REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 4 OF 2018

ANTI-DOPING AGENCY OF KENYA……APPLICANT

-versus-

LUKA KANDA LOKOBE…… RESPONDENT

DECISION

Hearing: 14th June, 2018

Panel:

John Ohaga	Chairman
Elynah Shiveka	Member
Peter Ochieng	Member

Appearances: Messrs Erick Omariba and Bildad Rogoncho, Counsel for Applicant (ADAK);

Ms. Eunice Olembo, Advocate – Center for Sports Law for the Respondent (Acting pro-bono);

Luka Kanda Lokobe – Athlete/Respondent

1. The Parties

1.1. The Applicant, The Anti-Doping Agency of Kenya (ADAK) is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016. It is the body charged with managing Anti-Doping activities in the country including results management.

1.2. The Respondent (is a male adult of presumed sound mind, an international level long-distance athlete to whom the Anti-Doping Act No. 5 of 2016 and the ADAK Anti-Doping rules apply to. .

2. Background

2.1 On 29th, October 2017, Korea Anti-Doping Agency (KADA) Doping Control Officers in an in-competition testing, at the Chosunilbo International Marathon in Chuncheon (Korea) 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; **A4161020 (the "A Sample")** and **B4161020 (the "B Sample")** under the prescribed World Anti-Doping Agency (WADA) procedures.

2.2 Subsequently, both Samples were taken to the WADA accredited laboratory in Seoul, Korea. The Laboratory 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 ***Clenbuterol. Clenbuterol*** is listed as a prohibited substance under S1.2 of the 2017 WADA Prohibited List (Anabolic Agents) and is a non – specified substance according to Article 4.2.2 of WADC.

2.3 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 5th of February, 2018. In the said communication the Respondent Athlete was offered an opportunity to provide an explanation for the same by 12th February, 2018.

2.4 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 12th February, 2018 for the same.

2.5 The Respondent Athlete in his response to the letter dated 5th February, 2018 acknowledged receipt of the letter from the ADAK Chief Executive Officer Mr. Japhter K. Rugut. He stated that he had obtained information from the internet on possible sources of Clenbuterol including asthma medication and animal products.

2.6 According to the Applicant, the Respondent Athlete's explanation is not satisfactory and avers that there was negligence on his part in view of his situation and career and that if he was on treatment he ought to have sought a Therapeutic Use Exemption ('**TUE**').

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

2.8 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 Clenbuterol in the athlete's sample.

3.2. **Clenbuterol** is listed as a prohibited substance under S1.2 of the 2017 WADA Prohibited List (Anabolic Agents) and is a non – specified substance according to Article 4.2.2 of WADC.

3.3. The presence of a prohibited substance or its metabolites or markers in an athlete's sample or the use of a prohibited substance constitute an anti-doping rule violation under Article 2.1 of WADC and rule 32.2 and rule 32.2 (b) of the IAAF rules.

3.4. Article 2.2.1 of WADC and as read together with ADAK ADR provides; **"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 the metabolites or markers found present in their sample."**

3.5. 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 Findings.

3.6. 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 of WADC and ADAK Anti-Doping Rules.

3.7. The Applicant also states that under Article 22.1 of the ADAK ADR the athlete is responsible to be knowledgeable of and comply with the anti-doping rules.

3.8. No plausible explanation has been advanced for the adverse analytical finding and accordingly the ingestion of the prohibited substance by the Athlete was out of negligence and no possible explanation can be given on fault or negligence by the athlete or a third party.

3.9. The Applicant prays that:

a) All competitive results obtained by the Respondent Athlete Luka Lokobe Kanda from and including 29th October, 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 and WADC.***

b) Respondent Athlete be sanctioned to a four year period of ineligibility as provided by ***Article 10 of ADAK Rules*** and ***WADC.***

c) Costs as per ***Article 10.10 of WADC.***

4. Jurisdiction

4.1. The Sports Disputes Tribunal has jurisdiction to entertain the matter pursuant to Sections 55,58 and 59 of the Sports Act No. 25 of 2013 and sections 31 and 32 of the Anti-Doping Act No. 5 of 2016 as amended to hear and determine this case.

5. Preliminary Matters

5.1. The matter was first brought to the Tribunal vide a notice to charge addressed to the chairman of the Sports Disputes Tribunal dated 22nd February, 2018 by Ms. Damaris Ogama for the Applicant (ADAK). The matter was filed on the 26th of February, 2018 at the Tribunal. The notice also requested the Tribunal to constitute a hearing panel to whom the charge documents and other relevant materials were to be served.

5.2. Upon reading the notice to charge dated 22nd February, 2018, the Tribunal directed and ordered that the Applicant should serve the mention notice, the notice to charge, the notice of ADRV, the Doping Control Form and all other relevant documents on the Respondent within 15 days from the date hereof, and the matter was to be mentioned on 21st March, 2018 to confirm compliance and for further directions. A hearing panel comprising **Mr. John Ohaga, Mrs. Elynah Shiveka** and **Mr. Peter Ochieng** was constituted.

5.3. On 21st March, 2018 when the matter up for mention, Counsel for the Applicant, Mr. Omariba confirmed to the Tribunal that the notice and directions had been served on the Respondent Athlete, who was present at the Tribunal and confirmed the same. The

Respondent Athlete requested for legal representation of his case. The Tribunal undertook to provide the Athlete with one from its pro-bono panel.

5.4. ADAK was to serve the Charge Document within 7 days and a mention date was scheduled on 11 April, 2018 to take a hearing date. The Charge Document was filed at the Tribunal on 27th March, 2018 as directed.

5.5. On 11th April, 2018 during the mention of the matter, Ms. Eunice Olembo Advocate from the Center for Sports Law came on record to represent the Respondent Athlete pro-bono. She requested for 3 weeks to file her statement of response. The Applicant's counsel had no objection on the time sought. The Tribunal granted leave to the Respondent as requested and the matter was to be mentioned on 2nd May, 2018.

5.6. The matter was mentioned on 2nd May 2018, and the Applicant was represented by Mr. Bildad Rogoncho but the Respondent was absent. A further mention of the matter was set for 16th May, 2018 by the Tribunal and the Applicant was to serve the mention notice to the Respondent.

5.7. When the matter was mentioned on 16th May, 2018, both parties were represented; Mr. Omariba for the Applicant and Ms. Olembo for the Respondent Athlete. Ms. Olembo sought for more time to respond to the charge document and promised to file by 21st May, 2018. The Tribunal granted her the time and set the matter for a further mention on 23rd May 2018 to confirm compliance of the same.

5.8. On 23rd May, 2018, the parties agreed by consent to hear the matter on 14th June, 2018 at 2.30pm.

6. Hearing

6.1. At the hearing on 14th June, 2018, the Applicant was represented by Counsel Eric Omariba and Bildad Rogoncho.

6.2. The Respondent Athlete was present andwas represented by Counsel Ms. Eunice Olembo.

7. The Respondent's Evidence

7.1. The Respondent, Luka Kanda Lokobe, took oath and testified at the hearing. He was identified by his National Identity Card No. 23278924. He is 34 years old having been born in the year 1983 in Marakwet Central.

7.2. He stated that he understood the charge and why he was before the Tribunal. He had received an ADRV notification that his sample collected during the marathon held in Chuncheon (Korea) on 29th October, 2017 had returned an Adverse Analytical Finding (AAF).

7.3. He stated that he has been an athlete since 2008 participating in races both locally and internationally returning varied results and has this far participated in around 9 marathons. Some of the international races he has participated in and undergone anti-doping tests include Paris Marathon in 2014 and 2015 where he finished in the 3rd and 2nd positions respectively, Chosunilbo International Marathon in Chuncheon in 2016 and 2017 where he took the pole position in both, and Rome marathon in 2012 where he won among others.

7.4. He posited that he was shocked when he was informed by ADAK of the Adverse Analytical Finding. He responded to ADAK and said that he would comply. He revealed to ADAK in his statement the list of supplements that he normally use during his training and preparation for races. He reiterated that he has never used any drugs to enhance his performance. He disclosed that his friend and training partner Peter Kiptoo is also facing the same consequences.

7.5. He submitted that he was in Korea for about five days and ate rice and meat at the Bears Hotel where the organizers of the race had booked him and other athletes in.

7.6. He informed the panel that he is a class 8 drop-out, married with 3 children and that his athletics manager is Mr. Bineda from Spain.

7.7. During cross examination, Mr. Omariba sought to find out if the Respondent Athlete had any receipts from the hotel where he was accommodated or bought food, which he had. Mr. Omariba also confirmed from the Respondent Athlete that his training partner Peter Kiptoo is facing consequences of the same prohibited substance whereas they ran in different races, different continents but at the same time.

8. Respondent's Submissions

8.1. Ms. Olembo filed her written submissions at the Tribunal on 2nd August, 2018 a summary of which is captured herein.

8.2. Ms. Olembo submitted that the Respondent had no intention to cheat and that the presence of the Clenbuterol in the Athletes sample occurred as a result of an inadvertent mistake as a result of ingesting contaminated food on the part of the Respondent in the course of his 5-day stay in South Korea.

8.3. She asserts that the presence of the prohibited substance in the Respondent's urine sample was not as a result of negligence on the part of the Respondent neither was it as a result of any subjective fault on the part of the Respondent.

8.4. She argues that the Respondent could not have reasonably known or even suspected even with the exercise of utmost caution that he had committed an anti-doping rule violation.

8.5. Ms. Olembo argues that the test used to detect Clenbuterol in urine cannot distinguish between contaminated meat and deliberate ingestion nor can any scientifically validated test.

8.6. Ms. Olembo is convinced and as testified by her client the Respondent Athlete, that he did not have any intention of enhancing his performance.

8.7. Ms. Olembo reckons that the Applicant must prove to the comfortable satisfaction of the panel that the Respondent not only knew the substance he was taking was prohibited, but that he took the substance wilfully in order to enhance his performance.

8.8. Ms. Olembo pleaded with the panel to consider reducing the requested sanction of 4 years ineligibility period by the Applicant to the lowest possible as provided by law specifically Article 10.5.1.2 of the WADA Code pertaining to Contaminated Products provides that in cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a contaminated product, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years ineligibility, depending on the Athlete's or other Person's degree of fault.

8.9. She refers us to the Arbitration ***CAS 2015/A/4129 & Others v. International Weightlifting Federation (IWF),*** as instructive, the Panel stated that: "Under the applicable anti-doping rules, in order to benefit from an eliminated or reduced sanction, the burden of proof is placed on the athlete to establish that the violation of the anti-doping rules was intentional and/or that he/she bears no fault or negligence or no significant fault or negligence. The standard of proof is the balance of probabilities." i.e. that it is more likely than not, that the prohibited substance was for a credible non-doping explanation.

8.10. Ms. Olembo requested the panel to therefore assess the level of diligence required of the Respondent under his specific circumstances and in light of his personal capacities.

9. Applicant's Submissions

9.1. The Applicant's final written submissions were filed on 15th August, 2018 by Ms. Damaris Ogama. Their legal position is as captured herein below;

9.2. The applicant submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of

proving the ADRV to **the comfortable satisfaction** of the hearing panel.

Presumptions

9.3. Article 3.2 provides that facts relating to anti-doping rule violation may be established by **any reliable means** including **admissions** and the methods of establishing facts and sets out the presumptions. Which include:

a. ***Analytical methods or decision limits*** .....
b. *WADA accredited Laboratories and other Laboratories approved by WADA are **presumed to have conducted Sample analysis** and custodial procedures in accordance with the International Standard for Laboratories*
c. *Departures from any other International Standard or other anti-doping rule or policy set forth in the code or these Anti-Doping **Rules which did not cause an Adverse Analytical Finding** or other anti-doping rule violation shall **not invalidate** such evidence or results.*
d. *The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of a pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other person establishes that the decision violated principles of natural justice.*
e. *The hearing panel in a hearing on an anti-doping rule violation on may draw an inference adverse to the athlete or other person who is asserted to have committed an anti-doping rule violation based on the athlete or other persons refusal, after a request has been made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the agency.*

What are the roles and responsibilities of the athlete?

9.4. That under Article 22.1 the Athlete has the following roles and responsibilities:

a. To be knowledgeable of and comply with the anti- doping rules;
b. To be available for *Sample* collection at all times;
c. To take responsibility, in the context of anti-doping, for what they ingest and U*se;*
d. To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take

responsibility to make sure that any medical treatment received does not violate these Anti-doping rules;

e. To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years;
f. To cooperate with Anti-doping Organisations investigating Anti-doping rule violations.

9.5. It was the Applicants submission that the athlete is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;

.....The spirit of sport is the celebration of the human spirit, body and mind and is reflected in values we find in and through sport including;

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- *Character and education*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity*

9.6. The Applicant noted that in his defence, the Respondent made a number of admissions and a few general denials. In his **evidence in chief** the respondent made the following admissions;

a. He admitted the results of "Sample A" and he 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 that he has been an active participant in athletics events in previous occasions and has provided samples for testing on those occasions;
d. The athlete accepted that he had been a user of supplements.

9.7. The respondent/athlete by the scientific results of a valid and unchallenged laboratory results of the presence of a prohibited substance Article 2.1.1 provides for *"strict liability"* on the part of the athlete. Similarly, Article 10.2.1 the burden shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction.

9.8. The athlete therefore has the burden of demonstrating how the prohibited substance entered his body.

Proof of Anti-Doping Rule Violation - Intentional Violation

9.9. The Athlete was charged with the presence of *clenbuterol* in his sample a violation of Article 2.1 of the ADAK ADR. Clenbuterol is a Specified Substance and in fact accepted that it was there throughout the entire proceeding.

9.10. Rule 40.3 of the IAAF Rules sets out that the term intentional is meant to "identify those athletes who cheat. The term therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk"

9.11. For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, **he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV. According to 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.

9.12. A failure to explain the concrete origin of the prohibited substance only means that an athlete cannot prove the lack of intent. In the matter of Canadian Weightlifting Federation and Taylor Findlay, the CAS Arbitrator Yves Frontier stated that:

77. 'It appears to me that logically, I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says, contained Clenbuterol. With respect to the contrary view, I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body'

9.13. From the above, it is clear that to prove lack of intention, the Athlete must show sufficiently the manner in which the prohibited substance entered his body. We submit 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 the medication/supplement 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'*

9.14. The applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional. It follows then that he must necessarily establish how the substance entered his body.

9.15. The Applicant urges the Panel to disregard the Respondent's assertion as it has been rendered unable to weigh the likelihood based on the absence of evidence.

9.16. It is the Applicant's submission that the Respondent 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 a burden of convincing the panel that the occurrence of the prevailing circumstances is more probable than their non-occurrence.

9.17. It is the Applicants submission that by failing to adduce any evidence to support his assertion, the athlete has in effect tied the

hands of the Tribunal as it is unable to weigh probable scenarios that would answer the question as to the origin of the prohibited substance.

9.18. The Applicant cited the case of **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. More is required by way of proof given the Athlete's basic personal duty to ensure that no prohibited substance enters her body.

9.19. It is clear from the above-mentioned CAS case law that it is not sufficient for an athlete to merely suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine, food or other product the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that the medication the athlete took contained the particular substance.

9.20. The athlete in this case supposes that the substance may have entered his body through ingesting contaminated food. The Respondent failed to give details as to the possible location where he suspects he ingested contaminated meat. His omission casts a shadow of doubt on his explanation as he has failed to adduce concrete evidence as dictated by CAS Jurisprudence. Moreover, clenbuterol contamination in meat is region specific since not all cattle breeders use the same to increase meat production.

9.21. The above is made clear by the observations of the panel in **CAS 99/A/234 and CAS 99/A/235 Meca-Medina v. FINA** 'The raising of unverified hypothesis is not the same as clearly establishing the facts.

9.22. Further in **CAS 2006/A/1067 IRB V. KEYTER** the panel held as follows:

"The Respondent has stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of the cocaine occurred".

9.23. In that regard, the Applicant submits that the origin of the prohibited substance has not been established.

Fault/Negligence

9.24. The athlete contends that he may have ingested contaminated meat leading to an AAF.

9.25. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

9.26. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body:

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*

9.27. In **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26** the panel observed that *'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*. In the event that the Athlete's assertion that he ingested contaminated meat is true, the Applicant contends that the Athlete in this case fell short of this requirement as he failed to carefully consider the eating establishments to which he has been a patron in the past. This lack of consideration is evidenced by the glaring absence of the mention of any establishment by name. This implies that the Athlete is not keen on upholding his duties under the rules

and regulations.

9.28. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before consuming meat of unknown origin. He was thus grossly negligent.

Knowledge.

9.29. The Applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

9.30. Further the applicant contends that the Athlete being an elite athlete has had a long career in athletics and it is only questionable that he has had no exposure to the crusade against doping in sports. In his Evidence-In-Chief, the Athlete stated that he has participated in several international events where his sample has been tested.

9.31. The Applicant holds that an athlete competing at national and international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited/ specified substances.

9.32. The athlete has in his response indicated that his friend Peter Kiptoo is also involved with the same case under the same substance and facing consequences. He further admits using substances which he could not explain their importance or ingredients.

9.33. The Applicant further observes that the athletes in both cases were heavy users of supplements, participated in two different races on

the same day being 29th October and are managed by the same person.

9.34. It can only be assumed that in preparation for races the athletes intentionally ingested prohibited substances to boost their performance.

9.35. The Applicant submits that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited or specified substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product.

9.36. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that "an Athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of the Athlete's intent to enhance sport performance.

Sanctions

9.37. For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a Specified Substance *"and the Agency ... can establish that the (ADRV) was intentional"*. If Article 10. 2. 1 does not apply, the period of ineligibility shall be two years.

9.38. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. The athlete must:

(i) establish how the specified substance entered his/her body;
(ii) establish that the athlete did not intend to take the specified substance to enhance performance.

If, but only if, those two conditions are satisfied can the athlete adduce evidence as to his degree of culpability with a view to eliminating or reducing his period of suspension.

9.39. The Applicant submitted that in the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance and that theyare convinced that the Respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADC to warrant sanction reduction.

Conclusion

9.40. Article (WADC 2.1.1) emphasizes that it is an athlete's 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

9.41. The Applicant submitted that they found that ideal considerations while sanctioning the athlete are:

i. The ADRV has been established as against the Athlete.
ii. The admission made by the athlete concerning "Sample A".
iii. The failure by the athlete to establish the origin of the prohibited substance.
iv. Failure by the athlete to take caution when ingesting meat of unknown origin.
v. The knowledge and exposure of the athlete to anti-doping procedures and programs.
vi. The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was as a result of his negligent acts.

9.42. The maximum sanction of 4 years of ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

9.43. The Applicant urged the panel to consider the sanction provided for in Article 10.2.1 of the ADAK Rules and sanction the athlete to 4 years of ineligibility.

10. Discussion

10.1. We have carefully considered the matter before us and the parties' submissions and supporting documents and these are our observations:

10.2. 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."

10.3. Consequently, our decision will be guided by the Anti-Doping Act 2016, the WADA Code and other relevant legal sources.

10.4. The applicant's counsel asserted that according to Article 2.1 and 2.1.1 of the WADA Code and as read together with ADAK rule 2.1 and 2.1.1, it is the athlete's responsibility to ensure what goes into his system is suitable for an athlete thus liable for the consequences in contrary.

10.5. The responsibility as to the knowledge of how the substance was ingested remains the personal duty of the athlete. It is the view of the panel that the principle of strict liability does indeed lie with the athlete. The respondent has failed to discharge his duties under Rules 22.1.1 and 22.1.3 of ADAK ADR. In view of the admission it is the panel's view that the ADRV has been established in the prescribed manner **(Article 3.2)** and thus from that point the burden shifts to the Respondent to demonstrate that such ADRV occurred without any fault or negligence on his part. We think that

the submissions by the Respondent's counsel regarding the burden of proof are in error as already noted and without due regard for the obligations placed on the Athlete both under the ADAK ADR and WADC.

10.6. The Respondent admitted to having undergone tests before and that he is familiar with the doping controls. He has travelled variously to run in several local and international events. He therefore cannot be considered to be naïve or totally unknowing. In any event, the provisions of both the Anti-Doping Act No 5 of 2015 and the WADC make it his obligation to be knowledgeable on matters on Doping (Article 22.1) and take responsibility for what he ingests and use.

10.7. From the Respondent's evidence at the hearing, the Tribunal is convinced that the Respondent has **NOT** demonstrated to the comfortable satisfaction of this panel (see **Maria Sharapova case - [case 2016/A/4643**]) that the ADRV occurred without intent on his part or after the exercise of due diligence and that there is no significant fault or negligence. The panel is inclined to believe that the ADRV arose from a deliberate action or an act of total and reckless abandon of duty of care expected of him and imposed by the applicable Anti-Doping Rules.

10.8. We do not agree with the Respondent's counsel submission that the ADAK has failed to discharge the burden of proof of facts as there was no meat availed to be tested or comparatives done of the Samples, which had not been requested for the Case of Sample B. On the contrary, ADAK does not have to show that the Respondent used the substance intentionally. The burden is in fact on the Respondent to show lack of intention in order to attract a reduced period of ineligibility, to show no fault or negligence. In this case the Respondent has failed to do so in both counts.

11. Conclusion

11.1. Having considered this matter in totality, the evidence of the Respondent and doctor, the admission and the fact that there was no evidence adduced to show how Clenbuterol was ingested, this

Panel is not convinced that there are no grounds for reduction of the period of ineligibility. Accordingly, we are of the view that the Athlete's deliberate assumption of risk must attract the full period of ineligibility of 4 years being a first offender. **[Art.10.3.1. of the ADAK Rules]**

12. Decision

12.1. This Panel therefore holds as follows:

i. The ADRV has been sufficiently proved. There are no grounds for reduction of sentence. The Respondent shall be ineligible for a period of 4 years with effect from 5th February, 2018 that being the date of provisional suspension;
ii. All result obtained by the Respondent from 29th October 2017 inclusive of points and prizes are disqualified;
iii. The parties shall bear their own costs of these proceedings;
iv. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and ADAK ADR.

Dated at Nairobi this 18th **day of** *October,* **2018**

John M. Ohaga, Panel Chairperson

Ms. Elynah Shiveka, Vice-Chair

Peter Ochieng, Member