

2.1 By a charge dated 31st January, 2017, and filed at the Tribunal on the 31st January 2018, the Respondent is charged with

“Administration or attempted administration to any athlete in competition of any prohibited substance or prohibited method, or administration or attempted administration to any athlete out of competition of any prohibited substance or any prohibited method that is prohibited out of competition.

2.2. The Respondent is described as a coach of a male athlete Ferdinand Omanyala and as such an Athlete support personnel. The said athlete’s sample collected on 9th June 2017, and remitted for analysis as prescribed returned an Adverse Analytical Finding (AAF) for Glucocorticoids / Betamethasone, a prohibited substance under section 59 of the 2017 WADA prohibited list and is a specified substance (Article 4.2.2 of WADC)

2.3. The applicant therefore prayed for

- a) Provisional suspension from any involvement with athletes, participation in all competitions, events or activities organized, authorized, convened or recognized by ADAK prior to the final Hearing, article 7.9.2. ADAK ADR
- b) Sanctions as provided by Article 10.3.3
- c) Costs (Article 10.10)

3. PRELIMINARY MATTERS

3.1. The matter was first brought to the Tribunal by way of a charge Notice dated 30th November, 2017 it was mentioned before the Tribunal Chair ex-parte on the same day.

3.2. A panel was constituted and the Applicant directed to serve the Respondent with a Notice to appear before the Tribunal on 6/12/2017 for further directions

3.3. The Respondent appeared as directed on 6/12/2017 together with Mr. Omariba representing the applicant. The Respondent requested for time to seek Legal Representation which request was granted. The matter was directed to be further mentioned on 18/1/2018.

3.4. When the matter came up for mention on 18/1/018, the Respondent had appointed Dr. Maurice Ajwang Owuor Advocate, who came on record on his behalf.

3.5. At that hearing Mr. Omariba for the Applicant requested for 7 days to file and serve the charge document upon the Respondent. The matter was adjourned to 31/1/2018 for mention.

3.6. When the matter came up on 31/1/2018 Mr. Omariba had on the same day filed the charge Document (dated 31/1/2017) with the respective supportive documents.

- 3.7. As the charge document had just been filed and served on the Respondent, Dr. Ajwang Owuor Advocate prayed for time to file a response to the charge. This was allowed and the Respondent was granted 7 days to file his response and a similar period for the Applicant to file any necessary reply. A hearing date was set for 1st March, 2018. An appropriate order for directions dated 31/1/2018 was issued by the Tribunal Chair for service upon the Applicant, and was served on 7/2/2018.
- 3.8 On 12/2/2018, a Notice of Appointment of Advocates was filed by the firm of M/S AGA OPOLO & ALOSA ADVOCATES for the Respondent. This was filed together with a statement of Defense, A Defendant's list of witnesses and the Respondent's list of Documents.
- 3.9 This matter was mentioned on 28/2/2018 when M/S Ochwada held brief for DR. Ajwang Owuor. It was indicated that Dr. Ajwang would not be available on 1st March, 2108, the date set for hearing accordingly the hearing set for 1st March 2018 was vacated and a fresh date of 14th March, 2018 granted.
- 3.10. On 14/3/2018, when the matter came up for hearing, Dr Ajwang requested for some time to prepare for the hearing as he had not had time to do so due to other pressing engagements. The matter was adjourned to 22/3/2018.
- 3.11 On 22/3/2018, the matter was to proceed for hearing. The panel assigned the hearing could not be Constituted due to urgent matters due for hearing affecting selection issues for the April, 2018 Commonwealth Games. A new panel as set out above was constituted to facilitate hearing. The Parties had no objection to the reconstitution and the matter proceeded to hearing.

4. APPLICANT'S CASE

- 4.1.Mr. Omariba for the Applicant made his remarks and stated that he would rely on the charge as presented together with the annexed documents.
- 4.2.He stated that the Respondent Duncan Ayiembra, is an athlete support personnel who acted as a coach for an athlete Ferdinand Omanyala Omurwa (Hereinafter Athlete) whose urine sample collected in competition on the 9th June, 2017, returned an Adverse Analytical Finding (AAF) for the presence of a prohibited substance namely Glucocorticoids/ Betamethasone, This is a substance prohibited under section 59 of the 2017 WADA prohibited List and is a specified substance under Article 4.2.2. of WADC.

- 4.2.3. According to the Applicant, upon the Athlete being informed of the AAF by a Notice dated 17/10/2017, he made a response via a letter of 18/10/017, which response informed the applicant that the Respondent herein directed him to a doctor to acquire medication for his back injury and administered or supervised the administration of Tramadol and Diprofos which the Athlete stated would have been the cause of the AAF.
- 4.2.4. Based on the response from the Athlete as above, the Applicant (ADAK) communicated to the Respondent vide the letter of 17th October, 2017 of the Notice of an ADRV of the Athlete Ferdinand Omanyala, and of his response as follows
- “Athlete Ferdinand Omanyala being served with a Notice of charge, he made a response via letter where he informed the Agency that you directed him to a Doctor to acquire Medication for his back injury and administered or supervised the administration of Tramadol and Diprofos on the Athlete in as (sic) as a form of an injection. The Athlete was injected with two injections of the prohibited substance with your knowledge and your presence by Dr. Jerita Mshilla. Further in his letter, the Athlete supposes that the AAF was occasioned by the administration of the aforementioned drugs”
- 4.2.5. ADAK therefore formally notified the Respondent that he would be charged with Administration or Attempted administration to an athlete in competition of a prohibited substance or administration or attempted Administration to an Athlete out of competition of a prohibited substance that is prohibited out of competition in violation of ADAK ADR Article 2.8.
- 4.2.6 Article 2.8 of the ADK Rules provides that the following conduct will constitute an ADRV.
2.8 Administration or attempted administration to any Athlete in- competition of any prohibited substance or prohibited method or administration or attempted administration to any athlete Out of competition of any prohibited substance or any prohibited method that is prohibited in Competition
- 4.2.7. Mr. Omariba Advocate for the Applicant also relied on Articles 2.1.1 and 3.1 of the code and the Statements from the parties in response of the charges as filed. The statements are from the Athlete and the Respondent.

5. RESPONDENT' S CASE

- 5.1. The Respondent testified He stated that. He also relied on the statement of Response filed on 12/2/2018. He also called Dr. Jerita Mshilla as a witness, and further relied on the various documents filed with his Response.
- 5.2. The Respondent stated that he has been working with an Athlete Ferdinand Omanyala a sprinter (100 & 200 meters) he has known him since early 2016. He denied ever administering any drugs on him or requesting him to take any prohibited substance.
- 5.3. It was his statement that sometime in March 2017 the Athlete sustained a back injury. That sometime during training in preparation for National Trials he was in pain. By the following Saturday the injury got worse and the Athlete had difficulties even in walking. They tried physiotherapy through a physiotherapist recommended by the Prisons Athletics Team Coach Thomas Musembi. This did not help. The physio Clinic is at NHIF house. The Athlete was at the time running for the Prison Athletics team.
- 5.4. By the time of this injury, the athlete was doing good times 10.2 for 100 meters and 20.6 in 200 meters (recorded as 20.3 by Athletics Kenya hand held gadget)
- 5.5. The Respondent also stated that prior to this the Athlete, due to his performance, had undergone various doping tests and sample collected at least 5 times.
- 5.6. By June 2017, the Athlete was in too much pain and the condition was getting worse despite the physiotherapy sessions. He then one day walked into a chemist at random while in town center. He thought it would be better to get a medical Dr. as the physiotherapy was not working.
- 5.7. At the chemist, he asked them if they do checkups before giving medicine. They told him they had no Doctors and did not do checkups. They however gave him a small business card for a Doctor whom they recommended.
- 5.8. He then called the Athlete who was in college at the University of Nairobi; he asked him to join him in town so they could go and see the Doctor. He waited for the Athlete to join him before they located the Doctor's clinic as per the business card.
- 5.9. He stated that at the Doctor's clinic they went to the reception and requested to see the Doctor. She was in and they went to her office. He was categorical that
 - a) They notified the Doctor (Dr. Jerita Mshilla) that the patient was an athlete who had a forthcoming competition. Where testing would be done.
 - b) They ensured that the Dr. was aware of the athlete's special requirement not to breach doping rules.
 - c) She said or assured them she knew substances banned and that whatever she gave would be alright.

d) That they engaged the Doctor in the matter and she gave them medical terms and they felt confident of her knowledge of the matter more so when she told them she was a medical Doctor at Mama Lucy Kibaki Hospital, a fairly large public hospital. She also has a small book with substance which she referred to.

5.10. With the foregoing, he, the Respondent was satisfied that she was good in her profession and was happy to let her deal with the Athlete. He was certain they had done what they could to confirm that the medication given would be alright but informed the Doctor that if there was a problem he would get back to her. He confirmed that he did not know the Doctor before this day. He bargained for the Medication (injections) prescribed and paid on behalf of his charge the athlete.

6. WITNESSES

6.1. The Respondent called two witnesses Ferdinand Omanyala, the athlete, and Dr. Jerita Mushilla.

6.2. Ferdinand stated that he started working with the coach Duncan Ayiamba the Respondent from March 2016. He had no coach prior to this, but had participated as a private entrant in various Local athletics events.

6.3. Their relationship paid off and his times improved. He even featured in the July 2016 National trials for RIO Olympics. He qualified for the East Africa University Games, in Nairobi.

6.4. In April 2017 he took part in the trials for the Bahamas youth games and he qualified to represent Kenya in the world relays competition.

6.5. Under the Respondent, he had a 6 days training schedule with 2 sessions each day track and gym but varied depending on the season.

6.6. He stated that while in Bahamas he started getting back pains and the team physiotherapist Alice attended to him and he got relief. Thereafter on return he would have sessions at Nairobi Hospital weekly.

6.7. He went through this for a while with no medication but a short while to the National trials due in June, 2017. while he was training on block starts with the Kenya Prisons team, he got severe pain. The Prisons team coach send him to the team physiotherapist at NHIF house. By then he could hardly walk. So he stopped training.

6.8. He attended sessions with Peter Nduhiu the physiotherapist and his assistant Wainaina, it gave some relief.

6.9. On a Sunday 3rd June he was still in pain, the coach called him while he was at his University student's hostel and he informed him he was still in pain. So the coach said he would look for a Doctor.

- 6.10. That the coach called him on 4th June to say he had found a Doctor and asked him to join the Coach in Town as soon as possible to go see the Doctor. He joined the coach and they located the doctor as per a business card which the coach had. The clinic was at a building near Afya Center in Nairobi Central Business District, on the 1st floor of the building.
- 6.11. They were ushered in to the Doctor's consultation room and introduced themselves, she took his history of the injury as he narrated. She also did a physical examination, the coach even asked if she would take x-rays because the back pain was severe, but she said there was no need from the history and examination, so she would give medication.
- 6.12. Ferdinand, stated that he cautioned the Doctor that he was an athlete and thus requested her to ensure she did not prescribe medication that would offend the ADR. She took out a book which he recalls was by a company that sales supplements and appeared to be on banned substances. He stated that he reminded her severally that he was an athlete and still held hopes of competing in the National trials and did not want any banned substances.
- 6.13. After perusing the book, he said, the Doctor reassured him that the substance she had prescribed was not banned and would not offend Anti-Doping Rules. She then administered on him two injections. He learnt from the Doctor that the injections were of Tramadol and Diprofos which she told him were anti-inflammatory medications that medics generally give to patients. The coach paid for the service 3,800/= by M-Pesa. After a bargain from 4,200/=
- 6.14. The medication gave him relief such that he was able to resume training.
- 6.15. At the National trials when being tested he saw the prohibited list but did not go through it for lack of time but he carried it. That coupled with the assurance from the Doctor was the reason he did not put down the injections of Tramadol and Diprofos in the Doping control form as he still was sure they were not banned substances. He also did not have his phone where he had saved the names of the medication given.
- 6.16. In cross-examination, he stated that the coach had never administered anything on him or asked him to cheat or intentionally use prohibited substances. He trusted his coach and the Doctor.
- 6.17. Doctor Jerita Mshilla testified on behalf of the Respondent. She said she knew Ferdinand Omanyala as a patient who went to her clinic in town in June 2017.
- 6.18. Dr. Mshilla stated that she is a medical Doctor G.P No 14678 admitted in 2014 qualified from Muhimbili medical school in Tanzania, she undertook studies from 2008-2013, she has a private clinic called Clinicare at Information House, opposite Afya Center within the city center. There they undertake routine laboratory and medical services with another Doctor, her partner. They have operated for 2 ½ years.
- 6.19. At the clinic the patients are mainly walk-ins and some referrals from pharmacies around who she gave her business cards. This particular client was referred by a nearby pharmacy Rangechem.
- 6.20. The patient went to her clinic in the company of his coach the Respondent and they both went into her consultation room. She took his history and also did a physical examination. She noted that he had internal leg pain radiating from the back. There were no physical wounds or fracture he was physically good but had signs of inflammation thus the pain plus raised temperature. Her diagnosis was "induced arthritis secondary to vigorous physical exertion."

- 6.21. For the diagnosis, she decided to use a mild steroid with anti-inflammatory effect. Such is usually used in arthritis (in this case autoimmune from physical exertion). She stated that such medication Betamethasone 5ml per 2ml vial liquid is usually done intramuscular and intraarticular (to the point or source of discomfort). In this case she injected the athlete at the upper arm.
- 6.22. She confirmed that he (the athlete) notified her that he was an athlete and was going to run and he asked her if the prescription would “affect” him. She confirms that she told him that the drugs prescribed were not “illegal” such as those used by the athletes to enhance their performance which are high in steroid content.
- 6.23. She said she had heard of doping issues from Kenya’s near miss of the 2016 Olympics. As a doctor she believed what was banned was the high dosage of steroid substances intentionally taken or administered aimed at aiding the athlete to enhance performance. In this case she said the dose was mild thus in her view safe. She said she is not a sports doctor, neither has she received training in sports medicine. She had only now gathered interest and followed doping issues since this case came up.
- 6.24. She stated that she used Tramadol injection which is a strong pain reliever. She prescribed and administered once. At the hearing she checked (at cross-examination) and she stated that was not in the list of banned substances.
- 6.25. The patient went to see her one more time after about a week as scheduled and she did not see him again as a patient but was contacted by his advocate after he had been charged with an ADRV, and saw him next at the Tribunal at this hearing.
- 6.26. Upon Cross-Examination by Mr. Omariba, Counsel for ADAK, Dr. Mshilla confirmed that the Athlete informed her that he was an Athlete and that he would be in competition soon where testing would be done and asked her if what she had prescribed was prohibited or would be detected. But at the time she did not have a specific knowledge of prohibited substances but reassured him that what she prescribed was safe, since what she prescribed was mild. Knowing what she knows now, she said, she would **NOT** use the same treatment on the Athlete.
- 6.27. She was certain that, but for the reassurance, the patient would not have accepted the drug. Both the patient and the coach relied and believed in her reassurance and trusted what she told them. She did not even know the name of the Respondent. She said he walked in with the patient but allowed her privacy to do the physical examination.

7. SUBMISSIONS BY ADAK

- 7.1. ADAK relied fully on the response by the Athlete Ferdinand Omanyala in his evidence against the Respondent. Mr. Omariba poses that the Athlete “on being served with the Notice of Charge, made a response via a letter where he informed the Agency that his Coach Dancun Ayiamba the Respondent herein “directed and accompanied him to a doctor to acquire medication for his back injury and administered and/or supervised the administration of Tramadol and Diprofos on the Athlete as a form of treatment.”

7.2.ADAK by large relied on the statements by the Respondent and his witnesses and did not challenge their truthfulness or accuracy but instead wished to use the same admitted facts as proof of the ADRV offence as set out in the charge document. ADAK summaries the position on facts as follows:

- a) He admitted being an Athlete Support Personnel
- b) He confirmed that he was aware the athlete suffered back problem that was disturbing him for a while.
- c) He was aware that the Athlete used to attend physiotherapy at Nairobi Hospital
- d) He was present at the training session on 3/6/2017 where the athlete's spine snapped and was unable to continue with practice session.
- e) He accompanied the athlete to NHIF building where the athlete was attended to by a physiotherapist on referral from the Prisons coach.
- f) He went to the city center and obtained contacts of a doctor on a Sunday evening and confirmed that she was available to treat the athlete.
- g) He called the athlete to come to town to receive treatment
- h) He accompanied the athlete into the doctor's chambers and witnessed the administration of the prohibited substance.
- i) He made payment for the treatment for the two occasions they visited.
- j) The athlete felt relief and continued with training the following day and participated in the races on Thursday and Friday.
- k) He admitted that when pain recurred on Friday 9th June, 2017 he took the athlete back for another injection to enable him participate in the finals on Saturday and it worked just fine.
- l) He admitted being aware of the prohibited list and had on several occasions been tested both as an athlete and Athlete Support Personnel. And Doping control and anti-doping are not new concepts;
- m) He admitted that he was aware that the doping substances could be detected;
- n) He admitted that he did not cross-check to see if the drugs she administered contained a prohibited substance;
- o) He admitted to the fact that since the athlete was desirous of participating in the meeting the following day week he was keen to have him participate;
- p) He admitted that on Saturday prior to the event the athlete had a serious dislocation of the spinal column;

- q) He admitted that as at Sunday the athlete was in immense pain from the injury and could not have participated without medical intervention;
- r) He admitted that he did not closely look at the book the Doctor was carrying when she gave the assurance that the medication is not prohibited.

7.3.ADAK also submits that the roles and responsibility of the athlete support personnel to be: -

- a) To be knowledgeable of and comply with the anti-doping rules
- b) To cooperate with athlete testing program
- c. To use his or her influence on athlete's values and behavior to foster anti-doping attitudes
- d) To disclose his or her international federation and the Agency any decision by non-signatory finding that he or she committed an anti-doping rule violation within the previous ten years.
- e) To cooperate with Anti-Doping Organizations investigating Anti-Doping rule violations.
- f) The Athlete support personnel shall not use or possess any prohibited substances or prohibited methods without valid justification.

7.4.In regard to the proof of ADVR, ADK's position is that the presence of prohibited substances and the laboratory finding is admitted by the athlete and not challenged at all.

7.5.ADAK therefore posed that, as an athlete support personnel, the Respondent knew or ought to have been aware under the rules that the athlete was subject to anti-doping rules and due care needed be taken in administration of any drug as envisaged in article 2.2. ADAK ADR. Accordingly, ADAK submitted that it was upon the Respondent to demonstrate that the substance was not to enhance the athlete's performance, and it would not suffice to merely state that he did not know that the medication contained a banned substance. On this proposition, ADAK relied on the decision in CA5 A2/2011 KURT FOGGO –vs- NATIONAL RUGBY LEAGUE (NRL)

7.6. ADAK concedes that the origin of the athlete's AAF has been established to be the medication administered by doctor Mshilla, but argues that the Athlete Support Personnel ought to have cross-checked further to find out if the same is a prohibited substance. He was under a duty to be knowledgeable in matters anti-doping and to encourage anti-doping culture on his charge, he did not seem knowledgeable and was not concerned in the protection of the athlete.

7.7. On the question of fault/negligence, ADAK relies on the CAS case CAS 2012/A/2804-DIMITAR KUTROVSKY VS ITF (pg. 26)

“The athlete’s fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any prohibited substance.

7.8. ADAK contends that the actions of the Respondent were reckless as he

Failed in his duty of care thus failed on his responsibilities under rules 22.2.1 and 22.2.6 ADAK ADR.

7.9. In conclusion ADAK stated that

- A. The ADRV has been established as against the Athlete support personnel.
- B. The admission was made by the Athlete support personnel concerning administration of the prohibited substance.
- C. Failure by the Athlete support personnel to cross-check the medication administered to the Athlete to see if the same contained prohibited substances.
- D. The knowledge and exposure of the Athlete support personnel to anti-doping procedures and programs and or failure to take reasonable effort to acquaint themselves with anti-doping policies.
- E. The Respondent herein has failed to give any explanation for his failure to exercise due care in causing the administration of the drug to the athlete and as such the ADRV was as a result of his negligent acts.
- F. Welcoming the results and returning for a second time to ensure the pain is gone throughout the period of training and competition.
- G. The risk the athlete was exposed by the suppression of pain so as to participate in a championship with the dislocated back.

ADAK therefore calls for the application of sanction of a lifetime ineligibility against the Respondent. Under Article 10.3.3 of ADAK Rules.

8. RESPONDENT' S SUBMISSIONS

- 8.1. The Respondent's submissions stress on the fault or negligence and the standards of proof visa vis the mitigating factors on intention.
- 8.2. The submissions set out the issues established by the Respondent as follows
- i. That before seeking further medical treatment that the Respondent has sought the assistance of a physiotherapist.
 - ii. That having sought further medical treatment he made it clear to the Doctor that the patient was an athlete and was due for competition and would be tested and that the doctor should ensure that the medication is not prohibited by the relevant sports agencies.
 - iii. That the doctor appreciated the profession of the athlete and as a medical expert gave them assurance that the medication would not breach the sports rules.
 - iv. That the respondent and the athlete had never met the doctor previously.
 - v. That the medication did not enhance the performance of the athlete and that the time achieved was not the best ever by the athlete
 - vi. That the respondent /support personnel as a reasonable person took the necessary precautions in the process of seeking further treatment for the athlete, by asking all the relevant questions and acquiring all the possible assurances from persons endowed with relevant knowledge based on their professions.
 - vii. That the respondent/support personnel did not breach his duty of care, by seeking all possible assurance and information.
 - viii. That the respondent/support personnel action did not lead to the adverse analytical finding.
 - ix. That in cross examination the medical doctor accepted the assertion that it is her who persuaded the patient/athlete and the respondent /support personnel that her medical treatment was safe and that it would not contain anything prohibited by sports rules.
 - x. That in cross examination the medical doctor accepted the assertion that, if it was not for persuasion/ assurance, the athlete and the respondent would not have accepted the medical treatment.

- x1. That in cross examination the medical doctor accepted the assertion that, the medical doctor admitted that she assured the athlete and the support personnel that the drugs she was administering was not prohibited.
- x11. That in cross examination the medical doctor stated that the drug she gave would not enhance performance due to the dosage and that the athlete and the respondent trusted her as a medical doctor and were right in trusting her due to her profession.
- x111. That the drugs were administered not by the respondent but the medical doctor.

8.3. The Respondent submits that the strict liability rule while placing the burden on the Respondent, should be viewed against the emerging jurisprudence that proof of the absence of intention, fault or negligence would be a mitigating factor and the Respondent can avoid or reduce and /or eliminate sanctions if he establishes that he had no fault or significant fault or did not intend to enhance performance.

8.4. The Respondent relied on two past decisions on the matter

- a) FINA VS CIELO. CAS 2011/A/2495
- b) CAS 2009/A/1870 WADA VS JESSICA HARDY & USADA.

8.5. The Respondent submitted that the 2 cases clearly set out the conditions for reduction of ineligibility periods. The conditions are

- 1. The athlete must establish how the prohibited substance entered his or her system.
- 11. The athlete must establish that he/she bears No significant Fault or Negligence.

8.6. The Respondent further submits that based on the established standard of proof “greater than a mere balance of probability but less than proof beyond a reasonable doubt” he has satisfactorily and fully answered the charge confronting him, he has rebutted the presumption of guilt by establishing specific facts or circumstances leading to the violation.

8.7. The Respondent thus asks that this panel dismisses the charges set forth in the charge sheet there being no fault or negligence, and also that the suspension imposed be lifted.

9. **DECISION**

9.1. There are some facts that are not disputed by both parties which would then leave to discussion only those that are contested.

- 9.2. There is at least a meeting point on the following
1. The Athlete (Ferdinand) and the Respondent do not contest the ADRV, and laboratory finding for the presence of Glucocorticoids/ Betamethasone in the Athlete's sample A collected on 9th June, 2017.
 - ii. There is also a meeting of minds on the source of the prohibited substance and how it got into the athlete's system. It is agreed that the prohibited substance was contained in the medication by injection given to the Athlete (Ferdinand) by Dr. Jerita Mshilla prior to the participation in the Safaricom Athletics Kenya Championships where his urine sample was collected.
 - iii. It is also agreed that the Athlete and the Respondent herein immediately upon notification of the AAF did state and disclose how the prohibited substance got into the Athlete's body. This position has also been confirmed by Dr Jerita Mshilla who was a witness in this case, Dr. Mshilla confirmed that she administered Tramadol and Diprofos injections upon the athlete at her clinic on the specified date(s) for purposes of treating an injury.
 - iv. The panel also finds that the fact of the existence of an injury on the athlete was not denied or contested by the Appellant.
 - v. The Respondent also conceded that he was a coach of the Athlete Ferdinand Omanyala and thus an "Athlete support personnel" as defined under the WADA code and the Kenya Anti-Doping Act No. 5 of 2016. Together with the ADAK Anti-Doping Rules.
- 9.3. The point of departure to the panel's understanding is whether as claimed by the Appellant, the Respondent willfully and/or negligently directed the Athlete Ferdinand to have a prohibited substance administered on him, or whether as the Respondent states he did what he could possibly do to ensure that the Doctor was aware that his charge was an athlete who would compete and be tested and that he relied on the expertise and assurance of the Doctor that what she had prescribed was safe and not prohibited, thus no intention to offend Anti-Doping Rules or willfully administer prohibited substance.

- 9.4. The Respondent has been charged under the provisions of ADAK ADR 2.8 with “administration or attempted administration to any Athlete in competition of any prohibited substance or prohibited method ...”
- 9.5. Under Appendix I the definition provision of the ADAK ADR; which is similar to the WADAC definition, Administration has been defined as
“Providing, supplying, **facilitating** (emphasis ours) or otherwise **participating** (emphasis ours) in the use or attempted use by another person of a prohibited substance or prohibited method. ...”
Facilitating (verb) is defined as: make (an action or process) easy or easier: make possible, smooth the path, clear the way...
To make easier or less difficult, help forward (an action, a process etc.) ... to assist the progress of (a person)
Participate (verb): be involved in, take **part, play a part, play a role, be a participant.**
- 9.6. Considering the above definitions and the evidence adduced in regard to the actions of the Respondent herein leading to the ADRV by his charge the athlete Ferdinand Omanyala, this panel is of the view that the charge as frame is appropriate and has been sufficiently established by the evidence –mostly by the statements of the Respondent and his witness. The Respondent participated in
- a) Sourcing the Doctor
 - b) Calling the Athlete to join him in town to see the Doctor
 - c) Took the Athlete to the Doctor
 - d) Was present and involved in the discussion leading to the Doping Rule violated
 - e) Making payment for the treatment after negotiating the sum
- 9.7. It is the panel’s view that indeed, the coach’s actions of actively looking out for the Doctor and getting the Athlete to attend were the direct lead to the ADRV.
- 9.8. To the panel’s mind, a look at the Respondent’s presentations and evidence would be useful.
- 9.9. The Respondent’s evidence was that the Athlete Ferdinand a sprinter was injured in training; he was turning out for the prison’s Athletics team so they were referred to the prisons team’s physiotherapist. The Athlete did have several physiotherapy sessions which did provide some relief but the pain returned and so he sought further

treatment. This led him to a chemist in town chosen randomly, and it's here that he got a referral to Dr. Jerita Mshilla's clinic.

- 9.10. There was no indication from the Appellant that the Respondent knew Dr. Mshilla before this referral. Indeed Dr. Mshilla in her testimony stated that the two people (Respondent and Athlete) were strangers who introduced themselves when they went to her clinic.
- 9.11. Doctor Mshilla further stated, which was not challenged, that for business purposes, she does get referrals from the chemist near her clinic when they have persons who require medical evaluation before dispensing drugs.
- 9.12. The Respondent and the witnesses did state that when the Respondent went with the Athlete to the Doctor's office, the Doctor was well informed that the Athlete (Ferdinand) was an Athlete who would be in competition and would undergo testing and they therefore asked if what she would/had prescribed would result into an AAF, we understood the Respondent and the Athlete to say "we told the Doctor the athlete would be tested for banned substances."
- 9.13. On her part the Doctor's position as we see it was simple; this is the treatment doctors use all the time to treat similar cases so not a drug for enhancing performance but treatment.
- 9.14. It would appear to us that on that point the Doctor and her patient may have not had a meeting minds. The Doctor was looking at providing relief and healing while the Respondent and his charge were thinking of pain relief and treatment but not offending the applicable ADR. Yet this apparent divergent understanding of the matter by the two sides led to a catastrophic outcome of the ADRV.
- 9.15. According to the Respondent, the Doctor did refer to a book and she confirmed knowledge of the prohibited substances and assured the athlete that the medication she had prescribed did NOT contain any such substances. This was the information he gave at the hearing and also contained in his letter in response to the ADRV notification.
- 9.16. At the hearing Dr. Mshilla did give a similar narration of the sequence of events leading to the administration of the drug which by admission led to the AAF. She confirmed that the athlete notified her that he was an athlete and that he would be tested for doping control purposes. According to her what she prescribed was a mild steroid used for arthritis, and for the athlete's case it was for relief of autoimmune injury and pain resulting from physical exertion. She thus gave 5ml per 2ml vial in

liquid form. She stated “I told him it was not an illegal steroid such as those used by athletes to enhance performance- those are high dosage steroids 5 times higher than this...”

9.17. Dr. Mshilla also conceded in cross-examination that she had no training on doping and what she knew at the time was what she had seen and heard on TV sports news about WADA from the 2016 Olympics. For her, prohibited substances was “something to enhance performance” deliberately used by specialized Doctors to aid athletes. She only keenly followed up on issues of Doping after this matter came up after being notified by Ms Sarah Ochwada the Advocate for the Athlete Ferdinand Omanyala. She did admit that knowing what she now knows, she would not administer the same treatment under similar circumstances.

10.

10.1. The AAF has not been contested and therefore there is a clear ADRV established in terms of both the Kenya Anti-Doping Act and WADAC.

10.2. The Applicable period of ineligibility to be imposed for the presence of a prohibited substance in an Athletes sample is a period of 2 years being the first offence unless that period is eliminated or shortened under Article 10.4 or 10.5 of the WADAC, and relevant provisions of the Kenya Anti- Doping Laws and Rule.

10.4. 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.

10.5.1.1 “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 maximum, two years of ineligibility, depending on the athlete’s or other person’s degree of fault.”

10.3. As has often been stated, for purposes of assessing the athlete’s or other person’s fault under Article 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the athlete’s or other person’s departure from the expected standard of behavior. From the review of the statement of the Respondent and the corroborating statements and evidence of his witnesses, the Respondent has demonstrated to the comfortable satisfaction of the panel and the same having been unopposed by the Appellant that

- a) There was no prior acquaintance between the Respondent and Dr. Jerita Mshilla. Attendance before her was a random decision after reference by a chemist.
- b) The Respondent and the athlete specifically informed the Doctor that the Athlete was a sports person (Athlete) and was due to participate in competition within that week and would be subject to Doping control regulations/process.
- c) The Respondent was assured that and/or understood the Doctor to have stated that the prescribed medication was safe and would not offend Anti-Doping requirements and he believed he that this statement was made in clear misunderstanding of the matter by the doctor.
- d) The Respondent accepted and relied on the Doctor's professional assurance that the medication prescribed did not infringe on Anti-doping requirements. This was well before the same was administered.
- e) It is accepted that the presence of the prohibited substance arose from the prescribed medication administered by Dr. Jerita Mshilla (diprofos and tramadol)

10.4. The panel finds from the circumstances of this case that there was no intention on the part of the Respondent to cheat or to enhance the performance of Ferdinand Omanyala the athlete.

10.5. From the foregoing, the panels duty is to answer whether, the Respondent can be found to bear "No significant fault or negligence" for the anti-doping rule violation and what would be the appropriate length of the suspension to be imposed on him.

10.6. The question is whether his conduct was such as to eliminate the risk of the breach of ADRV which then followed.

10.7. Considering the Respondent's level of exposure visa vis the steps taken to seek medical attention for his charge the athlete, the panel is of the view that he could have done a little more. Whereas his conduct is not of "significant fault" he is not completely without blame. In view of the risks involved which he was clearly alive to, hence the effort to notify the Doctor that Ferdinand was an athlete, he could and should have sought the assistance of athletics Kenya or its medical commission which consists of Doctors well versed in doping issues. He instead went to a chemist who referred him to Dr. Mshilla to that extend he must bear some degree of responsibility for the resultant AAF of the athlete's sample and the ADRV. Being alive to the dangers and consequences of doping, it was careless of the Respondent to simply walk into a chemist seeking medication for the athlete.


- 10.8. The panel however also notes that the Respondent was diligent in notifying the doctor that his charge was an athlete which act goes to show lack of intention to cheat.
- 10.9. It however appears to this panel that the parties were not in tandem in their discussion on the issue of the notification of the doping and testing process. Whereas the Respondent and his charge Ferdinand seemed to be clear that they were talking of doping as prescribed by the WADC, the doctor seemed to have been on a different tangent. The evidence shows that she completely misunderstood the issue yet the Respondent and the athlete relied on her presumed expert knowledge as a doctor to submit to treatment whose prescription has led to the AAF.
- 10.10. Considering the knowledge and position of the Respondent, how does it reflect on the steps he took such that they can be judged either to have been significantly reckless or negligent and to what level. This would assist in determining the degree of fault which then would assist to determine whether or not the Respondent can benefit from a reduction of the prescribed period of ineligibility in terms of Article 10.5.2
- 10.11. It has been stated that the Doctor was specifically informed severally that her patient was an Athlete who was due to compete in a National competition where testing would be undertaken. It has also been stated that the Doctor consulted a book in the presence of the Respondent and athlete and from such "consultation/ review", she did confirm that what she had prescribed to give to the athlete was not "illegal" and it is this reassurance that led to Respondent and athlete to submit to the administration of the prescribed medication which led to the AAF.
- 10.12. The Respondent a military officer has not been shown to have received any training on doping or any other specialized knowledge on doping. The issue then would be whether in view of his personal circumstances, the reliance he placed on the Doctor's advice would be deemed to be a significant fault or even negligent such as to lead this panel to impose the maximum period of ineligibility. We think that the circumstances of what transpired at the clinic points to some effort by the Respondent and his charge to avoid a breach of the ADAKC/ WADC. To that extent we are persuaded that the Respondent can be said to have had no significant fault or negligence and can benefit from the minimum prescribed period of ineligibility, and possible reduction
- 10.13. We are however not persuaded that the circumstances in their totality would render him a candidate to benefit from a total elimination of the period of ineligibility. As stated earlier he failed the athlete by not seeking better clarification either through AK and its medical commission or further follow up with the prisons Athletics team which the Athlete turned out for.


- 10.14. Considering both the objective and subjective elements of fault based on the steps taken by the Respondent to prevent the consumption of the prohibited substance, we think that this case can be distinguished from that CAS 2017/A/5110 International SKI Ferdinand VS Theresa Johaug and Norwegian Olympic and Paralympic Committee and Anor. In the situation of the Theresa Johaug case both the athlete and her team Doctor had very high level of exposure and experience. Indeed, the team Doctor was described “as a fussport” as he was considered to be very strict in ensuring compliance.
- 10.15. Further in the case of Theresa Johaug the medication leading to the AAF had clear doping signs on the label which she failed to read. They failed to perform a check on the product label. In the present case, the Respondent saw the Doctor check in a book and thereafter confirmed that what she had proposed to use was “legal”
- 10.16. We have duly considered the various past CAS cases referred to by the parties’ respective counsel herein; we observe:
- a) That prescription of medicine by doctor does not of itself relieve the Athlete / support personnel from checking if the medicine contains forbidden substances.
 - b) Individuals involved in doping process always bear personal responsibility. If failure of a doctor does not exempt the athlete from personal responsibility would the support personnel be placed in any better position by the same. We think not.
 - c) Athletes and their support personnel have a duty to cross-check assurances given by a doctor even where a doctor is a “sports specialist.”
- 10.17. Having observed as above, but also being persuaded that the Respondent committed the violation with no significant fault by reliance on a doctor’s reassurance that the prescribed medication was “legal” and taking cue from past decisions of similar nature and bearing in mind the principle of proportionality of sanctions, we are of the view that the Respondent herein is a fit candidate to benefit from the minimum period prescribed, and to a reduction in terms of Art. 10.5.1
- 10.18. The panel however observes that the prescribed minimum period of ineligibility is 4 years, however, as observed above, the panel notes that the ADRV was not committed intentionally with the aim of enhancing the athlete’s performance. Further it was observed that the Respondent can benefit from no significant fault. Consequently, the panel is persuaded that the period of ineligibility may be reduced under Article 10.5.1.1
- 10.19. Accordingly, we find that the Respondent violated the ADAK ADR as charged, we hold that the Respondent shall serve a period of ineligibility of 2 years with effect from 18/9/2017 being the date of notification of the ADRV.

ORDER

1. The Respondent shall serve a period of ineligibility of 2 years with effect from 18th September, 2017
2. Each party shall bear its own costs for these proceedings
3. The parties have a right of appeal against this decision in terms of Article 13, 2, 2.

✓ DATED at NAIROBI THIS 30TH DAY OF AUGUST 2018

ELYNAH SHIVEKA 
SDT VICE CHAIR

NJERI ONYANGO 
SDT MEMBER

G M T OTTIENO 
SDT MEMBER