathon scheduled for 24th April 2017 was fallacious as she has previously participated in and won the same marathon in 2016. She had tested negative on that occasion. He invited the Panel to be cognizant of the fact that it is standard practice for athletes

to be tested after winning events and this proves that that the Athlete had been tested in 2016.

33. With respect to the question of negligence or fault, Mr. Wahome submitted that there was no negligence or fault on the part of the Athlete as when she sought treatment she did not know or suspect that there could be any anti-doping rule violation. That the Athlete had a history of ectopic pregnancies which were a cultural taboo among her community and which therefore prevented her from dealing with this medical condition in a manner that would have been more open to scrutiny. Nonetheless, the Athlete was willing to have her medical records examined and had not been obstructive by seeking to have her B Sample tested.

34. Finally, Mr. Wahome submitted that the period of ineligibility should be reduced since the Athlete had demonstrated how the substance entered her body. He also asked the Panel to consider the history of the Athlete and allow a substantial reduction in the prescribed sanction since the nature of the ailment that the Athlete suffered from was considered a taboo in her culture and that the Athlete had feared that if she had another ectopic pregnancy it would leave her barren, make her be dejected in the society and lead to her husband taking on another wife.

35. With request to the disqualification of all competitive results, Counsel submitted that the Athlete had not participated in any competitions since the test and so there was nothing to disqualify; he submitted if there would be a period of ineligibility imposed, this should commence from the date when the sample was taken.

V. Jurisdiction

36. 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.

VI. Applicable Law

37. Article 2 of the ADR sets out the definition of doping and anti-doping rule violations 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.

VII. MERITS

38. The Tribunal will address the issues as follows:

a. ***Whether there was an occurrence of an ADVR and the Standard Sanction;***

b. ***The Burden and Standard of proof;***

c. ***Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***

d. ***Whether there should be reduction based on the Athlete's prompt admission;***

e. ***What sanction to impose in the circumstance.***

A. The Occurrence of an ADRV and the Standard Sanction

39. With regard to the Athlete's ADRV, the Tribunal notes that it is undisputed that the Athlete's A Sample revealed the presence of the prohibited substance recombinant erythroprotein (r-EPO).

40. With respect to the appropriate period of ineligibility, Article 10.2 of the 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.

41. The Tribunal notes that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete can establish that the ADRV was not intentional.

B. Burden and Standard of Proof

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

43. Pursuant to Article 3.1 of the ADR, the standard of proof is on a balance of probability. The Article provides as follows:

[...] 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.

44. The Panel notes that this standard requires the Athlete to convince the Panel 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?

45. The main relevant rule in question in the present case is Article 10.2.3 of the ADR, which 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.

46. 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 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.*

47. The Panel in the present case aligns with the Panel in CAS 2016/A/4377 that the Athlete must establish how the substance entered her body and 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*".

48. 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: to 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.*

49. The Panel notes that the Athlete did not declare treatment information on the DCF despite the alleged treatment having been administered less than 7 days prior to the sample collection. We further note that the Athlete contends that she was under medication and she did not know the medication given to her, and neither did she know the doctor who attended to her. She provided the treatment note appearing at page 22 of the Charge Document but which was disputed by the KNH by the letter dated 9th June 2017. We note with concern that the narrative by the Athlete of the events

leading to the visitation and treatment at the hospital are inconsistent at best. Indeed, we might go so far as to state that the Athlete's attempt to explain how the substance entered her body bordered on an attempt to deceive the Panel in view of the Hospital's denial that the Athlete attended at the Hospital for any treatment whatsoever.

50. In light of this, the Tribunal 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.

51. The Tribunal 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, 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 Panel finds, from the demeanour, character and history of the Athlete, that there does not exist in this case exceptional circumstances 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).

52. Accordingly, the Tribunal finds that the Athlete has not met her burden of proof.

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

53. Article 10.6.3 of the 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 f .4, 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.

54. The Tribunal notes that the Respondent after being informed of the Analytical Finding waived her right to sample B testing since she was of the opinion that both samples were from the same specimen. Further that the Respondent did not contest the provisional suspension and has not been engaged in any activity related to athletics since the finding was communicated to her. However, these are not sufficient to qualify as 'prompt admission'.

VIII. SANCTIONS

55. We find Article 10.2 of the ADR 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.

56. 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.

57. 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.

58. Conversely, it is instructive to note that No Fault or Negligence would not apply in the following circumstances, among others where there was 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

59. 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. However, given the very serious nature of the

violation and the Athlete's high degree of Fault, the Panel does not see any mitigating factors in favour of the Athlete which would trigger the exercise of this provision.

Disqualification

60. Article 10.8 of the 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.*

61. The Panel notes that the Athlete has not taken part in any games since her sample tested positive. We therefore find no basis for making any disqualification.

Period of Ineligibility Start and End Date

62. With respect to the sanction start date, the Panel is guided by Article 10.11 of the 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.*

63. Article 10.11.3 of the 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.*

64. In this case, the sample collection was made on 28th February 2017, and the Athlete was provisionally suspended on 3rd April 2017. It follows, therefore, that the Athlete should receive "credit" for the period of ineligibility already served. In this regard, the Tribunal determines that the Athlete's period of ineligibility, if imposed, shall commence as from the date of her provisional suspension (that is 3rd April 2017) thus giving her full credit for time already served in accordance with Article 10.1.3 of ADR.

IX. Conclusion

65. In these circumstances, the following orders commend themselves to the Panel:

    a. The period of ineligibility (non-participation in both local and international events) for the Athlete shall be for four (4) years from 3rd April 2017 pursuant to Article 10.2.1 and 10.11.2 of the ADR and the WADA Code;

    b. The Athlete shall bear the costs of this cause;

    c. Orders accordingly.

66. 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 ADR.

Dated at Nairobi this __31ST____day of ____*October*___, 2017

Signed:

John M Ohaga, FCIArb

Chairperson, Sports Disputes Tribunal

Mary N Kimani (Member)

Robert Asembo (Member)