REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 13 OF 2017

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

-versus-

SARAH KIBET..... RESPONDENT

DECISION

Hearing: 16th November, 2017

Panel:

John M Ohaga	Chairman
Elynah Shiveka	Deputy Chairperson
Edmond Gichuru	Member

Appearances: Ms. Damaris Ogama instructed by Anti-Doping Agency of Kenya for the Applicant

Ms. Sarah Ochwada instructed by Centre for Sports Law for the Respondent

THE PARTIES

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a female athlete competing in national events and international events.

BACKGROUND AND THE APPLICANT'S CASE

3. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 5th September, 2017.
4. The Applicant brought charges against the Respondent that on 04/12/2016 CHINADA Doping Control Offices in an in-competition testing at Shenzhen International Marathon collected a urine sample from the Respondent and gave it code numbers A6208947 ("A" sample) and B 6208947 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The "A" sample was subsequently analysed at the WADA accredited laboratory of Seibersdorf, Austria and an Adverse Analytical Finding revealed the presence of prohibited substance *prednisone* and *prednisolone* which is prohibited under S9 of the 2016 WADA prohibited list. They also are specified substance under Article 4.2.2 WADC.
6. The findings were communicated to the Respondent by Japhter Rugut, Chief Executive Officer of ADAK through a Notice of Charge and provisional suspension vide letter dated 07/07/17 to which the Respondent made written submissions vide letter dated 13/07/17 stating that she was unwell and sought medication at Iten County Referral Hospital where the doctor prescribed the medication with the prohibited substance.

7. The Respondent disclosed this information on her Doping Control Form and that the AAF and use of the drugs was not intentional but based on medical prescription.

8. The Applicant states that the Respondent's explanation is not satisfactory and that there was negligence on her part and she did not request a sample B analysis.

9. Moreover, the Applicant states that the Respondent has a personal duty to ensure what whatever enters her body is not prohibited.

10. Subsequently, ADAK preferred the following charges against the Respondent:

    Presence of a prohibited substance prednisone and prednisolone in the athlete's sample.

11. The Applicant further stated that the Respondent had no TUE recorded at the IAAF for 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 adverse analytical finding.Furthermore, the Applicant states that there is no plausible explanation by the Respondent to explain the adverse analytical finding.

12. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act.

The Response

13. The Respondent represented by Centre for Sports Law filed her statement of defence dated 10/10/17 denying each and every allegation contained in the Charge Document.

14. The Respondent asserts that she is an international level athlete as defined by the WADC and Rule 35.9 of IAAF Competition Rules 2016-17.She contends that she has in the course of her career participated in:

    i. Shenzhen Marathon, China 2015.
    ii. Tianjin Marathon, China 2016.
    iii. Shenzhen Marathon, China 2016.

15. The Respondent concurs that this Tribunal has jurisdiction to hear and determine this dispute save to add that the Tribunal should also incorporate the IAAF's Anti-Doping Regulations and the WADC which governs both substantive and procedural results management aspects for international level athlete.

16. The athlete admits the presence of *prednisone* and *prednisolone* in her sample but denies that she intentionally used it to enhance her performance.

17. She stated that despite her lack of sufficient knowledge on doping in sports she has been cooperative and honest and has managed to explain the most likely cause of the AAF.

18. She further stated that she used *prednisolone* following her diagnosis of arthritis from Iten County Referral Hospital and stated as much in her letter dated 13/07/17 to ADAK after the notice of the AAF.

19. She notes that the burden of proof lies with ADAK to show that she intentionally used the medication to enhance performance given the standard of proof on specified substances. She quotes the case of **CAS 2015/A3945 Sigfus Fossdal v.International Powerlifting Federation (IPF)**

20. On the athlete's degree of fault the respondent relies on **CAS 2013/A/3327 Marin Cilic v.International Tennis Federation & CAS**

2013/A3335 International Tennis Federation where the court said that in determining the level of fault:

> ***"an athlete's youth and/or experience: language or environmental problems encountered by the athlete, the extent of anti-doping education received by the athlete, any personal impairments such as those suffered by an athlete who has taken a certain product for a long period of time without incident,... .... an athlete who is suffering from a high degree of stress and an athlete whose level of awareness has been reduced by a careless but understandable mistake."***

21. The Respondent's stated that she disclosed that she was taking *mara moja* and her circumstances are mitigated to a larger extent by the cases aforementioned as doping procedures are highly technical.

22. She pleaded for leniency as all these circumstances do not demonstrate intentional breach of the Anti-doping rules.

23. On proportionality of sanctions the Respondent urges the Tribunal to look at the totality of the mitigating circumstances in order to reach a fair decision.

24. Finally, the Respondent prays for a substantial reduction from the standard penalty to a reprimand, costs of the suit be borne by ADAK and any other relief that the Tribunal deems fit.

HEARING

25. At the hearing of the case on 12/10/2017 both parties relied on the documents filed in the Tribunal which included the charge document dated 05/09/2017, the response to charge dated 10/10/17 and the list of documents respectively.

26. The Respondent while being examined in chief indicated that she was born on 01/01/1990 and that she has been participating in athletic races since 2012.

27. She further stated that she has participated in world marathons in Poland and China among other places. She stated that the first doping test she underwent was the one in China in 2016.

28. She noted that the doping process was translated to her from Chinese to English but it was not clear to her what was going on.

29. She further noted that she stated to the DCO she ingested "mara moja"7 days before the race in China while in Nairobi as she was having pains in her ankle joints that were also swollen. She stated that she bought the drugs from Iten County Referral Hospital using prescription. She further notes that no physical examination was conducted or tests carried out.

30. She stated that she did not understand what doping was all about and what substances are banned or prohibited.

31. On cross examination by M/S Ogamba she stated that she has never used the internet and that she has no coach.

32. She also noted on cross examination that she was also given two more drugs i.e *clavam* and *diclofenac* when she visited the hospital on 26/11/2016 but she was told to buy *prednisolone* which she took for three days.

33. She acknowledged that she did not state that she was taking the three drugs in the doping control form as she could not remember their names.

34. The Respondent further admitted that she did not understand what a TUE is and an ADRV are and that she took the drugs for her illness and not to cheat despite the fact that the marathon race she was to participate in was due on 04/12/16 a few days after the hospital visit. She noted that she emerged position three (3) after the race.

35. She also stated that she is a holder of Kenya Certificate of Primary Education and that she did not pursue her education further.

36. The case was adjourned for a further hearing on 19/10/17 for ADAK to avail a doctor. On 19/10/17 the Tribunal ordered that the hearing would proceed on 16/11/2017 as the doctor was not available.

37. However, on 16/11/17 the Applicant dispensed with the need for the doctor's testimony as they could not avail him in the Tribunal on this material day again. The Tribunal ruled that the decision would be delivered on 30/11/2017.

38. The Applicant filed and served written submissions on 15/11/2017 while the Respondent filed hers on 16/11/2017.Both parties relied on these submissions.

DECISION

39. The panel has looked at all documents and taken into account verbal presentations. We observe as follows.

40. *Prednisone* and *prednisolone* which is prohibited under S9 of the 2016 WADA prohibited list is alleged to have been found in the Respondent's urine sample.

41. Article 2 of the WADC states that:

> *"Athletes or other persons shall be responsible for knowing what constitutes an anti-Doping rule violation and the substances and methods which have been included on the prohibited list"*

42. Additionally Article 2.1 WADC provides that:

> *"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 sample.*
> *Accordingly, it is not necessary that intent, fault negligence or knowing on the athlete's part be demonstrated in order to establish an anti-doping rule violation under WADC Article 2.1 (emphasis ours).*

43. Deductively, as provided in Article 2.1.2 WADC sufficient proof of an anti-doping rule violation under 2.1 is:

> *"presence of a prohibited substance or its metabolites or markers in the athlete's A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or....."*

44. In the instant case the presence of a prohibited substance has been established in the Athlete's A sample and has not been denied by the athlete.

45. Article 2.1 of the WADA code establishes "strict liability" upon the athlete. Once presence is established as in this case the onus is upon the athlete to render an explanation and to dispel the presumption of guilt on her part. Such explanation must however be assessed while bearing in mind sections of Article 2.1.1 of WADC as set out above and emphasized.

46. It is worth noting that the athlete did not reveal the drugs namely *prednisolone,diclofenac and clavam* that were prescribed to her by the doctor in Iten County Referral Hospital on 26/11/2017 in doping control form. She only disclosed that she had ingested *mara moja.*

47. Indeed, even with her modest education and at 26 years of age the Respondent has been able to muster her resources and piece up a response and defence to the notice to the ADRV from the Applicant as seen from her letter dated 13/07/2017.She has travelled the world finding her way out of and into international airports without much difficulty.

48. With such kind of international exposure we find it hard to comprehend why the Respondent who has been competing in world marathons has not taken the liberty to understand what doping entails.

49. As we have said elsewhere, the drafters of the Code were also alive to the fact that athletes would occasionally fall sick and seek medical attention. But they also gave a window of opportunity for athletes to seek Therapeutic Use Exemption (TUE) under Article 4.4 of the Code and use it as a defence for the medication they use. There is no evidence that the Respondent sought such exemption.

50. It is the Applicant's onerous duty to establish whether in fact the ADRV by the Respondent was intentional under Article 10.2.3 of WADC. While the Respondent bears much of the blame for the ADRV we find that the Applicant has not established the ADRV by the Respondent to have been intentional.

51. With respect to the question of "no significant fault" this Tribunal has in the past relied on the case of **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** where the critical components used to assess the degree of fault on the part of an Athlete were established thus as: the Athlete's professional experience; his age; the perceived and actual degree of risk; whether the athlete suffers from any impairment; the disclosure of medication on the Doping Control Form; the admission of the ADRV in a timely manner; any other relevant factors and specific circumstances that can explain the athlete's conduct. The relevant legal provision is WADA Code Article 10.5.1.1.

52. Moreover, when considering degree of fault on the part of an athlete the Tribunal has always applied these factors:

> *The athlete's experience, whether the athlete is a minor, the degree of risk that should have been perceived by the athlete; the level of risk, whether the athlete suffers from any impairment, any other relevant factors and specific circumstances that can explain the athlete's conduct.*

53. We also rely on CAS decisions of **CAS 2013/A/3327 Marin Cilic v.International Tennis Federation & CAS 2013/A3335 International Tennis Federation** presented to us by the Respondent where the court said:

> *"an athlete's youth and/or experience: language or environmental problems encountered by the athlete, the extent of anti-doping education received by the athlete, any personal impairments such as those suffered by an athlete who has taken a certain product for a long period of time without incident,..... an athlete who is suffering from a high degree of stress and an athlete whose level of awareness has been reduced by a careless but understandable mistake."*

54. We are alive to the fact that the Respondent is a first time offender and she experienced language barrier while undergoing the doping control process with CHINADA officials on the 04/12/2016.However,the Respondent joined the athletic profession out of her own free will. She should live by the rules that obtain thereof.

CONCLUSION

55. In the circumstances, the Tribunal imposes the following consequences:

    a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 2 years from 07/07/17 pursuant to Article 10.2.2 of the WADC;
    b. The disqualification of the Shenzhen International Marathon results of 04/12/16 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
    c. Each party to bear its on costs;
    d. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.

56. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

Dated and delivered at **Nairobi** this __*30th*___day of _*November*_____, **2017**.

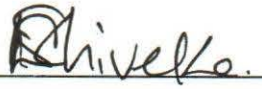
Signed:

John M Ohaga

Chairman, Sports Disputes Tribunal

Signed:

Elynah Shiveka



Deputy Chairperson, Sports Disputes Tribunal

Signed:

Gichuru Kiplagat

Member, Sports Disputes Tribunal