REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI DOPING NO. 6 OF 2018

IN THE MATTER BETWEEN

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

-versus-

DR. JERITA MKALUMA MSHILA.....ATHLETE SUPPORT PERSONNEL

DECISION

Hearing : 23rd May 2018

Panel : Mr. John M. Ohaga - Chair
Ms. Mary N. Kimani - Member
Mr. E. Gichuru Kiplagat - Member

Appearances: Mr. Erick Omariba, Advocate for the Applicant;
Mr. Bemih Kanyonge, Advocate instructed by the firm of Mburugu & Kanyonge Associates Advocates for the Athlete.

The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter **'ADAK'** or **'The Agency'**) a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Respondent is a female adult of presumed sound mind, an Athlete Support Personnel whose address of service is through the Advocates on record for her (hereinafter **'the Respondent' or 'the Athlete Support Personnel' or 'R-ASP'**).

Factual and Procedural Background

3. The Respondent is a practicing medical officer of Reg. No. 14678. She works at Mama Lucy Kibaki Hospital and also runs a private clinic in partnership - the Clinical Routine Lab and Medial Services in Nairobi. The clinic is a general practice with walk-in clients as well as referrals from partners and former patients.
4. As the ADRV is connected to a national level Athlete, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.
5. On 9th June, 2017, during the Safari Athletics Kenya Championships 2017 held in Nairobi, Kenya, ADAK Doping Control Officers in the course of an in- competition testing, collected a urine sample from Ferdinand Omanyala (hereafter, the '**Athlete**'). The sample was split into two separate bottles in accordance with the prescribed WADA procedures and given reference numbers A 4042918 (the "**A Sample**") and B 4042918 (the "**B Sample**").
6. The Samples were sent to a WADA accredited Laboratory in Paris, France. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance Glucocorticoids/ Betamethasone.
7. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.
8. Upon the Athlete being served with a Notice of Charge dated 14th September 2017 he stated that he had sustained a back injury and dislocation of the backbone disc while training and was referred to Peter Nduhiu's physiotherapy clinic for treatment. The disc was placed back during therapy, but the pain persisted which led him to seek medication from the Respondent's clinic where he was directed by his coach, Duncan Ayiemba

(hereafter, C-ASP), where R-ASP injected Tramadol and Diprofos as confirmed by treatment notes the Athlete furnished to ADAK.

9. ADAK made efforts to obtain information with regard to the circumstances of administration of the prohibited substance on the Athlete through summons and though R-ASP availed herself, she failed, refused and or declined to submit to the process and provide the relevant information leading to the preference of charges against her under the Anti-Doping Act and ADAK ADR.
10. R-ASP was charged under WADC/ ADAK ADR Article 2.8 administration or attempted administration to any athlete In- competition of any prohibited substance or prohibited method or administration or attempted administration any athlete Out-of-competition of any prohibited substance or any prohibited method that is prohibited Out-of-competition & Article 2.9 Complicity: Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation or violation of Article 10.12.1 by another person.
11. The Applicant filed a Notice to Charge the R-ASP with the Tribunal on 27th March 2018 which on 6th April 2018 directed the Applicant to serve the Mention Notice, Notice to Charge, Notice of the ADRV, the Doping Control Form and all relevant documents on the Respondent within fourteen (14) days and scheduled a mention on 25th April 2018 to confirm compliance and for further directions. A panel comprising Mr. John M. Ohaga, Ms. Mary N. Kimani and Mr. E. Gichuru Kiplagat was also constituted.
12. On 23rd April 2018 a Notice of Appointment of Advocate was received by the Tribunal from Mburugu & Kanyonge Associates to act on behalf of the R-ASP.
13. A Charge Document was filed at the Tribunal on 25th April 2018 accompanied by verifying affidavit and lists of documents and witnesses.
14. In attendance during the mention on 25th April 2018 was Mr. Omariba, Counsel for Applicant and Ms. Sarah Ochwada holding brief for Mr. Kanyonge for the R-ASP. Applicant's Counsel confirmed that it had served the Charge Document while Counsel for R-ASP requested for time to study it and file a response. The Tribunal directed the Statement of Response be filed within fourteen (14) days and scheduled the next mention for 16th May 2018.
15. On 16th May 2018 the Response to Charge was filed at the Tribunal together with verifying affidavit, list of witnesses & list and bundle of documents. At the mention both Counsel appeared, and a hearing date was set for 23rd May 2018.

16. During the hearing on 23rd May 2018, Counsel for the Applicant called two witnesses namely the Athlete, Ferdinand Omanyala and the Athlete's Coach Duncan Ayiemba (hereafter, C-ASP) while the Counsel for the R-ASP called one witness being the Respondent herself.

17. Discussion

i. Fact not contested was the occurrence of an ADRV while the question whether the Respondent ASP was an Athlete Support Personnel was contested and whether there was intent to enhance performance or negligence was also contested.

Is the R-ASP an Athlete Support Personnel?

18. Defense Counsel raised this factor in both his Response to Charge and submissions. Nonetheless, in its submissions at page No. 7 ***"background/ facts.*** *The Respondent is an Athlete Support Personnel hence the WADC3 and the ADAK ADR apply to her."*, is all the Applicant had to say on account of contention on whether R-ASP was an Athlete Support Personnel. Perhaps on account of the idea of presumptions relied upon by WADC the Applicant considered it a moot point? Article 3 sub Article *3.2 Methods of Establishing Facts and Presumptions*, the one of *'by any reliable means'* deals mainly with the scientific bases. Contention of status of ASP is not a scientific fact and there could be a remote chance that *'other Person'* is proven not to be an ASP. Further, Article 3.2.3 mentions *'other anti-doping rule or policy'* and therefrom shifts the burden back to the ADO *'if other Person establishes a departure'*... so in my reading, the ASP status challenge does call for a rebuff from Applicant, even if it is just by rote... i.e. Kenya is signatory so we all are automatically in.
19. The charge preferred against the R-ASP is in the category of serious ADRVs and therefore consequences thereof, not to mention the strict liability nature of anti-doping offences and on those accounts, it behooved the Applicant to prove that the R-ASP was an ASP and the failure or negligence does not show the Applicant in good light.
20. The R-ASP's Counsel quoted the WADC's / ADR definition: *"Athlete Support Personnel: Any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other Person working with, treating or assisting an Athlete participating in or preparing for sports Competition."*, and interpreted this to mean that for one to be deemed to be an Athlete Support Personnel, *"they must have knowledge of anti-doping policies and rules and further the Athlete Support Personnel must be aware that the Athlete would be participating in or preparing for sports competition."* Based on this he went on to state that the R-ASP *"had never met the Athlete before and although she (R-*

ASP) was informed that he was an athlete she was never made aware that PW1 (Athlete) was preparing for a sports competition." distancing herself *"in line with the"* the Respondent's view of the WADC's definition. At this point in her submissions, we would like to note that the R-ASP contradicted her own testimony during cross-examination at the oral hearing where she clearly stated that *"the Athlete had informed her that he needed to be in a race on Thursday."*, meaning she had knowledge that the Athlete was competition bound and might have chosen her mode of treatment based on that need by the Athlete. That said, it is noted that, still at cross-examination, R-ASP said that the Athlete did not mention that he was an athlete in the history-taking but revealed this detail prior to her administering the medication and it was at this point that she assured him that the drug would not be found if he was tested after consulting reference her book.

21. Further, we would like to point out that R-ASP's Counsel also offered a rather pedestrian/'face value' interpretation of the WADC definition, that is one not rooted in context; even though on the other hand the Applicant should be admonished for ignoring/failing to offer any explanation to the R-ASP's challenge raised, in his Response to charge document.
22. To exemplify how the definition is related to the R-ASP, we shall revert to the substantive law, the World Ant-Doping Code (Code), within which the definition is provided. The universality of the Code is elaborated upon under Purpose, Scope and Organization of World Anti-Doping Program and the Code: 'The *Code* is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the *Code* is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The *Code* has been drafted giving consideration to the principles of proportionality and human rights. It should be noted: *The Olympic Charter and the International Convention against Doping in Sport 2005 adopted in Paris on 19 October 2005 ("UNESCO Convention"), both recognize the prevention of and the fight against doping in sport as a critical part of the mission of the International Olympic Committee and UNESCO, and also recognize the fundamental role of the Code.']*
23. The comments to description of the Code allude to the UNESCO Convention to which Kenya is a signatory, meaning the WADC is a treaty binding all its nationals. Further at the Introduction of the World Anti-Doping Code (WADC) it is noted that doping rules are one among the core rules governing participation in sports by athletes or any other persons:

'Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. *Athletes* or other *Persons* accept these rules as a condition of participation and shall be bound by these rules.' Acceptance of the WADC is a prerequisite for engagement of sport universally: 'Each *Signatory* shall establish rules and procedures to ensure that all *Athletes* or other *Persons* under the authority of the *Signatory* and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant *Anti-Doping Organizations.*'

24. To enable Kenyans' participation in world sports Kenya passed into law a doping act and its attendant rules which are managed by ADAK, therefore the Code is the genesis of the Anti-Doping Act 2016 alluded to by R-ASP: 'Each *Signatory* shall establish rules and procedures to ensure that all *Athletes* or other *Persons* under the authority of the *Signatory* and its member organizations consent to the dissemination of their private data as required or authorized by the *Code,* and are bound by and compliant with *Code* anti-doping rules, and that the appropriate *Consequences* are imposed on those *Athletes* or other *Persons* who are not in conformity with those rules.' The said rules are also in existence and are binding to Kenyan nationals who engage in sports and/or sports related matters. Further, 'These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the *Code* and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.' The definition that R-ASP's Counsel sought to render in an overly simplistic manner, then is a piece of these overall rules that govern the practice of sport nationally and internationally.
25. How then is one designated as an Athlete Support Personnel in the above context? Our answer rooted in the WADC is that, it is assumed that if any person(s) falls within that rather wide net defined above by the Code, (even as inadvertently as in R-ASP's case) then undoubtedly/ automatically they shall be categorized as ASP, period. The otherwise mundane doctor/patient relationship described in her written and oral testimonies (between herself and the Athlete) cast the two individuals into the net of the WADC. The R-ASP was 'treating' the Athlete who had repeatedly informed her that he was

an athlete, irrespective of claim that, *"she was never made aware of the fact that the Athlete was preparing for a sports competition"*. The R-ASP at oral hearing and in her submissions elaborated how she herself conducted her medical examination on the Athlete before arriving at her diagnosis and thereby her prescription; essentially by her own admission, she treated the Athlete thereby falling into the category of Athlete Support Personnel as envisaged by the WADC. By dint of her medical involvement with the Athlete, we satisfy ourselves that she indeed was his Athlete's Support Personnel.

26. So, for R-ASP we delve directly into intent, her having admitted to administering the Prohibited Substance on the Athlete, witnessed by the C-ASP (and Athlete himself). At page No. 29 of its submissions the Applicant invoked Article 10.2.3., see *"30. The Code and Rules at Article 10.2.3 define 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"*** *31. The Athlete Support Personnel in this case, being a, medical practitioner who has admitted to having treated athletes on several occasions, was well aware or ought to be aware under the rules that the athlete was subject to anti-doping rules and due care need be taken in administration of any drug. She however, administered the drug with blatant disregard of her duties. 32. We submit also that the Athlete Support Personnel must demonstrate that the substance "was not intended to enhance" the athlete's performance."*
27. The Article in WADC that relates to the intention the Applicant references in its submission is Article 10. 2 which at sub Article 10.2.1 provides as follows: 10.2.1 'The period of *Ineligibility* shall be four years where... 10.2.1.1'The anti-doping rule violation does not involve a *Specified Substance,* unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.' Article 10.2.3 enunciates the term intention.
28. The R-ASP's ADRV though, fell under Article 10.3.3 For violations of Article 2.7 or 2.8, the period of *Ineligibility* shall be a minimum of four years up to lifetime *Ineligibility,* depending on the seriousness of the violation. An Article 2.7 or Article 2.8 violation involving a *Minor* shall be considered a particularly serious violation and, if committed by *Athlete Support Personnel* for violations other than for *Specified Substances,* shall result in lifetime *Ineligibility* for *Athlete Support Personnel*. In addition, significant violations of Article 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.

29. The Code as we established earlier is drafted giving consideration to the principles of proportionality and human rights and in adherence to these principles the panel considered that it was R-ASP's right to argue her case of lack of intention in order to counter the serious allegation levelled against her even though her ADRV fell in the category of 'others'.
30. Further to this, we considered and declined the R-ASP's contention in reliance on **CAS 2014/A/3480 Cunyet Yuksel V. Turkish Athletic Federation** that it was the Applicant's duty to prove its allegations, the burden having already shifted to R-ASP's side on account of aforesaid Article 10.2.1.1. Moreover, regarding the CAS case quoted by R-ASP, it was observed by that panel that the coach could not be held automatically liable for an ADRV committed by one of his athlete when, it had not been conclusively established that he had played any part in its actual commission, unlike in the present case where, it has been established via the R-ASP's admission that she had actually administered the prohibited substance. Therefore, the R-ASP is obligated to show she was guilty of no wrong doing or negligence for causing the Athlete's AAF herein.

Was there intention by R-ASP to enhance performance?

31. The Applicant relying on the testimony of the Athlete argued that R-ASP was well aware that she was handling an athlete, "Further, the Athlete in question stated that the Respondent herein was aware that he is an athlete prior to administration of the drug containing a prohibited substance and was scheduled to compete in a week's" time from the date of appointment." But despite or in spite of this awareness she still recklessly proceeded to prescribe and administer the proscribed medication not once but twice on various dates.
32. Relying on **CAS A2/2011 Kurt Foggo v. NRL** the Applicant rightly requires demonstration of lack of intent by R-ASP who must sufficiently show lack of intent without merely resorting to the often repeated '*did not know*' plea: "With respect, we do not agree with the approach taken by the Panel in **CAS 2010/A/2107** ***Flavia Oliveira v. United States Anti-Doping Agency***, award dated 6 December 2010. In our view Rule 154 (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient. **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.' Reading the into the context of quoted case law we note that the key

word set out by the Panel herein is 'demonstrate' which is defined as 'show something clearly by giving proof or evidence.'

33. Responding to the Applicant's assertions and in an unfortunate demonstration of ignorance of the Anti-Doping Act2016, the R-ASP submitted as follows:

"It was the Respondent's testimony that she had used the drug several times before, that the drug could easily have been sold over the counter had the pharmacy understood exactly what PW1's affliction was. Further, she consulted her Drug Indices to confirm whether there would be any side effects considering the fact that PW1 had informed that he was an athlete. The Respondent submits that Diprophos (Equivalent to 2 mg betamethasone) is a widely used drug and that to her knowledge, only requires caution when it comes with dealing with certain categories of patients. PW1 did not belong to any of these categories."

This clearly demonstrated that she approached her relationship with the Athlete from a strictly medical angle oblivious of the doping in sport perspective.

34. Could R-ASP be identified as a cheat as defined by Article 10.2.3 or would she be able to show lack of intent without solely relying on the lack-of-knowledge in sports doping in this particular case? Based on her submissions and replies during cross-examination at the hearing, it was obvious that the R-ASP had no knowledge of anti-doping prior to the event that brought her before this tribunal, but from the sequel of evidence tendered in form of written and oral submissions by both parties before the panel, it was not too obvious to us that she intended 'strictly' to enhance performance as alleged by Applicant.

35. The evidence of the Athlete and coach (C-ASP) collaborated R-ASP's claim that they (athlete and his coach) were indeed walk-in clients who until they got the referral from the Chemist and walked into her clinic were unknown to her. This walk-in factor brings to question the issue of a premeditated commission of the ADRV by the R-ASP. The Athlete's and C-ASP's written statements attached as JM4 (page not numbered) & JM7, page 17 respectively of the charge document succinctly collaborated the walk-in factor and it is notable that the Applicant did not challenge this. The *Kurt* panel acknowledged that one way of 'demonstrating' is proffering credible corroborated evidence: CAS A2/2011 Kurt Foggo v. NRL, *'Ground 2: The Existence of Corroborating Evidence The Appellant submitted that; The corroborating evidence was supplied by the evidence which demonstrated that the Appellant sought advice from the store-owner when first purchasing the product,*

including searching the ASADA website; conducted further searches with his mother, as a result of her caution against using such products; and consulted with one of the team training and conditioning coaches about these types of product. It was submitted that the uncontested evidence of his mother (Attachment 6 pp 107-9), the signed letter from Mr. McNally (Attachment 7) and the signed letter from his mentor and former Manly and representative NRL player, Mr. Eadie (Attachment 8) was evidence in corroboration of the extent to which the Appellant went to ensure that he was not purchasing and/or consuming a prohibited, specified or banned substance. It was submitted that the Appellant received poor, inaccurate, unreliable and outdated advice from the ASADA website.'

Question is, would the evidence from the Athlete and C-ASP be considered 'credible' given that they too were subject to 'connected' ADRVs of their own and therefore could give evidence against R-ASP while seeking to strengthen self-defense of their own causes or in the opposite, to collude for same end gain? It should be borne in mind that there were witnesses called by the Applicant and not R-ASP. It is thus assumed that by the sheer fact that the Applicant elected to present both Athlete and C-ASP as its prime witnesses itself gave the panel basis upon which to assess and accept or reject, based on due merit, their representations before it (prima facie). Thereby, in this particular instance they collaborated the R-ASP's word and in absence of any other contradictory evidence then the panel would accept that their exposition was most probably what transpired as CAS case law did in CAS A2/2011 *'Kurt Foggo v. NRL, '18. Both parties relied on the evidence of the Appellant and his mother as recorded in the transcript of the proceedings before the Tribunal which became an exhibit in the appeal. The transcript shows that the Appellant's mother was not cross-examined or challenged on her evidence. Hence, no basis was established for not accepting her evidence.'* 19. As the exhibited transcript shows, the Appellant was subject to limited cross-examination before the Tribunal below. It appears on the Panel's reading of this transcript that his answers were accepted, and he was not pursued or further tested on the veracity or otherwise of his denials or assertions critically as to intention and purpose. Doubtless, this approach was taken with regard to forensic considerations. Had the Panel been asked to reject or discount the weight to be given to the evidence by either the Appellant or his mother, it was necessary for the Respondent to establish a rational basis upon which the Panel should do so but in our view it did not. Relevantly, it was not put to the Appellant the proposition to the effect that by taking what he understood to be a pre-workout powder for gym work that he intended to enhance his performance or ability as a rugby league player. In his testimony, he denied that his consumption of the product was intended to

enhance his performance as a rugby league player. The Panel accepts that denial.

36. Further study of the witnesses' statements revealed that the two healthcare seeking sportspersons and R-ASP who were essentially strangers then discussed the medical matter that was the Athlete's troublesome back and having gotten to the point of medication again deliberated, this time 'speaking at cross-purposes', the merits /demerits of the drug to be administered, the Athlete's keen questioning to ensure no banned was given to him (in his mind seeming to refer to WADA proscribed drugs) while R-ASP answering (in her mind seeming to refer to certain categories of patients to whom Diprophos is counter-indicated for), his reference book being, the WADA Prohibited List, her reference book, Drug Indices to confirm whether there would be any side effects considering the fact that the Athlete had indicated his sport orientation. It is also crucial to note that the Applicant once again did not contest the matter of 'speaking at cross-purposes' at the oral hearing and in fact introduced and/or used the term himself when cross-examining the R-ASP.
37. Even in the part of the C-ASP's statement where he stated, "... *For a little while we asked her of her knowledge of the banned substance she said she knew them and even showed us a book. She also said she has dealt with many athletes and she couldn't give Ferdinand any banned substance.*", it is conceivable that the R-ASP's clinic being strategically located a short distance from a major stage for passengers using public transport to-from the Nyayo National Stadium where most athletes train, she could have attended to such previously 'without incident'. In ***CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin;*** the CAS panel highlighted matters which could be taken into account in assessing level of subjective fault of person, for example: *any other "personal impairments" such as those suffered by (i) an athlete who has taken a certain product over a long period of time without incident; (ii) an athlete who has previously checked the product's ingredients; ... (iv) an athlete whose level of awareness has been reduced by a careless but understandable mistake.'*
38. As for the book R-ASP showed to the twosome at the clinic, it later emerged, during the oral hearing when the same was exhibited to the witnesses, that this was the Drug Indices booklet and the Athlete and C-ASP were no wiser to identify the same as such, rendering all, including the R-ASP at that point, blissfully unaware of the ramification of their drug of choice in regard to the bona fide WADA Prohibited List which the Athlete had all along intuitively alluded to. This behavior in itself pointed to widely divergent intentions; one intention departed on a tangent to provide healing while the other

intended to access healing for an obviously painful back without offending the rules of his sport. From this we inferred a tangential relationship between these two parties that was not consistent with a barometer of active collusion; we therefore burnish the allegation of connivance mentioned by the Applicant on account of insufficient evidence to exemplify the same.

39. Further, it is instructive that the Applicant also, acquiesced to the possibility of such an occurrence through the following statement regarding R-ASP in its submissions at No. 26 (j): "*She admitted that with further information and hindsight what she administered was actually prohibited in the athletics circles.*" We surmise that if R-ASP figured out the Prohibited List retrospectively as the Applicant admits in its own submissions at No.26 (j), then she could not have premeditatedly engaged in its reckless abuse in the strict sense elaborated upon by Article 10.2.3 '*As used in Articles 10.2 and 10.3, 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 or result in an anti-doping rule violation and manifestly disregarded that risk*'. The term hindsight in the oxford dictionary means: '*the understanding that you have of a situation only after it has happened and that means you would have done things differently*', essentially translating to the Applicant's admission that if R-ASP 'knew' differently she may not have picked the course of action she did took on that day that the Athlete and C-ASP showed up at her clinic, again by sheer accident as evidence available suggests.
40. Consequently, when the rest of the 'admissions' the Applicant submitted as "*evidence in chief*" concerning the R-ASP are read in their proper context, it becomes apparent that these so-called admissions are in keeping with the nature of the work of the R-ASP and are allowable in her profession, therefore it would be absurd to automatically count these as admissible or reliable evidence of her intentional aim to administer a prohibited substance to enhance performance in sport circle, as stated in page No. 26(a)-(i) & (k) of the Applicant's submissions. What the Applicant's submissions labelled as 'admissions' we construe as the R-ASP's version of what transpired between herself and the sportspersons who visited her clinic for treatment and she delivered this information in a clear, candid and knowledgeable fashion albeit sometimes appearing timid as though intimidated by the complex legal lexicon.
41. Further, the evidence adduced by the Applicant through its own witnesses exhibited that, the extent of R-ASP's knowledge – or lack thereof – of the Prohibited List and therefore her disregard of the same, whilst it was not in

collusion with the Athlete and C-ASP – as we have established above – was in actual fact erroneously misinterpreted by the Applicant who seemed to have earlier on relied entirely only on the written statements recorded by the latter two with the Applicant's client. This state of affairs could be attributed to the fact that R-ASP had earlier declined, despite presenting herself, to record her own explanation with the Applicant's client, giving rise to present proceedings against her – see her letter/reason through her Counsel on page 24 of the charge document. In this respect the R-ASP neglected her Code responsibility under sub Article 21.2.5

'To cooperate with Anti-Doping Organizations investigating anti-doping rule violations.', or to put it in the words of the Applicant at No. 14 of their submissions *"...In accordance with its mandate under the Anti-Doping Act, the Applicant issued summons to the Respondent herein to appear before the Applicant in order to seek further information as to the circumstances leading to Mr. Omanyala"s AAF. The Respondent herein declined to give a statement on record which effectively amounted to dishonoring the summons issued by the Applicant."*

It is worth noting the comments in the Code in regard to the aforesaid article: notably in Article 21.2.5 Failure to cooperate is not an anti-doping rule violation under the Code, but it may be the basis for disciplinary action under a stakeholder's rules.

42. The Applicant in its submissions reiterated that R-ASP, 'fully knowing' she was handling an athlete proceeded to prescribe and administer a prohibited substance. However, the circumstances that unraveled during the oral hearing depicted an alternative scenario. On analysis of apparent missteps at the history taking stage, it does appear that R-ASP was unaware of the status of the Athlete during the initial period when she conducted her diagnosis and made a decision on which medication was best suited for the condition. The information according to her came when she was about to administer the said medication, which then lends itself to the assumption that the medication R-ASP selected was 'unbiased' by knowledge that the patient at hand was an athlete, (let alone knowledge that he was due for a competition). When the Athlete broached the subject of his sports orientation, the R-ASP in her apparent medical professional wisdom pulled out her 'go-to' reference book which eventually turned out to be the Drug Indices. The C-ASP's statement JM7 at page 18 of charge document lends credence to R-ASP's contention that the awareness of Athlete's status was proffered at the tail end of the patient/doctor interaction. This delay becomes material in adjudging a preconceived intent by R-ASP to dope. See Kurt panel's take in CAS A2/2011 Kurt Foggo v. NRL, *'16. Rule 154 (WADC 10.4) also requires the production of corroboration evidence in addition to the*

athlete's word which establishes "...the absence of an intent to enhance sport performance". Accordingly, the corroborating evidence must be sufficient to demonstrate the absence of intent, e.g. conduct inconsistent with intent ***at the relevant time****. This is to be determined by the Panel undertaking an objective evaluation of the evidence as to the facts and circumstances relevant to the issue of intention.'*

43. Still on the matter of intention, R-ASP's Counsel submitted that;
"A medical examination by Respondent (R-ASP) following a series of questions showed PW 1 (Athlete) did not have a fracture. Further questioning confirmed that PW 1 was an athlete. The Respondent, guided by this new information, confirmed that PW 1 had suffered autoimmune damage and that his joints were not well lubricated. Based on her experience, the Respondent proceeded to prescribe and administer a combination of drugs she was certain would not only stop the pain, but further repair the said autoimmune damage." The Applicant on the other hand submitted the following: *"45. ADAK submits that whereas the athlete is good and would have performed well but with the injury which most likely resulted from fatigue and strenuous training the first line of treatment would have been rest, the choice of medication was triggered by the desire to participate hence he performed higher than would have if he went into the race with the pains."*
We wish to make the following observations regarding the two excerpts:
    a. Both parties agreed that the Athlete was unwell or was injured; and While R-ASP approached the matter from a medical perspective, the Applicant weighed in on the anti-doping legal perspective.

44. We are of the view that, hinged on first point of agreement, that is, the Athlete was indeed unwell then both points of view above were legitimate, in the first instance; the gist of the matter here is that both parties from their various arguments before the panel established that there was a case of genuine injury. The point of divergence was if/what medical intervention was warranted and the panel shall not attempt to make a decision one way or the other on whether the Athlete should or should have not medicated, but rather seek to establish if the R-ASP's decision to render said intervention was reasonable or a probable occurrence or that she indeed went out her way to act in that manner, given the Applicant's opposition towards her plea of lack intent: *"33. The Respondent failed to prove that her actions were not with the aim of enhancing the athlete's performance. The evidence adduced on her knowledge of the prohibited list and her disregard of the same make it highly probable that she, in collusion with the Athlete and the Athlete Support Personnel intended to improve the Athletes performance by ensuring that he was well and at the event."*

45. The R-ASP went ahead to give a prognosis and administer treatment based on her professional medical knowledge. The Applicant on the other hand decried the medication used on account of the fact that it fell in the category of 'banned' substances, which informed the preferring by Applicant of an ADRV against the R-ASP; thereafter, we wish to query and/or investigate if the Applicant's Counsel was the qualified authority to recommend 'rest' (as it did in its arguments) against her medical intervention argument and further, if R-ASP's intervention fell within what would be considered as standard approach in medical circles. This is in view of the fact that R-ASP sought to defend her action purely from her medical stand point and so that is the prime stand the Applicant should have appropriately rebuffed.
46. R-ASP stood her ground that the mode she chose was the best and it was based on her professional expertise while Applicant side stepped that stand with 'rest recommendation'. In its list of witnesses, the Applicant had indicated a medical doctor would be called to the stand; we are of the opinion that perhaps it would have been necessary for the Applicant to back its 'rest' contestation with apt professional testimony from its own medical expert(s) for the same to be (considered as) qualified information in order to satisfy criteria for admissibility as reliable evidence for the panel's examination.
47. The stand on record thereafter then is that of the R-ASP and in absence of opposing credible evidence from the Applicant, it can be assumed that the mode she opted to adopt was most probably the standard procedure in ordinary circumstances, which meant that if the Athlete was as an ordinary patient, there was no notable (or suspect) departure in how the R-ASP handled his heath condition, pointing her intent in the direction of restoration of health rather than enhancement of performance.
48. Health provision is the basis on which the R-ASP practiced her profession and on that account alone she claimed she was validly justified in treating the Athlete with the prohibited substance as she similarly did to a variety of other patients not in sports profession and hence on all those other occasions she was not (and should not have been deemed to be) attempting to enhance their performances just as in this particular case concerning the Athlete. In other words, the curative approach R-ASP adopted was not shown not to be standard procedure or even common practice, as she said, in medical circles because she evidenced that it was not just the pain she targeted with her chosen medication but also set out to cure the *autoimmune* damage she had diagnosed in the Athlete's back. In this instance, on the basis of the evidence before it the panel does not accept that the Applicant has conclusively proven that R-ASP disregarded her code responsibility as articulated in

Article 21.2 *'Roles and Responsibilities of Athlete Support Personnel: 21.2.6 Athlete Support Personnel shall not Use or Possess any Prohibited Substance or Prohibited Method without valid justification.'*, R-ASP having sufficiently demonstrated a probable valid justification of restoration of health.

49. Further, Article 21.2.6: stresses the issue of justification, allowing recourse to other sanctions only where an ASP is found culpable of using prohibited substance without justification. The Code 'comments' also talk of an ASP's responsibility to encourage their Athletes not to dope; during the oral hearing there was no hint in the direction of encouragement to dope and what we observed was concerted and very genuine effort by the Athlete and C-ASP to explain their status and thereto the need to avoid banned substances to R-ASP, who continuously reassured them albeit the two parties were inadvertently differently informed and thus differently comprehended the banned substances. Not once was it discerned from their demeanors that they sought anything further than alleviation of pain and health restoration.
50. As observed in Sports Disputes Tribunal **Appeal No. ADAK 14 of 2017 ADAK v. Jemimah Sumgong:**

'The Tribunal is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the Panels considered that an Athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. In CAS 2016/A/4676, at para 72, inter alia, stated that "the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanor, but also his character and history, even if such a situation may inevitably be extremely rare".'

51. In summary regarding the Article '21.2 Roles and Responsibilities of *Athlete Support Personnel'* the panel has the following to say as relates to R-ASP 's case:
    i. To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the *Code* and which are applicable to them or the *Athletes* whom they support. R-ASP had proven this was a walk-in medical case and perhaps as in cases of ambush marketing there was precious little time to educate herself appropriately as required by this clause, but this does not absolve her from responsibility and she should have exercised the utmost caution especially once she noted the prodding from the 'patient'.
    ii. To cooperate with the *Athlete Testing* program.
    iii. To use his or her influence on *Athlete* values and behavior to foster anti-doping attitudes.

iv. To disclose to his or her *National Anti-Doping Organization* and International Federation any decision by a non-*Signatory* finding that he or she committed an anti-doping rule violation within the previous ten years. There was no evidence adduced to show she shirked any of these three roles.

v. To cooperate with *Anti-Doping Organizations* investigating anti-doping rule violations. There was insufficient proof to show R-ASP did not cooperate given she also had a duty to protect herself.

vi. *Athlete Support Personnel* shall not *Use* or *Possess* any *Prohibited Substance* or *Prohibited Method* without valid justification. R-ASP's medical justification was considered more reasonable than the otherwise unanchored 'rest' recommendation from the Counsel for the Applicant.

50. The Applicant also appeared to raise a contestation regarding quantity of prohibited substance administered by the R-ASP. *"43. In Arbitration **CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** .... It is the Applicant's submission that the same standard extends to Athlete Support Personnel and the Respondent's implication that the administered substance was not in sufficient quantities does not discharge her from her duties to the athlete. The respondent therefore knew or ought to have known that the substance administered would enhance the performance of the Athlete."*

51. From quote of above case law, we understand the Applicant to be arguing that R-ASP's intentionality be considered using same standard as the Athlete's which is a fair assertion. We point out though, that the panel in the excerpt quoted by Applicant was deliberating quantities in regard to strict liability while establishing an ADRV: CAS A2/2011 Kurt Foggo v. NRL, *'There had been sufficient proof of the anti-doping rule violation by the analysis of the athlete's sample which confirmed the presence of the prohibited substance. Further, this was a case where there was no requirement for a quantitative threshold and accordingly the presence of "any quantity of" the prohibited substance constituted the anti-doping rule violation in accordance with Rule 34 (WADC 2.1.3).'* In regard to 'presence' of prohibited substance in the Athlete's body, amount was of no consequence since this was a substance that should not be ingested at that given time, therefore presence of any amount of it was a clear ADRV unlike in some cases where the Prohibited List prescribes threshold levels e.g. norandrosterone.

On the other hand, in R-ASP's case (the issue of establishment of the ADRV having been dispensed with), further argument on quantity may have mattered when same was being adduced to try and establish intent or lack thereof and/or no negligence.

52. Quite rightly the Applicant had pointed out that the R-ASP implying that the administered substance was not in sufficient quantities did not absolve her from her duties to the Athlete. Yet, for purposes of intent/negligence, if the Applicant, instead of the down-right dismissal of R-ASP's contention had perhaps endeavored to conducted enhanced investigations, after which adduced alternative evidence to show for instance that R-ASP's prognosis and/or diagnosis, dosage or mode of administration was not consistent with widely accepted health procedures, (that perhaps she had manipulated or adjusted the dosage for the Athlete) so that it was proven or it became apparent that that particular mode/ medication was notably or especially efficacious, or it differed in any other manner, from what she prescribed for the rest of the general populace she treated with similar substance and thus departed from set medical criteria, then that could have eroded the nexus to health restoration linkage that the R-ASP had established, which was her basis of lack of intent in this specific case; as captured by CAS A2/2011 Kurt Foggo v. NRL, '*14. The next issue is the issue of intent, the determination of which depends upon the proper construction of the phrase in Rule 154 (WADC 10.4): "that such specified substance was not intended to enhance the Athlete's sport performance". We are of the view that the task of the Panel is to give effect to the natural and ordinary meaning of these words having regard to the context of the rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance.* ***The time at which the absence of intent is to be shown is the time of ingestion of the substance.*** *The athlete must negate an intention at that time to enhance his or her performance in the relevant sport, in this case rugby league, by the taking of the substance.* ***The rule focuses on the nexus or link between the taking of the substance and the performance as a player of the sport. Whether or not the link will be established will depend on the particular circumstances of the case.*** Rule 154 (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient.'

53. Thereto, the R-ASP having adduced evidence to show lack of intent at the point of dispensation of the drug, that ought to have been the time at which the Applicant rebuffed her evidence, but the witnesses the Applicant called to assist it prove intent, orally and in their written statement instead concurred with R-ASP and in fact alluded to no such intent. What comes out was a situation where the Athlete having painstakingly conducted his due diligence in order to avoid ingesting any prohibited substance was roundly

assured by R-ASP who equally diligently perused her copy of the Drug Indices and confirmed that the *medication is not a restricted drug* neither did it pose any allergic reaction on the athlete or persons in his category, *apart from becoming overweight due to chronic use of the drug.*

54. It is noted that the Applicant, not convinced that timing of medication was a coincidence, regarded the timing as another a clear sign of goal to enhance performance. *"The 1st meeting of the respondent and the athlete was on a Sunday evening! What a coincidence?"* Having regard to the context of the circumstances as a whole, our evaluation of the same, sent us in a different direction. For one, in our capacity as mortals we were unable to judge coincidences in regard to illnesses, that for instance, there are certain days it would be an utter coincidence if a person fell ill; or perhaps expert advice from Applicant's side of the divide might have advanced an opinion on this matter too had they been invited accordingly.
55. Focusing our attention on what falls within our competence, after exhaustive examination of the matter of intention above and having arrived at the conclusion that it was more probable that R-ASP's ADRV was more associated with medication for curative purposes rather than for enhanced performance and analyzing the prescription R-ASP gave to the Athlete adduced as evidence, at page 15-JM5 of charge document plus the studious follow-up instructions she issued as captured in page 18 of charge document by C-ASP in his statement titled JM7. We deduce that the walk-in or first chance encounter between Athlete and R-ASP's gave way to a second round encounter which was more likely health protocol obeisance, which was duly observed by the Athlete; the Health Act 2017 articulates the need for observance of this protocol vide Section 13 on duty of users states:
'A user of the health system has the duty, in the absence of any observable incapacity – ... (b) ***to adhere to the medical advice and treatment provided*** *by the establishment; ... (d) to cooperate with the healthcare provider;' Furthermore, "44. The Applicant submits that the respondent Knowingly or recklessly administered the drugs not once but twice before and during the competition and without her administration the athlete would not have participated in the event let alone win."*
In regard to this, it was noteworthy noting that the Athlete at oral hearing admitted to not being sure if the same prohibited substance was re-administered the second time and said he only assumed it was the same since he was seen by the same doctor; R-ASP in her statement averred that on review, the Athlete had shown a measurably improvement so she only administered tramadol; it was either the Athlete's or R-ASP's word here, therefore for lack of neutral review, we could not conclusively ascertain if

the prohibited substance was administered again 'In- competition' as asserted by the Applicant and hence we will rely only on the substance confirmed to have been administered Out-of-competition. See further reference to this particular matter at sanction.

56. It is an uncontested fact that the R-ASP did not impede the Athlete when he made his way back to the clinic to request for proof that he had indeed been treated there with the prohibited substance and that she duly furnished him with the prescription *"after being informed that PW1 had tested positive for a prohibited substance"* which further illustrated her professional medical 'mindfulness' to the unfolding situation; In R-ASP's own words, *"In this regard, it is the Respondent's humble submission that while handing over the prescription to PW1, she had nothing to hide or doubt her professional decision while treating PW1."*

    In regard to gravity of the violation, the Applicant stated:

    "46. The Violation herein is ***so grave*** *that the Athlete was at a risk of death. The Athlete had been experiencing back pains for which he had previously sought physiotherapy treatment at Nairobi Hospital."*

    This very serious statement was not served with any reliable or collaborated evidence showing in exactly which manner the Athlete was at risk of death other than the word of Counsel for the Applicant. As earlier said there was a preponderance of evidence collaborated by the Applicant's two witnesses that the origin of R-ASP's ADRV was not a planned doping exercise. Without further counter evidence and/or any other witnesses, especially independent medical expert opinion the panel would assess the case on the facts/evidence available to it.

57. The panel thoroughly studied and took into account the crucial specific circumstances presented by parties in written submissions, pleadings and documentary evidence including evidence in chief, before arriving at its conclusion that R-ASP despite committing an ADRV had established that its genesis was an honest mistake on her part done when she was treating the Athlete. The evidence adduced ejected a conspiracy theory and/or it was not indicative of an intricate patterned or planned behavior exhibited by R-ASP right on the outset.

58. In conclusion the panel was comfortably satisfied including 'on the prescribed higher standard of proof' that the R-ASP had established that her medical interaction with the Athlete and C-ASP had ensued into a cross-purpose speak which appears to be a much different and unique situation than the gross negligence or a veiled attempt to defeat the fight on doping in sports as contended by the Applicant, see CAS A2/2011 Kurt Foggo v. NRL; *'17. It is necessary to establish an anti-doping rule violation to the*

"comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made" (Rule 46/WADC 3.1). This standard of proof is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt. On the other hand, where the Policy or the WADC places the burden of proof upon the athlete to rebut a presumption or to establish specified facts or circumstances, the standard of proof borne by the athlete is a balance of probability. But the athlete must satisfy "a higher burden of proof" when the athlete seeks an elimination or reduction in the period of ineligibility under Rule 154 or WADC 10.4. Bearing these provisions in mind, we are satisfied, on the prescribed higher standard of proof in this case, that, in all the circumstances and on the evidence, the Appellant did not intend to enhance his sport performance when he ingested the product which contained the specified substance.'

59. We surmise that the conduct of R-ASP was devoid of concealment which was a reliable pointer to her lack of intention to dope the Athlete. That said, her incessant plea of ignorance of the Anti-Doping Act which is in the first place, the reason that caused her to find herself in this bind, is unacceptable. WADC like other laws too requires individual diligence, see Article 2 Anti-Doping Rule Violations: *'Athletes* or other *Persons* shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the *Prohibited List.'*
60. Despite the numerous queries by the Athlete, R-ASP did not seek further clarifications and was content to proceed only on her medically informed line thereby resulting in an unintended AAF for the Athlete. Athletes being mortals like the rest of us will fall sick or be injured therefore, they too may now and then need to seek the professional services in R-ASP's field, and hence, keeping abreast of the laws of the land by such professionals is not just a desirability but an absolute necessity. The Therapeutic Use Exemption (TUE) tool exists under doping law which allows health professionals proceed with health delivery to sports persons without hindrances and therefore it must be exploited by both health care seekers and health care providers. The panel acknowledges the Athlete and his coach were 'walk-in' clients and gave R-ASP precious little time to fully acquaint herself with the special dispensation that informed health care for his category. Likewise, the Athlete had very basic knowledge of doping knowledge and therefore was not able to adequately 'inform' and/or guide R-ASP resulting in the cross-speak and resultant AAF. It will be noted that this general lack of awareness seems to pervade even though the Anti-Doping law 2016 is now in its second year of operation. Crucially, the WADC places a huge premium on educating athletes and athlete support personnel and the same must come to bear on ADAK to help prevent unnecessary AAFs, see WADC's

'FUNDAMENTAL RATIONALE FOR THE WORLD ANTI-DOPING CODE *'Doping is fundamentally contrary to the spirit of sport. To fight doping by promoting the spirit of sport, the Code* ***requires*** *each Anti-Doping Organization to develop and implement education and prevention programs for Athletes, including youth, and* ***Athlete Support Personnel.'*** Such rueful situation is also noted in CAS A2/2011 Kurt Foggo v. NRL *'22. 'The evidence shows that athletes were encouraged to take pre-workout substances for gym training sessions, a practice which the Club condoned. It also shows that the appellant, a young professional player, was given very limited formal drug education by the Club. Nonetheless, the Panel is conscious of the provisions of Rules 32, 37, 45 and 233 of the Policy which provide, in effect, that the athlete is under a personal duty to ensure that there is no violation,* ***and that ignorance is no excuse.*** *In our opinion it cannot be too strongly emphasised that there is imposed a continuing personal duty to ensure that ingestion of a product will not be in violation of the Code. 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 while ever the athlete uses the product. There is a salutary lesson in this respect to be learned from the circumstances of CAS OG 06/001, where the athlete tested positive to a banned substance at the World Cup in November 2005. The athlete freely admitted that he had been taking the banned substance since 1999 for medical reasons and that he had checked the prohibited list on the USADA website every year for the 5 years from 1999 to 2004. In each such year the substance was not on the banned list, but he failed to check in 2005 when it was. The Panel in that case found that the athlete had not exercised "the utmost caution" in 2005.'*

61. In addition to the laws concerning health, to further secure the wellbeing of the category of Kenyans in sports, the Anti-Doping law mandates heightened caution in delivery of healthcare by healthcare providers to guard against doping, a vice that puts the health of sportspersons at risk.

Sanction

62. The Applicant submitted that in arriving at the probable sanctions, the Tribunal should take regard of the provisions of Article 10.3.3 of the WADA Code. As such, the Applicant in his submissions prayed:

"52. The maximum of four years ineligibility ought to be imposed as no plausible explanation has been advanced for the Administration and all explanation goes to ignorance which is not a defense in law. 55. For an ADRV under Article 2.8, Article 10.3.3 of the ADAK ADR provides for a sanction of a minimum of four years up to lifetime ineligibility depending on the seriousness of the violation. 56. From the

foregoing, we urge the panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the respondent to lifetime ineligibility."

63. Further pursuant to Article 2 of WADC, the Applicant filed the charges accordingly, but it is noted that though the Applicant in its Charge document charged R-ASP with both Articles 2.8 & 2.9 in same charge document; it sought R-ASP to be sanctioned to a four-year period of ineligibility. No specific prayers were made for Article 2.9 therefore the same shall not be considered further.

    In arriving at an appropriate sanction, the Tribunal considered the following:

    a. It is acknowledged that an ADRV had been admitted by R-ASP as per WADC's Article 3.2;
    b. Lack of intent was established by R-ASP;
    c. This was R-ASP's first ADRV and she seemed genuinely apologetic.

64. In addition, cognizance is taken of the fact that the proscribed substance was administered on 4th June 2017. The panel was not informed on which date the event commenced but the Applicant submitted that R-ASP administered the proscribed before and during the competition. The Athlete raced on 8th & 9th Thursday/ Friday June 2017 after which he proceeded for the second injection, see C-ASP's statement, JM 7 page 19 *"The following day Friday after competing he again started feeling the pain which made us go for the second injection that **Friday evening**."* The Doping Control Form/Test Result show the test was done on 9th June 2017 which the Tribunal assumes is not long after the Athlete's race. The substance revealed in the Doping Test Result lay in the S9 category which in the WADA Prohibited List 2017 is prohibited In-competition.

65. From the foregoing it is evident that the prohibited substance was administered before the competition and it was traced after a test conducted on 9th June 2017 before any other substance was re-introduced by R-ASP. Further, R-ASP had argued that on review of the Athlete that said Friday evening, she only administered Tramadol which was not prohibited either 'In' **OR** 'Out'-of-competition, as stated at page 3 No. 16 of her Response to Charge, and the same was accepted by the panel. Therefore, the latter part of Article 10.2.3 is also applicable: *'... An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.'* Having concluded that the R-ASP acted in a context unrelated to sports

performance, the panel firms up the view that the R-ASP's ADRV was not intentional.

66. As to the period of ineligibility, the Panel is conscious of the desirability of *"harmonisation of sanctions"* (WADC 10.2 and Rule 149) in international sport and international sporting disputes. The Panel's attention has been drawn to decisions of the National Anti-Doping Panel Appeal Tribunal in the UK in the matter of *Rachel Wallader* dated 29 October 2010, *Matthew Duckworth* dated 10 January 2011 and *Steven Dooler* dated 24 November 2010. Nevertheless, each case must be decided on its own facts.
67. In all the circumstances the Panel is satisfied that a reduction of the period of ineligibility is justified and is of the view that the appropriate period is 6 months.

Conclusion

68. In light of the above, the Tribunal commends itself to the following Orders:
    a. The period of ineligibility for the Respondent shall be six (6) months from the date hereof;
    b. Each party shall bear it's on costs;
    c. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and Part IV of the Anti-Doping Act No. 5 of 2016 as amended.

Dated at Nairobi this _17th_ day of _October,_ 2018

John M. Ohaga, Panel Chairperson

Ms. Mary N. Kimani, Member **E. Gichuru Kiplagat, Member**