

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

APPEAL NO. ADAK CASE NO. 20 OF 2017

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

-versus-

NELLY JEPKURUI KIBET..... RESPONDENT

JUDGEMENT

Hearing: 7th December, 2017

Panel: Elynah Shiveka Chairperson
Mary Kimani Member
GMT Ottieno Member

Appearances: Mr. Erick Omariba Advocate for Applicant
Dr. Njaramba Gichuki and Ms. Rebecca Wanyama
for Respondent (Pro-bono)
Nelly Jepkurui Kibet the Respondent present & in
person at the hearing

1. The Parties

- 1.1 The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016 whose address of service is **Anti-Doping of Kenya, Parklands Plaza, 2nd Floor, Muthithi Road/Chiromo Lane Junction, P.O. Box 66458-80100, Nairobi.** Represented in this matter by Counsels Mr. Erick Omariba and Ms. Damaris Ogama.
- 1.2. The Respondent is a female national and international level athlete. She is represented by Counsels Dr. Njaramba Gichuki and Ms. Rebecca Wanyama of **Wanyaga & Njaramba Advocates, View Park Towers, 16th Floor, Utalii Lane/Uhuru Highway, P.O. Box 3695-00200, Nairobi.**

2. Background

- 2.1. The proceedings have been commenced by the Applicant filing a notice to charge the Respondent Athlete dated 17th August, 2017 addressed to the chairman of the Sports Disputes Tribunal.
- 2.2. The Applicant brought charges against the Respondent vide a charge document filed at the Tribunal on 13th September, 2017 that on 19th of November, 2016 at the Chang'De Liuye Lake

International Marathon in China, CHINADA Doping Control Officers in an in-competition testing, 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 6158121 (the "A Sample") and B 6158121 (the "B Sample") under the prescribed World Anti-Doping Agency (WADA) procedures.

2.3 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 presence of a prohibited substance *Prednisolone*. *Prednisolone* is listed as a prohibited substance under S9 of the 2016 WADA prohibited list. Prednisolone is a specified substance according the WADC Article 4.2.2.

2.4. The findings were communicated to the Respondent athlete by one Japhter K. Rugut, EBS the Chief Executive Officer of Anti-Doping Agency of Kenya (ADAK) vide a notice of charge and and provisional suspension dated 3rd of July, 2017. In the

said communication the Respondent Athlete was offered an opportunity to provide an explanation for the same by 14th July, 2017.

- 2.5. 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 gave a deadline of 10th July, 2017 for the same.
- 2.6. In response to the letter dated 7th July, 2017, the Athlete vide an undated letter stated that she was unwell and sought treatment at Uasin Gishu District Hospital where the "doctor" prescribed the prohibited substance. However this information was not disclosed in her 'Doping Control Form' dated 19th of November, 2016. She also stated that the AAF and use of drugs was not intentional but on prescription.
- 2.7. The Applicant avers that the Respondent Athlete's explanation is not convincing and there was negligence on her part as she ought to have informed the doctor of her situation and career.
- 2.8. The Applicant further resonates that the Respondent did not bother to request for a Sample B analysis thus waiving her right to the same under rule 7.3.1 of ADAK Anti-Doping Rules.

2.9. 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. Charges

3.1. Subsequently, the Anti-Doping Agency of Kenya ADAK preferred the following charge against the Respondent Athlete:-

The presence of a prohibited substance or its metabolites or markers in the athlete's sample or use of a prohibited substance constitute an anti-doping rule violation under 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.

In this case *the Presence of a prohibited substance Prednisolone was found* in the Respondent's athlete's sample.

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 Analytical Adverse Findings.

3.3. The Applicant contends that the Respondent Athlete herein has a personal duty in ensuring that whatever enters his body is not prohibited and furthermore even on prescription they have the duty to be diligent as captured in *Article 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.*

3.5. 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.

3.6. The Applicant prays that:

- a) All competitive results obtained by the Respondent Athlete from and including 19th November, 2016 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 (Nelly Jepkurui Kibet) be sanctioned to a two year period of ineligibility as provided by the ADAK Anti-doping Code, Article 10 of ADAK and WADC Rules.
- c) Costs as per *Article 10.10*.

4. The Respondent's Arguments/Submissions

4.1. The Respondent Athlete was present during the hearing as a witness and was represented by Counsels Dr. Njaramba and Ms. Wanyama.

4.2. The respondent's counsel Dr. Njaramba allowed his client the 29 year old Athlete who was under oath to give a brief background about herself, whereby it was revealed that she is a class 8 dropout (primary school level of education) and a single mother of two children born in 2007 and 2013 respectively. She does not have any source of income apart from athletics. She lives with her sister in the outskirts of

Eldoret down. She trains regularly in the mornings after which she goes to assist her sister at her groceries business

- 4.3. The Respondent Athlete stated that on 20th October, 2016 she wasn't feeling well and had developed a cold, rashes, itchiness, breathing problems, chest and joint pains and went to seek treatment at the Pioneer Health Centre where she was given medicine. Before going to seek for treatment she had had the condition for about 3 months.
- 4.4. Her condition even after the treatment and the medicine prescribed on 20th October, 2016 did not improve and thus compelled her to return to the Pioneer Health Centre for further treatment.
- 4.5. The Respondent Athlete was diagnosed with Allergic Rhinitis and Dermatitis whereby she had complained of having persistent running nose, sneezing, coughing, itchiness, skin rashes and body hotness.
- 4.6. The Respondent Athlete after the diagnosis on 6th November, 2016 was given an injection and prescribed other drugs among them Diclofenac that she had to take orally.
- 4.7. The Respondent Athlete explained that she later proceeded to China where she took part in the Chang'De Liuye Lake Marathon and finished in the 2nd position.

- 4.9. Upon returning from China, her condition never improved and she decided to go for further treatment at Moi Referral Hospital in Eldoret on 5th of December, 2016. She conceded that she never told the doctor that she was an athlete but was only concerned about her treatment.
- 4.10. She asserted that she never went and had never gone to Uasin Gishu District Hospital but Pioneer Health Centre for her initial treatment.
- 4.11. Counsel for the Respondent Athlete Dr. Njaramba Gichuki proffered that it is not in dispute that the Respondent admits the presence of *Prednisolone* in her sample collected on the 19th November 2016 during In-Competition testing at the Chang'De Liuye Lake International Marathon.
- 4.12. Dr. Njaramba submitted that the substance entered the Respondent's both orally and through injection. He averred that the Respondent was under medication for allergies and severe inflammation of the skin. The drug containing *Prednisolone* was administered to her orally from 6th November, 2016 at Pioneer Health Centre in Eldoret. She continued to take the medication for five (5) more days as prescribed. She took the last dose of the medication

eight (8) days before her participation in the Chang'De Liuye Lake International Marathon.

- 4.13. Dr. Njaramba confirmed that the Respondent Athlete took the *Prednisolone* alongside other drugs, which were administered both orally and through injections, as treatment for severe allergies that had been diagnosed with at the same health centre.
- 4.14. Dr. Njaramba argues that the Respondent did not intentionally use the prohibited substance Prednisolone for purposes of performance enhancement as asserted in the charge document.
- 4.15. The Respondent therefore asserts that she was at all times using *Prednisolone* for medicinal purposes but not for performance enhancement. There was no intention to cheat and that the usage of *Prednisolone* occurred entirely outside the context of sport performance and there is no evidence that she did, or could have possibly, enhanced performance or could have distorted sporting competition.
- 4.16. The Respondent further submitted that she did provide a plausible explanation for the Adverse Analytical Finding (AAF) as captured in the charge document. The Respondent was indeed under medication for severe allergies which was

administered to her both orally and via an injection of a number of drugs, including *Prednisolone*, on 6th November, 2016 at Pioneer Health Centre in Eldoret town. *Prednisolone* is a drug used to treat severe allergies and skin inflammation.

- 4.17. Despite the complexities of anti-doping matters and the Respondent's lack of legal knowledge due to her level of education, she managed to not only provide this explanation in an honest and timely manner, but also to present corroborative evidence to support her explanation to ADAK (Applicant).
- 4.18. The Respondent posited that she received all the prescriptions for her ailments before the China race at Pioneer Health Centre and wondered why Pioneer Health Centre used a Uasin Gishu District Hospital stamp on her medical documents. She visited the health centre on 6th December, 2017 to try and inquire about the stamp as well as her medical report but in vain since the medical officer in charge was not available to assist her.
- 4.19. Dr. Njaramba averred that in her response to the Notice to Charge, the Respondent went ahead and attached evidence of the prescriptions she had received for the medication to

support her explanation. It is vital to note that the Respondent still sought treatment for ailments even after the race in China. She indeed visited the Moi Teaching and Referral Hospital in Eldoret town on 2nd December, 2016. Evidence of the same was availed in her Response to the Charge. This goes to show that she had a genuine medical problem that persisted for some time even after the race in question.

4.20. The Respondent was cooperative at all times and followed up diligently with ADAK's requests particularly the communication sent by the Chief Executive Officer Mr. Japther K. Rugut, EBS on 3rd July, 2017. The Respondent made several attempts to try and reach the medical officer who prescribed the medication to her. However, all these were in futile as she had been treated at a public Health Centre and never even remembered the name of the physician who treated her.

4.21. As doping control procedures are highly technical, the Respondent provided information to the Doping Control Officer with honesty and precision. She was required to disclose "*Prescribed/non prescribed medications and/or supplements taken over the past 7 days*" She disclosed that she

had taken a painkiller, Diclofenac, that morning, and an energy drink. However, the Respondent did not report any other medications as she had completed her dosage before the indicated 7 days prior to the marathon.

4.22. It is the Respondent's submission that her knowledge of anti-doping regulations was hindered by a number of factors. For instance the race was held in China thus a foreign language. Furthermore, the Respondent has difficulty communicating in English, leave alone in Mandarin that is spoken in China. She therefore experienced a language barrier as she didn't have an interpreter. Being a primary school dropout her low literacy level also made it hard for her to understand the complexities of anti-doping regulations, and even confirmed that she had never heard of the Anti-Doping Agency of Kenya (ADAK) prior to this case. She conceded that the closest she heard about doping was from her training counterparts who told her that one is not supposed to take *Piriton* during a race.

4.23. The Respondent also averred that she does not have much exposure to international sports. She said that her ticket to China for the marathon was paid by a Chinese man named Ethan through his agent, Sue.

That she was introduced to Ethan by Philip, a Kenyan living in the USA, who was introduced to her by Cheron, another Kenyan living in India. The Respondent had met Cheron, during training in Kimumu, Uasin Gishu County. She had never been subjected to anti-doping tests any other time, in China was the first time. This was her second time she was participating in an international race, the first time was in Hongkong in 2013 where she performed dismally as she was a young mother then still nursing an infant. Her ticket to Hongkong had been paid for by Thomas, a Kenyan living in Hongkong.

- 4.24. Dr. Njaramba further submitted that given the complexities of anti-doping regulations , the Respondent was unfortunately unaware that the prescribed medication contained prohibited substances. She was equally unaware of procedures on seeking Therapeutic Use Exemptions which may have assisted her at the material time. According to Dr. Njaramba, this is an inadvertent offence, a first for the Respondent, which she sincerely regrets and requests the Tribunal to assess the totality of mitigating circumstances in order to reach a fair decision.

5. Discussion

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

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

“The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organizations. (2) The Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency’s Anti-Doping Rules, amongst other legal sources.”

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

5.4. This panel is called upon to determine this matter. In order to do so, the panel must examine and answer the following;

a) Whether the Respondent Athlete has established how the prohibited substance entered her body;

- b) Whether or not, there was intent to violate the doping regulations;*
- c) Whether there should be reduction on the period of ineligibility based on the Athlete's plea of Timely Admission and No Significant Fault or Negligence;*
- d) What penalty or sanction to obtrude in the circumstances.*

5.5. It would appear to the panel that there are matters that were not in dispute by the parties which do not require elaborate review by this panel.

5.6. The parties in our view have not challenged the following facts;

- i. The Respondent Athlete has not contested the Adverse Analytical Finding (AAF) of her Sample 'A' in terms of the laboratory finding, for the **presence of a prohibited substance Prednisolone or its metabolites or markers** in her sample collected on 19th November, 2016.
- ii. The Respondent did not seek analysis of her sample 'B' thus waiving her right to the same under IAAF rule 37.5 and admitted the results would be similar with those of sample 'A' in any event.
- iii. The athlete's position is that the source of the AAF was the medication administered to her both orally and through injection prior to the date of sample collection which has not been contested by the Applicant ADAK.

- iv. The parties are in concurrence that the Respondent immediately upon notification of the AAF did respond and stated that she fell sick and the medication that was prescribed to her by a doctor at a health centre contained the prohibited substance and that is how it got into her body. This revelation came to the fore following the Athlete's letter of response, during the hearing and the various medical chits that were produced by the Respondent.
 - v. The panel is also cognizant of the fact that the Athlete's ailment has not been denied or in any way contested by the Applicant ADAK.
- 5.7. The parties however, are incongruity on the Health facility that the Respondent sought treatment, knowledge of seeking TUEs, and the intentionality of the Respondent usage of the prohibited substance for purposes of performance enhancement as claimed by ADAK in contravention of the relevant anti-doping regulations.
- 5.8. The Respondent Athlete proffered that she received all the prescriptions before the race at Pioneer Health Centre. The stamp appearing on the prescriptions originated from Pioneer Health Centre and does not know why Pioneer Health Centre used a Uasin Gishu District Hospital stamp. The Applicant rebutted the above submission and stated that the prescription she presented from the Pioneer Health Centre bore the stamp of Uasin Gishu District Hospital was denied following their investigation to verify the authenticity of the treatment records.

- 5.9. The Acting Medical Superintendent of Uasin Gishu County Hospital Dr. Noah Barmao confirmed that the Respondent's name is not captured in their OPD register on the said day that the Respondent claim she was treated and therefore couldn't comment on the injuries and treatment given. Surprisingly the investigations stopped there and the Applicant did not see the reason of exhausting their investigations by visiting the Pioneer Health Centre to ascertain the truth. The Applicant instead subjected the Respondent to self investigation and it did not bore fruits regarding the issue. The Applicant in this case failed to adduce compelling evidence as to the non-existence of the Health facility the Respondent sought treatment. It is our take therefore that the Respondent attended Pioneer Health Centre and there she received the injection that gave birth to the AAF.
- 5.10. It is noted that, this was the first offence for the Respondent and also the first time she was being subjected to anti-doping test. At 29, having started running at primary school and with two international races and numerous local events under her belt, it is perturbing to hear her say that she had not heard about ADAK but seeing that she was attending to her first test, a fact not contested by the Applicant, it was unsurprising she pleaded ignorance to CODE obligations such as requesting for relevant TUEs, informing the doctor that she was an athlete and fully declaring medication used in her DCF. An accumulation of running years per se did not necessarily add up to building the requisite experience in sports anti-doping matters, especially when those years did not yield podium finishes which primed one to be plucked out for doping tests in essence leaving athletes in her low performing category pristine.

- 5.11. Upon review of the evidence adduced, and noting the unchallenged fact of the ailment. We must address the question of intent to dope and enhance performance our position being that the fact of the AAF has not been denied or challenged, and therefore stands proved.
- 5.12. The source and /or origin of the substance and how it got to the Respondents body is also not challenged as submitted. The Respondent asserted that she was at all times using *Prednisolone* for medicinal purposes but not for performance enhancement purposes. Thus there was no intention to cheat and the Applicant has not given evidence to prove otherwise. We are of the view that the intent to cheat or to enhance performance has been dispelled, to the required comfortable satisfaction of the panel.

6. Decision

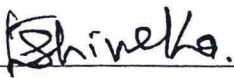
- 6.1. We find that an ADRV was established by the Applicant against the Athlete that is sanction-able pursuant to WADC's Article 10.2.1.
- 6.2. That the Applicant has not met the threshold as envisaged by Article 10.2.1.2 in regard to proving intention on the part of the Respondent.
- 6.3. Hence Article 10.2.2 is applicable in this case and given the extenuating individual circumstances elaborated herein, we find a 20 month period of Ineligibility appropriate for this case commencing from the date of provisional suspension which is 3rd July, 2017.
- 6.4. The Respondent's results obtained at Chang'De Liuye, Lake Marathon on 19th November, 2016 and thereafter, including any points gained and prizes, are disqualified.
- 6.5. The parties shall bear their own costs (if any) sustained in connection with the case.

6.6. Any other prayers or motions are dismissed.

Dated and Delivered at Nairobi this 16th day of October, 2018


Signed:

Elynah Sifuna-Shiveka



Deputy Chairperson, Sports Disputes Tribunal

In the presence of:

1. Mary Kimani 
2. GMT Ottieno 