REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 16 OF 2017

ANTI-DOPING AGENCY OF KENYA……APPLICANT

-versus-

LAZARUS TOO……..RESPONDENT

DECISION

Hearing: 26th April, 2018

Panel:

Elynah Shiveka	Panel Chair
Njeri Onyango	Member
Peter Ochieng	Member

Appearances: Mr. Erick Omariba and Ms. Damaris Ogama, Advocates for the Applicant;

Ms. Sarah Ochwada and Ms. Eunice Olembo, Advocates acting pro-bono for the Respondent

1. THE PARTIES

The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016;

The Respondent Lazarus Too is a male national and international level athlete. He is represented by Counsels Ms. Sarah Ochwada and Ms. Eunice Olembo of the Center for Sports Law (CSL) acting pro-bono.

2. BACKGROUND AND APPLICANT'S CASE

The proceedings have been commenced by the Applicant filing a Notice to Charge the Respondent athlete dated 27th July, 2017 addressed to the chairman of the Sports Disputes Tribunal.

The Applicant brought charges against the Respondent athlete vide a charge document filed at the Tribunal on 6th September, 2017 that on 4th December,2016 CHINADA Doping Control Officers in an in-competition testing, at the Shenzhen International Marathon, collected a urine sample from the Respondent. Aided by the Doping Control Officer, the Respondent split the Sample into two separate bottles, which were given reference numbers as follows; **A 6211605 (the "A Sample")** and **B 6211605 (the "B Sample")** under the prescribed World Anti-Doping Agency (WADA) procedures.

2.1. Subsequently, both Samples were taken to the WADA accredited laboratory in Seibersdorf, Austria. The Laboratory in Austria analyzed the **"A Sample"** in accordance with the procedures set out in WADA 's International Standard for Laboratories (ISL). The analysis of the **"A Sample"** returned an Adverse Analytical Finding (AAF) presence of a prohibited substance ***Furosemide.*** ***Furosemide*** is listed as a prohibited substance under class S5 of the 2015 WADA

prohibited list (Diuretics and masking agents). ***Furosemide*** is a specified substance according to the WADC Article 4.2.2.

2.2. 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 provisional suspension dated 7th of July, 2017. In the said communication the Respondent athlete was offered an opportunity to provide an adequate explanation for the same before 5.00 pm on 14th July, 2017.

2.3. The same letter also informed the athlete of his right to request for analysis of **"B Sample";** and other avenues that will result into sanction reduction including prompt admission and requesting for a hearing and was given a deadline of 14th July, 2017 for the same.

2.4. The Respondent athlete in his response through an email addressed to sarah@adak.or.ke and sent on 10th July, 2017, stated that he does not use any banned drugs and is ready to comply with ADAK.

He posited that owing to a hip injury and amoeba, he sought medication from a chemist for which a number of pain killers were administered namely Dramadol (tramadol) tablets, Voltaren tabs, Acepar tabs, Doloact"tm Mr (Diclofenac), ofloxacin & ornidazole tabs (AGIFLO-OZ) and Senidol tabs 1000mg. He further indicated that he also uses a supplement known as Animal pak and energy drinks such as monster, power horse and shark. However, all this information was never disclosed on his Doping Control Form during sample collection. He also stated that whatever happened was not intentional and the mistake was unintended

2.5. The Applicant avers that the Respondent athlete has failed to explain the co-relation of the presence of furosemide in his sample and the alleged medication of his alleged illness. Accordingly, an evaluation of the alleged medication does not reveal any content of the prohibited substance in the athlete's sample.

2.6. The Applicant further resonates that the Respondent athlete did not bother to request for a Sample B analysis thus waiving his right to the same under rule 7.3.1 of ADAK Anti-Doping Rules.

2.7. It is the Applicant's case that there was no departure from the International Standards for Laboratories (ISL) that could reasonably have caused the AAF as per Article 3.2.2 of ADAK ADR and further that there is also no departure from the International Standards for Testing and Investigations (ISTI) that could reasonably have resulted into the AAF in accordance with Article 3.2.3 hence the responsibilities, obligations and presumptions of Article 3 of ADAK ADR apply herein.

3. THE CHARGES

3.1. Subsequently, the Anti-Doping Agency of Kenya (ADAK) preferred the following charges against the Respondent athlete: -

The presence of a prohibited substance Furosemide a specified substance under class S5-Diuretics and Masking Agents of 2015 WADA prohibited list under Article 4(1) of the ADAK Anti-Doping Rules as read with IAAF Rule 32.2 (a) and 32.2(b) respectively the presence and use of prohibited substances or its metabolites or markers in an athlete's sample, constitutes an anti-doping rule violation (ADRV). The presence of diuretic agent in the urine sample cause alteration of the steroid profile.

3.2. The Applicant further stated that the Respondent athlete was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at ADAK for the substances in question and at the same time there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused the Adverse Analytical Finding.

Furthermore, the Applicant opines that there is no plausible explanation by the Respondent athlete on the AAF.

3.3. The Applicant proffers 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 and as amended to hear and determine this case.

3.4. The Applicant prays that: a) All competitive results obtained by the Respondent athlete Lazarus Too from and including 4th December 2017 until the date of determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes), as per ***Article 10.1 ADAK ADR.*** b) The Respondent athlete (Lazarus Too) be sanctioned to a four years period of ineligibility as provided by the ADAK Anti-doping Rules and WADC Article 10.2.1. c) Costs as per WADA ***Article 10.10.***

4. PRELIMINARY MATTERS

4.1. The matter was first brought to the Tribunal vide a notice to charge addressed to the Chairman of the Sports Disputes Tribunal dated 27th July, 2017 by Ms. Damaris Ogama for the Applicant (ADAK). The matter was filed on the same date at the Tribunal. The notice also requested the Tribunal to constitute a hearing panel whom the charge documents and other relevant materials should be served.

4.2. Upon reading the notice to charge dated 27th July, 2017 presented before the Tribunal by Ms. Damaris Ogama, on behalf of the Applicant (ADAK), the Tribunal directed and ordered as follows;

i. The Applicant to serve the mention notice, the notice to charge, the notice of the ADRV, the Doping Control Form and all relevant documents on the

Respondent within 15 days of the date hereof.

ii. The Panel to hear the matter was constituted and comprised; -

- Mrs. Elynah Sifuna-Shiveka;
- Mrs. Njeri Onyango;
- Mr. Peter Ochieng;

iii. The matter was scheduled to be mentioned on 24th Thursday August, 2017 to confirm compliance and for further directions.

4.3. The Applicant's advocate Mr. Omariba wrote to the Tribunal requesting for adjournment of all matters scheduled for 23rd & 24th August, 2017.

4.4. In response the adjournment was granted by the Chairman of the Sports Disputes Tribunal and rescheduled the matter and others for Thursday 31st August, 2017 at 2.30pm.

4.4. The matter came up for mention on 31st August, 2017, Mr. Omariba was present for the Applicant and likewise, the Respondent athlete Lazarus Too of Identification Number 29377872 was present too. Mr. Omariba told the Tribunal that after consultation with the Athlete, he was requesting for legal representation in the matter. The Tribunal from its pool of pro-bono lawyers appointed Ms. Sarah Ochwada of Center for Sports Law (CSL) as pro bono counsel to represent the Athlete. Mr. Omariba undertook to file charge documents by 5th of September, 2017.

4.5. The matter then was listed for mention on 20th September, 2017, the Applicant confirmed filing all the necessary documents in readiness for the hearing of the matter on 6th September, 2017. At the same mention the Respondent was represented by Ms. Sarah Ochwada and Ms. Eunice Olembo from the Center for Sports Law as pro bono counsels. They confirmed officially coming on record vide

a notice of appointment of advocate for the Respondent filed on 7th September, 2017 at the Tribunal. The Tribunal thereafter directed that the Athlete had 30 days within which to file his response. A hearing date was set for 2nd November, 2017 at 2.30 pm.

4.6. Mr. Omariba appearing for the Applicant once again moved the Tribunal on 23rdOctober, 2017 to adjourn the slated hearing of the matter on 2nd November, 2017, since he was attending a hearing at CAS. The Tribunal granted him his wish and rescheduled the hearing to 30th November, 2017 and requested the Applicant to serve an appropriate notice upon the Athlete and his advocates.

4.7. When the matter came up for hearing on 30th November, 2017, Ms. Damaris Ogama for the Applicant was ready to proceed, however, Ms. Ochwada for the Respondent asked for time to get in touch with the Athlete, whom the Tribunal was informed had relocated to Uganda from Tanzania. The request was granted, and the matter was set to be mentioned on 14th December, 2017.

4.8. On 14th December, 2017 when the matter was coming up for mention to set a new date for hearing, the Applicant was represented by Mr. Omariba, unfortunately the counsel for the Respondent Ms. Ochwada was bereaved and therefore the matter was adjourned to 20th December, 2018 for further directions.

4.9. On 20th December, 2017 when the matter came up for mention, Ms. Ochwada for the Respondent requested for more time to enable her prepare and file her response before 18th January, 2018. The Applicant's advocate Mr. Omariba had no objection and the matter once again was listed for another mention on 17th January, 2018 to confirm compliance by the Respondent's advocate.

4.10. On 17th January, 2018 at the mention, Ms. Ochwada confirmed filing all the information that the Applicant (ADAK) had asked for. In the meantime, Ms. Ochwada noted that likewise, she had requested for initial communication from CHINADA to the Respondent athlete to be availed by ADAK. Mr. Omariba

conceded that he was holding brief for Ms. Ogama and thus requested for a month to try and get the communication. Permission was granted, and a further mention of the matter was set for 21st February, 2018 at 2.30pm.

4.11. On 28th February, 2018 during the mention, Mr. Omariba confirmed that Ms. Ogama had filed her response regarding the communication from CHINADA which was being sort by the Respondent's advocate. Ms. Ogama was very categorical in her response filed at the Tribunal on 28th February, 2018, that ADAK had not received any communication from the forwarding client IAAF and CHINADA regarding any sanctions already imposed on the Respondent. Therefore, they were unable to furnish the Respondent with any further documents, with the described particulars.

4.12. The Tribunal accorded the athlete 30 days within which to establish such information as he deems fit for his defence and thereafter file his statement of response. A further mention was scheduled for 4th April, 2018 for further directions.

4.13. The Respondent's advocate Ms. Ochwada filed a response to the charge and indicated during the mention on 4th April, 2018 that the Respondent athlete will tender his evidence *viva voce*. The Applicant was represented by Mr. Omariba. The hearing date was agreed upon by both counsel to be 26th April, 2018 at 2.30pm.

5. HEARING

5.1. On 26th April, 2018 was the date scheduled for hearing. The Applicant's counsel Mr. Omariba was present and so was the Respondent's Ms. Ochwada. The Respondent athlete who was to tender oral evidence at the hearing was not present and his advocate Ms. Ochwada said that she will proceed with the matter by filing written submissions which will specifically border on the sanction. Mr. Omariba had no objection to how the Respondent would like to canvass his case and he

confirmed that he will respond by filing his written submissions by 10th May, 2018. A mention date was taken by consent to be 10th May, 2018 at 2.30 pm.

5.2. There was a delay in both parties filing their written submissions and finally this was executed by 17th May, 2018 when the matter had been listed for mention to confirm compliance.

6. PARTIES SUBMISSIONS

Respondent's Submissions

6.1. The Respondent's counsel in her submissions from the outset indicated that she will adopt and fully rely on the assertions made in the response but at the same time wished to make the following submissions as relates to the sanctions in this case.

6.2. On the period of ineligibility, the Applicant has requested for a 4-year ban whereas the Respondent requests that the panel considers this present charge as his first offence and reduce his sanction to the lowest possible as provided by law.

6.3. The Respondent is entitled to consideration of reduction of the standard sanction based on evidence proving credible non-doping reasons for its use and absence of intent to enhance performance.

6.4. The Respondent is deeply perturbed in the manner of notification of the Adverse Analytical Finding from the Anti-Doping Authorities, and specifically miscommunication by the Chinese Authorities which caused undue delays in result management not attributable to him.

6.5. The Respondent's counsel proffered that the WADA Code is clear on principles that ought to be respected and the steps that ought to be taken in order to notify an athlete about an AAF. She asserted that the main principle is that of timeliness and being prompt in issuing a Notification of Provisional Suspension;

7.9 Principles Applicable to Provisional Suspensions

7.9.1 Mandatory Provisional Suspension after an Adverse Analytical Finding.

The Signatories listed below shall adopt rules providing that when an Adverse Analytical Finding is received for a Prohibited Substance or a Prohibited Method, other than a Specified Substance, a Provisional Suspension shall be imposed promptly after the review and notification described in Article 7.2, 7.3 or 7.5: where the Signatory is the ruling body of an Event (for application to that Event); where the Signatory is responsible for team selection (for application to that team selection); where the Signatory is applicable International Federation; or where the Signatory is another Anti-Doping Organization which has results management authority over the alleged anti-doping rule violation.

6.6. The Respondent's counsel opines that the WADA Code imposes a formulaic approach of notification that if derogated from amounts to grave consequences for an athlete in light of the period of ineligibility. She avers that usually the period of ineligibility commences on the date of the final decision following a hearing in accordance with Article 10.11 of the WADA Code. She notes that such period of ineligibility can commence at an earlier date in
circumstances;

10.11 Commencement of Ineligibility Period: -

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.

10.11.1 Delays Not Attributable to the Athlete or other Person: -

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction

may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

6.7. The Respondent's counsel in her submission also brought to the Panel's attention the various delays and confusion visited upon the Respondent as a result of poor result management by the Chinese Authorities who to date have not provided clear documentation or indication concerning the steps taken to notify the Respondent not only of the AAF but also a prompt Provisional Suspension. The Respondent's counsel noted that, the duty to notify the Respondent was later on imposed on the Applicant who issued a fresh notice on the Respondent athlete long after his sample was collected in Shenzhen China on 4th December, 2016.

6.8. The Respondent's counsel avers that such a delay may result in adverse consequences on the Respondent whereby any period following immediately after sample collection but before effective Notice of Adverse Analytical Finding and Provisional Suspension by ADAK may not be calculated or credited as part of the period of Ineligibility.

6.9. The Respondent's counsel then argues that discretion should be applied in an instance where there is a possibility that the period of ineligibility imposed by a Panel may surpass the 4-year standard sanction as provided for in the WADA Code dependent on when the final decision is granted. The case of **CAS 2014/A/3485 World Anti-Doping Agency (WADA) v. Daria Goltsova and International Weightlifting Federation (IWF), award of 12 August 2014** is instructive of this. The Panel held that;

> *"In any event, the Athlete is entitled to be credited with the sixth-month period of ineligibility already served, which ran from 4th July 2011 when she was provisionally*

suspended. However, in addition, by 2009 ADP Art. 10.9.1 (which is reproduced in 2012 ADP) where there have been substantial delays in hearing process or other aspects of Doping Control not attributable to the Athlete, the IWF or Anti-Doping Organization imposing the sanction may start the period of ineligibility at an earlier date commencing as early as the date of sample collection or date on which another anti-doping rule violation last occurred. 51. In the present case, there was an unconscionable delay in the commencement of this appeal brought about by apparent unexplained failure of the IWF to comply with its obligation under Art. 8.1.6 of the 2009 ADP to notify of the result of the hearing before DHP. The Athlete was entitled to believe that the matter had closed and to get on with her career. It would be unconscionable for her now to be required to serve any further period of ineligibility. In these circumstances the appropriate course is to commence the period of one year's ineligibility from the date of sample collection on 13 May, 2011."

6.10. The Respondent denied that he intentionally used the prohibited substance Furosemide for purposes of performance enhancement as alleged under 20 of the Charge Document.

6.11. The Respondent admits that the only fault he made, and which he truly is apologetic for is failing to disclose the medication he was taking on his Doping Control form, even out of abundant caution. He asserts that given the complexities of Anti-Doping regulations, he was unaware that he ought to have disclosed any medication that he was taking two weeks prior to the race. He was equally unaware of procedures on seeking Therapeutic Use Exemptions which may have assisted him at that material time.

6.12. The Respondent's counsel submitted that an Athlete cannot of his/her own volition decide or predict when he/she falls ill. Nor can he invent symptoms of an illness. Therefore, it is not enough to simply claim and conclude that proximity to date of competition as a valid justification of intention to dope.

6.13. The Respondent's counsel stated that the Applicant must prove to the comfortable satisfaction of the Panel that the Respondent athlete not only knew that the substance he was taking was prohibited, but that he also took it wilfully in order to enhance his performance. The comfortable satisfaction standard is higher than that of probabilities but lower than beyond reasonable doubt.

6.14. The Respondent's counsel further posited that the Applicant must prove that the Respondent athlete was not ill and that he did not require medication for his condition in order to support their claims and discharge their burden of proof.

6.15. The Respondent's counsel in conclusion based on the above reasons requested the Tribunal to grant the following reliefs;

i. A substantial reduction from the standard penalty should be allowed to the Respondent;
ii. Recognize and credit the period within which the Respondent has not been participating in athletics events as being the period of ineligibility starting from the date of sample collection;
iii. All costs of the suit to be borne by ADAK (the Applicant in this matter);
iv. Any other relief that the Tribunal deems just and fair.

APPLICANT/ADAK'S SUBMISSIONS

6.16. The Applicant's position is that their duty under Article 3 of ADAK ADR, is to prove the charge to the comfortable satisfaction of the hearing panel.

6.17. The Applicant also relies on the presumptions under Article 3.2 of ADAK ADR in regard to analytical methods and inferences to be drawn from an AAF of an athlete's sample.

6.18. In the Applicant's submissions, the role and responsibility of an athlete include *inter alia;*

a) To be knowledgeable of and comply with the anti -doping rules.

b) To be available for Sample collection at all times.

6.19. The Applicant also draws the Panel's attention to matters which deems unchallenged, these comprise;

a) The Respondent athlete admitted the results of "Sample A" and waived his right to "sample B" analysis. Thereby accepting the 'Sample A' results under Article 7.3.1.

b) By accepting the 'Sample A' results under Article 7.3.1, the Athlete thus admitted to the presence of a prohibited substance in his sample (Article 3.2 of ADAK ADR).

c) The Athlete admitted not having declared treatment information on the Doping Control Form.

6.20. According to the Applicant, for an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, he/she did not know that his/her conduct constituted an ADRV or that there was no significant risk of an ADRV. Based on established case law of **CAS 2014/A/3820, par. 77** the proof by a balance of probability requires that one explanation is more probable than the other possible explanation. For that purpose, an athlete must provide actual evidence as opposed to mere speculation to disapprove intention.

6.21. The Applicant submitted, however that the athlete must demonstrate that the substance 'was not intended to enhance' the athlete's performance.

it does not suffice to say that one did not know that

medication contained a banned substance. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that: -

"The athlete must demonstrate that the substance 'was not intended to enhance' the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that Oliveira should not be followed."

6.22. The Applicant opined that the Respondent athlete intentionally ingested the substances containing prohibited substances in order to enhance his performance. According to the Applicant, the Respondent athlete has not sufficiently discharged his duty to disapprove since he merely provided for a host of possible medications he took without showing the link between the said medications and supplements visa vis the banned substance. The Applicant further stated that the Respondent athlete failed to give proof of purchase of the said medications leading the Applicant to infer an intention to cheat. The Respondent athlete failed to explain the origin of the prohibited substance.

6.23 The Applicant further averred that the Athlete is required to prove the origin of the prohibited substance on a 'balance of probability'. The Balance of Probability standard entails that the athlete has the burden of convincing the Panel that the occurrence of the prevailing circumstances is more probable than their non-occurrence.

6.24. The Applicant relies in **Arbitration CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission JADCO)** which states that in order to establish the origin of a prohibited substance by the required balance of probability, the athlete must adduce actual evidence as opposed to mere speculation. A lot is required by way of proof given by the athlete's basic personal duty to ensure that no prohibited substance enters his body.

6.25. The Applicant submits that the Respondent athlete claimed that he had purchased the medications listed in his statement from unnamed chemist, however he failed to provide proof of the said purchase thus he had no evidence to support his claim. Moreover, it is not clear if the Respondent athlete actually took the alleged medication and if so the said medication contained the prohibited substance in question.

6.26. The Respondent athlete contends in his response that he was under medication and he did not know that the medication prescribed to him contained the prohibited substance. **In CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26** is instructive; *the Panel observed that 'the athlete's fault is measured against the fundamental duty that he or she owes under the Programme and WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.* Thus, the Applicant is convinced that there were no apparent means demonstrated by the Respondent athlete showing any extra caution exercised when ingesting the alleged medication. He failed, at the very least to show that he explained to the pharmacist prior to the alleged purchase of his active participation in sport.

6.28. The Applicant contends that the Respondent athlete was grossly negligent because he ought to have known better the responsibilities bestowed upon him as an athlete before receiving any medication.

6.29. Conclusively, the Applicant placed emphasis on Article 2.1.1 of WADC which says that an athlete has a personal duty to ensure that no prohibited substance enters his or her body and that 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. There is sufficient proof of the anti-doping rule violation by the analysis of the athlete's sample which confirms the presence of the prohibited substance. Therefore, in the circumstances, the Applicant submits that ignorance is no excuse and cannot be entertained to feign lack of intent to enhance performance.

6.30. The Applicant, therefore submitted that the following considerations will be ideal while imposing sanctions on the Respondent athlete;

i. The ADRV has been established against the Athlete. The admission made by the athlete concerning the 'Sample A'.
ii. The failure by the athlete to inform the pharmacist that he was an athlete

and subject to anti-doping rules.

iii. Failure by the athlete to cross-check the medication given to ensure that the same did not contain prohibited substances.

iv. The knowledge and exposure of the athlete to anti-doping procedures and programmes.

v. Lack of explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV being as a result of his negligent acts.

7. DISCUSSION

7.1. We have carefully considered the matter before us and both counsels' submissions and these are our observations; -

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

> **"(1) 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."**

7.3. Consequently, our decision will be guided by the Anti-Doping Act 2016, the WADA Code, the IAAF Competition Rules and other legal sources.

7.4. Furosemide which falls under Diuretics and Masking Agents is a prohibited substance under Class S5 of the 2015 WADA prohibited list that came into effect on 1st of January, 2015. The Respondent's urine sample is alleged to have contained this prohibited substance during the Shenzhen International Marathon on 4th December, 2016 in China.

7.5. According to Articles 3 and 10.2.1.2 of the WADA Code, when the Anti-Doping Rule Violation (ADRV) involves a specified substance (such as Furosemide), The Anti-Doping Organization (ADO) in this case is the Applicant (ADAK) has the burden of proof to establish that the ADRV was intentional. The standard of proof here is greater than a mere balance of probability but less than proof beyond reasonable doubt.

7.6. The Respondent indicated that he had a hip injury and was also suffering from Amoeba and thus went to a chemist and was given several medications which pain killers were, he took a supplement by the name Animal Pak and a number of energy drinks. The Panel notes that the Respondent did not bother to find out the contents of what he was ingesting and neither did he inform the pharmacist that he was an athlete. The duty is bestowed on the athlete to find out the effect of the medication prescribed for his ailment as his responsibility pursuant to IAAF Rule 32.2.

7.7. The Applicant though has the onerous duty to establish whether in fact the ADRV by the Respondent was intentional. Article 10.2.3 of the WADA Code defines 'intentional' to mean;

> ***"....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 significant risk that the conduct might constitute or result 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 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 sports performance."

7.8. Whereas the Respondent carries much of the blame for the ADRV we find that the Applicant has not established the ADRV by the Respondent to have been intentional; as much as ***Furosemide*** *a* class S5 of 2015 WADA Prohibited List, being specified as a substance prohibited at all times In and Out-of-Competition, the Applicant failed to establish an intentional ADRV on the part of the Respondent.

7.9. On the question of no significant fault the case of **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** is instructive. CAS stated thus;

"The issue whether an athlete's fault or negligence is 'significant' has been much discussed in the CAS jurisprudence, ...These cases offer guidance to this Panel. It is, however, to be underlined that all those cases are very 'fact specific' and that no doctrine of binding precedent applies to the CAS jurisprudence. Indeed, the TADP itself, while defining the conditions for finding of NSF, stresses the importance to establish it 'in view of the totality of the circumstances' and therefore paying crucial attention to their specifies"

7.10. The critical components used to assess the degree of fault on the part of an athlete are; 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.

7.11. The Respondent is 28 years old, but he failed to disclose the medication on the Doping Control Form and denied being involved in doping. However, the Tribunal notes that he is a first-time offender and has been cooperative during the entire period of the case.

7.10. The Panel also took into account the delays that shrouded this case from the date of the sample collection which was 4th December, 2016 upto the notification of the AAF and provisional suspension on 7th July, 2017.

7.11. The Applicant should always as a matter of fact, carry out their investigations exhaustively in order to convince the hearing panel. For instance, in the case where the applicant submitted that the medication the Respondent athlete listed down as having taken, including; pain killers, supplements and energy drinks had no link whatsoever with the prohibited substance found in the athlete's sample. The Applicant was to go further than just informing us the non-existence relation of the drugs.

8. DECISION

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 2years from the date of provisional

suspension which is 7th July, 2017 pursuant to Article 10.2.2 of the WADA Code;

b) The Respondent's results obtained at Shenzhen International Marathon on 4th December, 2016 and thereafter, including any points gained and prizes, are disqualified pursuant to Articles 9 and 10 of the WADA Code;

c) The parties shall bear their own costs (if any) incurred in connection with the case.

d) Parties have a right of Appeal pursuant to Article 13 of the WADA Code and Part IV of the Anti-Doping Act No. 5 of 2016 as amended.

e) Any other prayers or motions are dismissed.

Dated at Nairobi this 13th **day of** *September,* **2018**

Mrs. Elynah Sifuna-Shiveka, Panel Chairperson

Njeri Onyango, Member

Peter Ochieng, Member