

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
ANTI-DOPING CASE NO. 12 OF 2017

BETWEEN

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

AND

JOSEPH KARIUKI GITAU.....RESPONDENT

DECISION

Hearing : 31<sup>st</sup> August, 2017

Panel : John M Ohaga - Chair.  
Njeri Onyango - Member  
Maria Kimani - Member

Appearances: Ms. Damaris Ogama for the Applicant;

The Parties

1. The Applicant is the Anti-Doing Agency of Kenya (hereinafter 'ADAK') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is Joseph Kariuki Gitau an international level male athlete (hereinafter 'the Athlete'). He appears in person in these proceedings.

### The Charge

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

**The commission of an anti-doping rule violation ('ADRV') for the Presence of Endogenous AAS/19-norandrosterone in the Sample provided by him on 8<sup>th</sup> January 2017 numbered A2860343 in violation of Article 2.1 ADR.**

### 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 Athlete appeared in person.
6. The Athlete confirmed to the Panel that:
  - i) He had received, read, and understood the Charge and the documents in support of the charge;
  - ii) he was happy with the composition of the Panel and had no objection to any member;
  - iii) He understood the English language;

### The Athlete

7. The Athlete, having not denied the charges agreed to confess to them. He acknowledged that he was the individual named in the Charge and that he

was presently a 2<sup>nd</sup> year student at Kenyatta University studying Physical Education.

8. He informed the Tribunal that he received the Notice of ADRV on 9<sup>th</sup> July 2017 and acknowledged the substance that was found in his body. He said that the substance was found as a result of the urine sample taken on 8<sup>th</sup> January 2017 in accordance with the Doping Control Form attached to the Notice.
9. He said that the sample was taken in Myanmar, Yangon City. He said that he was there to participate in the Yoma Yangon Marathon in Myanmar on 8<sup>th</sup> January 2017. He won the race and had been given the prize money of USD 2,700.00.
10. He reiterated that in the Doping Control Form he stated that he had taken some painkillers and some multivitamins. He said that as he was rushing to catch his flight he hurt his toe as he was wearing open shoes. He therefore took pain killers for the pain but he did not inform anyone of this as he did not have a coach.
11. He said that he had not been briefed prior to the event that there would be an issue of Doping Control.
12. He said that he finds events online and registers himself for them. Prior to the race in January, he had previously participated in races in Colombo in October 2016; he had also participated on three previous races in Myanmar which he won on each occasion. He had also taken part in many races in Kenya.
13. He stated that this was the first time he was being tested.
14. He said that it has always been his policy to ran clean and that he was an advocate for clean running. He stated, however, that on this one occasion, he had been tempted to deca-durabolin out of curiosity which arose from his interaction with other Kenyan athletes. He was aware that deca-durabolin was a body booster and this was well known to many Kenyan athletes.

15. He said that he was ready to reveal sources of the performance enhancing substances that he used.
16. He confessed that he had bought the substance from a pharmacy in Uchumi House, Temple Road in Nairobi and handed to the Panel the original receipt for a 'ghost' purchase of the drug. He said that he did not require a prescription to buy the drug and that it is used intravenously.
17. He confessed that he wanted to use the drug to ease fatigue even though he knew that he had already won the race three months prior because he was able to see the start list.
18. He confirmed that he had seen and understood the consequence of Clause 6.3 of the ADVR which provides for acceptance of the charge and no agreement as to consequences.
19. He said that he understands that he is on provisional suspension from 14<sup>th</sup> July 2017.
20. He has also waived his right to have Sample B tested.
21. He confirmed that he was willing to assist ADAK to eliminate the sources of the performance enhancing substances.
22. He closed his confession by stating that he had sponsored himself fully for the Myanmar marathon and that the net amount left over from the prize money was very little.

### ADAK

23. Counsel for ADAK stated that the Athlete was an international level athlete, that the substance is a non-specified substance and that the Athlete does not deny the ADRV Notice and charges.
24. She submitted that the international penal standard for the charge upon being found culpable is 4 years of ineligibility. Further she submitted that the Athlete had knowledge of the particular substance he is charged with having consumed and that the Tribunal's jurisdiction is not denied.

25. She sought for the imposition of sanctions to be applied in line with the provisions of the WADA Code.
26. She highlighted that the Athlete was a first-time offender, and he had promised to cooperate with ADAK but that ADAK preferred to wait and see the impact of his cooperation.
27. She closed by asking that the Athlete also be ordered to return the prize money that he had won in the Yoma Yangon Marathon in Myanmar on 8<sup>th</sup> January 2017.

### **Athlete's Response**

28. The Athlete stated that he was not in a position to refund the prize money he had won in previous races.
29. He also stated that he sought to rely on Clause 4.4.3 of the Notice of Charge as he had learnt about the charge through a letter of 7<sup>th</sup> July 2017 which was served on him on 9<sup>th</sup> July 2017 and he had confessed immediately.

### **Decision**

30. Article 2 of the ADAK Rules 2016 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.**

31. Under these Rules, an anti-doping rule violation is committed 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 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.

32. 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.

33. Against this background, the Tribunal is cognizant of the submission by ADAK as well as the confession by the Athlete.
34. ADAK has demonstrated the ADRV beyond reasonable doubt in this matter and the Athlete concurs although giving justification for the failure despite being alive to the consequences.
35. The Panel finds that the Athlete is a first-time offender and also looks at the agreement to confess and cooperate by the Athlete.
36. However, while the Tribunal notes that he is a first-time offender, it also takes cognizance of the fact that Kenya, an athletics giant, has earned herself a spot in the WADA Watch List for Anti-Doping violations in the

recent past. While a majority of our sportsmen and women stay true to the call of clean sports, a few have fallen on the way side and denigrate our beautiful name- this is unacceptable and unfair to genuine athletes who take part in competitions cleanly. It is also unfair to the pride of the Kenyan people. As we have held before innumerable times, this must not be allowed to continue.


### Conclusion

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

- i. The period of ineligibility (non-participation in both local and international events) for the Athlete shall be for four (4) years from 8<sup>th</sup> January, 2017 pursuant to Article 10.11.2 of the ADAK Rules and the WADA code;
- ii. Each party shall bear its on costs;
- iii. Orders accordingly.

38. The right of appeal is as provided under Article 13.2.1 of the Anti-Doping Rules;

Dated at Nairobi this 13<sup>th</sup> day of September 2017

  
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John M Ohaga (Chairman)

  
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Njeri Onyango (Member)

  
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Maria Kimani (Member)