REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ADAK CASE NO. 44 OF 2016

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

-versus-

BERNARD KIPKEMOI BOSUBEN..... RESPONDENT

DECISION

Hearing:	18th April, 2018	
Panel:	Elynah Shiveka	Chairperson
	Gichuru Kiplagat	Member
	Peter Ochieng	Member

Appearances: Messrs Erick Omariba and Bildad Rogoncho counsel for Applicant (ADAK)

Ms. Sarah Ochwada (Advocate) from Center for Sports Law representing the Respondent (Pro-bono)

Mr. Elias Masika counsel for Athletics Kenya Interested Party

1. The Parties

1.1 The Applicant Anti-Doping Agency of Kenya (hereinafter '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 Kenya including Result Management.

1.2. The Respondent Bernard Kipkemoi Bosuben, is a male adult long distance runner/athlete competing in national and international events and aged 30 years.

1.3. Athletics Kenya (hereinafter 'AK'), is the national federation governing and managing Athletics in the country. It is an affiliate of the International Association of Athletic Federations (hereinafter 'IAAF').

1.4. The Sports Disputes Tribunal (hereinafter 'Tribunal'), is an independent Sports Arbitration Institution created under the provisions of the Sports Act 2013 Laws of Kenya. Members of the Tribunal are appointed in terms of Section 6 of the said Act.

2. Background

2.1. The proceedings have been commenced vide a charge document against the Respondent by the Applicant dated 1st November, 2016 and filed on 2nd November, 2016 at the Tribunal together with other supporting documents.

2.2. The Applicant brought charges against the Respondent that at all material times and especially on 1st of November, 2015 at the Shenzhen International Marathon in Shenzhen, China when Doping Control Officers collected a urine Sample **code 6109724.** Aided by the DCO, the Respondent split the Sample into two separate bottles, which were given reference numbers **A 6109742** (the '**A Sample**') and **B 6109724** (the "**B Sample**") under the prescribed WADA procedures.

2.3 The sample was subsequently analysed at the WADA accredited laboratory of Beijing in China and an Adverse Analytical Finding (AAF) resulted, that disclosed the **presence of prohibited substance Norandrosterone** which is prohibited under **S1 Anabolic Agents** of WADA's 2015 prohibited list. This is according to the test report dated 11th November, 2015 and availed to this tribunal. The Laboratory analyzed the "A Sample" in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL).

2.4. On 25th January 2016, the IAAF informed Athletics Kenya (thereafter AK) of the positive finding and of the athlete's right to *inter alia* request for the B sample analysis and to provide an explanation.

2.5. On 17th February, 2016 IAAF wrote to the Chinese National Anti-Doping Agency **"CHINADA"** requesting it to confirm

that they would handle result management of the athlete herein.

2.6. On 19th February 2016, CHINADA informed IAAF that it will conduct result management of the athlete's case together with 2 other Kenyan cases.

2.7. On 12th May 2016, the IAAF requested an update from CHINADA in the athlete's case.

2.8. On 13th May 2016, CHINADA informed the IAAF that it had not been able to trace the athlete but Chinese Athletic Association had suspended the athlete from taking part i any competition in China. It also stated that *"as all these athletes (including the athlete herein) are not Chinese Nationality or residence, according to the code and CHINADA's Doping Control Rules, Neither CHINADA nor Chinese Athletics Association would make available penalties on them. I wonder that it would be appropriate if IAAF or the athlete's national federations make the sanctions"*.

2.9. On 15th June, 2016 the IAAF asked CHINADA to forward the decision rendered by CHINADA in case of *inter alia* the athlete. On the 16th June, 2016 CHINADA reiterated that *"Chinese Athletics Association can only suspend them to take part in any competition in China, but they cannot make sanctions on them. As mentioned in last letter, I wonder if IAAF or the athlete's*

national federations could make sanctions on them".

2.10. On 2nd September, 2016, CHINADA stated that it had *"no power to make penalty decision on any individual or unit according to the Anti-Doping regulations in China more practically, these athletes should be punished by the testing authority. In specific to the five foreign marathon cases {including the athlete's} it is Chinese Athletics Association. We have informed them relative information recently. So could you please contact to them for this matter directly".* The fact that CHINADA had no power to render a decision in the Athlete's case was also recalled by CHINADA in an email of 2nd December, 2016 to ADAK.

2.11. On 9th September, 2016 the IAAF wrote to Chinese Athletics Association (CAA) setting out that CHINADA had referred the athlete's case to CAA for adjudication and requesting whether a decision had been rendered and that such decision be sent to IAAF.

2.13. On 14th October, 2016 following a reminder, an Eric from CAA sent an email which read as follows; *"we have discussed the issue of Kenya athletes. As a result, we have banned those 2 athletes from competition held in China in the whole career as athlete, but as Chinese Federation, we cannot give them the punishment at international level, i.e. pending from the international competition ".*

2.14. Although WADA, IAAF and ADAK requested for a decision, the CAA was never able to provide it. CAA also confirmed that it could not trace any information about the runner. There is simply no contemporaneous written evidence to support existence of a decision; accordingly there is,

- No written decision
- No minutes of a hearing
- No indication who rendered it (which organ of CAA)
- No indication of whether this organ was empowered to render a decision
- No indication of any process leading to a decision (no charge letter, summons to a hearing)
- No evidence that any decision was ever implemented (e.g. inclusion of the athlete in the banned list on ADAMS)

2.15. In the respective communication CHINADA and CAA requested that due to their incapacity to conduct results management under the rules, IAAF or the National Federation should take up results management for the athletes for foregoing reasons.

2.16. It is on the above referral that the matter was forwarded to ADAK for result management.

2.17. The Applicant contends that all efforts to notify the athlete of the AAF had not been successful. The athlete was served with the charge document upon obtaining the athlete's home

details from the National Registration Bureau.

3. Charges

3.1. Subsequently, ADAK preferred the following charges against the Athlete Respondent:

Use of Norandrosterone a non-specified Substance Under Class S1 – Anabolic Agents, of the 2015 WADA Prohibited List.

Under Article 4.1 of ADAK Anti-Doping Rules, as read together with IAAF Rules 32.2(a) and Rule 32.2(b) the presence and use of prohibited substances or its metabolites or markers in an athlete's sample, constitutes an Anti-Doping Rule Violation (ADRV).

3.2. The Respondent Athlete had no Therapeutic Use Exemption (TUE) recorded at the IAAF to justify the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused the adverse analytical finding. Furthermore, the Applicant stated that there is no plausible explanation by the Respondent to explain the adverse analytical finding.

3.3. 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 envisioned in Article 3.2.2 of the WADA Code and further that there is no departure from the International Standards for Testing and Investigations (ISTI) that could reasonably have caused the AAF according to Article 3.2.3 of WADC hence the responsibilities, obligations and presumptions of Article 3 of WADC apply herein.

3.4. The Applicant contends that the athlete herein has a personal duty to ensure that whatever enters his body is not prohibited and further even on prescription they have the duty to be diligent as captured in Article 2.1.1 of WADC and ADAK rules.

3.5. 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 and to inform medical personnel of their obligation not to use prohibited substances and prohibited methods which the athlete failed to do.

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

3.7. The Applicant prays that:

a) The disqualification of the "Shenzhen International Marathon in Shenzhen, China" results and any subsequent event as per **Article 10.1** of the WADA Code.

b) Bernard Kipkemoi Bosuben be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code, **Article 10 of WADC and ADAK** Rules.

c) Costs, as per WADA **Article 10.10.**

4. Preliminary Matters

4.1. The matter was brought to the Tribunal vide a Charge Document dated 1st November, 2016 and filed on 2nd November, 2016 together with other supporting documents.

4.2. Upon reading the charge document as well as supporting documents, the Tribunal directed as follows;

(i) Athletics Kenya shall be enjoined as the 2nd Respondent to the proceedings.

(ii) The Applicant was to serve the Charge Document dated

1st November, 2016 and supporting documents on Bernard Kipkemoi Bosuben and Athletics Kenya by 16th November, 2016.

(iii) The matter was to be mentioned on Tuesday 22nd November, 2016 to confirm compliance and issuance of further directions. These orders were issued on 10th November, 2016.

4.3. On 22nd November, 2016, Counsel for the Applicant Mr. Erick Omariba vide an affidavit of service confirmed that he had not served the charge document and other supporting relevant documents to the Respondent Athlete after encountering difficulties in tracing his whereabouts. However he confirmed serving the same to the 2nd Respondent, Athletics Kenya.

4.4. On 23rd November, 2016 when the matter came up for mention, Athletics Kenya the 2nd Respondent, appointed the firm of Messrs Ochieng, Onyango, Kibet & Ohaga Advocates to represent them in the matter.

4.5. On February, 2017 during the mention of the matter Mr. Omariba reported that he had not been successful in serving the Charge Document to the Respondent Athlete. He stated that he had made a request to the Registrar of Persons but had not received a response. He requested

the Tribunal to grant him one month after which the matter could be mentioned. This was granted and the matter was to be mentioned on 23rd March, 2017.

4.6. By 26th April, 2017, there was still no indication in the Tribunal's records that Mr. Omariba had been able to trace the Respondent Athlete and effect service. Premised on that the Tribunal struck out the matter that had been listed for mention on 27th April, 2017 and rescheduled it for Thursday 4th May, 2017. Mr. Omariba at the same time was ordered to file an affidavit indicating the efforts made to trace and effect service on the Respondent Athlete by close of business on Wednesday 3rd May, 2017.

4.7. On 4th May, 2017 Mr. Omariba had not made any head way in tracing the Respondent Athlete, hence requested for fourteen days and the matter was slated for mention on 17th May, 2017.

4.8. On 17th May, 2017, Mr. Omariba never showed up and the matter was stood over and the Tribunal directed that, the Applicant picks new dates from the Registry for any further mentions and/or directions.

4.9. On 6th July, 2017, Mr. Omariba was back at the Tribunal. The Respondent Athlete was also present and identified by his identification card number 27539383. The Respondent

Athlete requested for legal representation. Ms. Sarah Ochwada one of our pro-bono lawyers who was present at the Tribunal accepted to take up the matter. The matter was scheduled for mention on 20th July, 2017. The Tribunal directed that the Panel will be the same as the one that heard the previous CHINADA CASE.

4.10. On 20th July, 2017 when the matter came up for mention Mr. Omariba was ready to take a hearing date. However, he objected on the Panel that heard the earlier CHINADA CASE on also hearing this matter. In the meantime, Ms. Sarah Ochwada formally came on record as the advocate for the Respondent Athlete after filing a notice of appointment on 19th July, 2017 at the Tribunal.

4.11. Hearing of the matter was scheduled for 17th August, 2017 with a new Panel consisting of Mrs. Elynah Shiveka (Panel Chairperson), and Messrs Gichuru Kiplagat and Robert Asembo constituted.

4.12. On 17th August, 2017 the matter was ready to proceed for hearing. However Ms. Sarah Ochwada for the Respondent Athlete put in a notice of Preliminary Objection which had to be heard before the substantive matter. Mr. Omariba for the Applicant requested for leave to respond to the Preliminary Objection and file by 30th August, 2017 in

readiness for the hearing of the same scheduled for 31st August, 2017. Mr. Omariba was reminded to serve the notice of hearing to Athletics Kenya as the 2nd Respondent in the matter.

4.13. Mr. Omariba filed the response to the Preliminary Objection on 31st August, 2017 when the matter was to be heard. By consent of the parties, the directive issued on 10th November, 2016 making Athletics Kenya a party were varied to the extent that Athletics Kenya shall now ne named as an Interested Party only and not a Respondent. The Preliminary Objection was heard despite Mr. Omariba putting in his response on the material day.

4.14. On 13th September, 2017 the Preliminary Objection was dismissed and the ruling was delivered on the 14th September, 2017. Ms. Ochwada requested for more time to compile a list of documents to be obtained from ADAK (Applicant). The Tribunal ordered for further directions on 20th September, 2017.

4.15. On 20th September, 2017, Ms. Ochwada filed a request for production of documents by the Applicant. Mr. Omariba responded by saying that the Respondent was engaging in a fishing exercise and instead asked the Respondent Athlete to request for "Sample B" testing. In the meantime the Tribunal

ordered ADAK to take leave to amend the charge within two days. The Tribunal at the same time issued directions to ADAK on the request for production of documents within the next 10 days. Consequently the matter was to be mentioned on 5th October, 2017.

4.16. By consent on 5th October, 2017 when the matter came up for mention, it was adjourned to 12th October, 2017 to allocate a hearing date after directions on production of documents has been dealt with. In the meantime Mr. Omariba had filed an amended Charge Document on 25th September, 2017, which contained other documents that been requested by the Respondent Athlete's counsel Ms. Ochwada.

4.17. On 12th October, 2017 the hearing did not proceed since Mr. Omariba had forgotten his file on the matter and at the same time he was yet to file and serve the documents requested for by the Respondent Athlete. By consent once more the matter was adjourned to 18th October, 2017 for further directions.

4.18. On 18th October, 2017 Mr. Omariba confirmed filing the list of documents. However, there was no appearance for Ms. Ochwada for the Respondent Athlete. The matter was pushed to the following day the 19th October, 2017 when Ms. Ochwada

was to avail herself to address the Tribunal.

4.19. On 19th October, 2017 Mr. Omariba was present and Ms. Olembo held brief for Ms. Ochwada. Mr. Omariba informed the Tribunal that the documents that had not been available the previous day on 18th October, 2017 had now been filed and served. Ms. Olembo confirmed the same but requested for time to peruse them.

4.20. On 23rd November, 2017, the matter could not proceed for hearing despite both parties being present. Ms. Ochwada reported that the Respondent Athlete had lost his mother to cancer. Ms. Ochwada also noted that the Charge Document had to be amended to reflect the true picture of the case.

4.21. Mr. Omariba requested for fourteen days to amend the charge document and serve. Likewise Ms. Ochwada was to require a similar period to respond. The matter was to be mentioned on 17th January, 2018 to confirm compliance by both parties.

4.22. On 17th January, 2018, Mr. Omariba informed the Tribunal that he had not filed a fresh charge and requested for seven more days to comply. Time to file the amended charge was enlarged. The Tribunal directed that the amended charge was to be filed within seven days and the Respondent was granted equal time to respond. The matter was listed for mention on 31st January, 2018 to confirm compliance and fix a hearing date.

4.23. On 31st January, 2018 Dr. Maurice Ajuang Owuor holding brief for Mr. Omariba reported that he had instructions that the Charge Document that was to be amended was not yet ready and requested for a further seven days to do so. There was no appearance for the Respondent. The Tribunal granted the Applicant it's wish and set the matter for mention on 15th February, 2018.

4.24. On the 15th February, 2018 Mr. Omariba confirmed filing the further amended Charge Document on the mention date. Ms. Ochwada for the Respondent requested for seven days to respond. A further mention of the matter was scheduled for 28th February, 2018.

4.25. Ms. Ochwada had not filed her response to the further amended charge document when the matter came up for mention on 28th February, 2018 but confirmed to do so after the session on the same day. The Tribunal ordered for the hearing of the matter to take place on 22nd March, 2018 but this was never to be. A new date to hear the matter was slated for 12th April, 2018.

4.26. On 12th April, 2018, Mr. Omariba was ready to proceed with the hearing. However, Ms. Olembo holding brief for Ms. Ochwada requested for an adjournment because the Athlete

was not able to travel to Nairobi citing personal reasons. The Tribunal recorded this as being the last adjournment of the matter and ordered that hearing will take place on 18th April, 2018 the absence of the Respondent athlete notwithstanding.

4.27. On 18th April, 2018 was the hearing date. The Applicant was represented by Counsel Erick Omariba and Bildad Rogoncho while Ms. Ochwada represented the Respondent Athlete. The Athlete was not present so did the Interested party in the matter Athletics Kenya. Both counsel agreed to rely on their written submissions. They both requested for time to file their submissions which they complied the 17th May, 2018. These submissions were to be relied on by the panel to make a decision on the matter.

5. The Respondent's Submissions

5.1. These submissions are made following the filing of the Response of Charge by the Respondent Athlete.

5.2. The Respondent Athlete's counsel indicated that she will adopt and fully rely on the assertions made in the Athlete's Response but wished to make submissions related to the sanctions in this case.

Athlete's Explanation

5.3. The Respondent Athlete admits to the presence of **Norandrosterone** in his sample collected on 1st November, 2015, during in-competition testing at the Shenzhen International Marathon in China.

5.4. According to the Athlete, the substance entered his body through ingestion of supplement tablets known as **Decabolin** which he purchased from a pharmacy in Hong Kong. **Decabolin** contains the anabolic compound 19-NorAndrost-4-ene-3b-ol which was detected in his sample. He attached fact sheets on **Decabolin** supplement to his response for the Panel's consideration.

5.5. He posited that in the month of October 2015, he was suffering from knee pains. He searched for medication in the area where he was residing in Hong Kong. He visited a herbal shop which stocked a variety of sports supplements. He then purchased and used **Decabolin** as it was the cheapest available supplement that he could afford and ingested 1 tablet per day for a week.

5.6. He states that he did not intentionally take **Decabolin** for purposes of enhancing his performance. He was not aware of having any prohibited substances within his

body until he received notification that his sample had tested positive for **Norandrosterone.**

5.7. The Respondent Athlete admits that the only fault he made and which he is truly apologetic for, is failure to disclose the use of **Decabolin** on his doping control form, even out of abundant caution. As doping control procedures are highly technical, the Respondent provided information to the Doping Control with honesty and precision. He was required to reveal "prescribed/non prescribed medications and / or supplements taken over the past 7 days". He did not report the supplement as he had not ingested the supplement within the 7 days window.

5.8. Given the complexities of Anti-doping regulations, the Respondent was unfortunately unaware that the supplements may contain prohibited substances. The Respondent was equally unaware of procedures on seeking Therapeutic Use Exemptions which may have assisted him at that material time.

5.9. They proffered that this is an inadvertent offence, a first for the Respondent, which he sincerely regrets and requests the Panel to assess the totality of mitigating circumstances in order to reach a fair decision.

Period of Ineligibility

5.10. The Applicant has requested for a 4 year ban whereas the Respondent requests that the Panel consider this present charge as his first offence and reduce his sanction to the lowest possible as provided by law.

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

5.12. The WADA Code is clear on the principles that ought to be respected and the steps that ought to be taken in order to of Notify an Athlete about an Adverse Analytical Finding. The main principle is that of timeliness and being prompt in issuing a Notification of Provisional Suspension:

> ***7.9 Principles Applicable to Provisional Suspensions***
>
> ***7.9.1 Mandatory Provisional Suspension after an Adverse Analytical Finding.***
>
> *The Signatories listed below shall adopt rules providing that when an Adverse Analytical Finding is received for a Prohibited Substance or a Prohibited Method, other than a Specified Substance, a Provisional*

Suspension shall be imposed promptly after the review and notification described in Article 7.2, 7.3 or 7.5; where the Signatory is the ruling body of an Event (for application to that Event); where the Signatory is responsible for team selection (for application to that team selection); where the Signatory is the applicable International Federation; or where the Signatory is another Anti-Doping Organization which has results management authority over the alleged anti-doping rule violation.

5.13. The WADA Code imposes a formulaic approach of notification that if derogated fromhas grave consequences for an athlete in light of the start of the period of ineligibility. Usually the period of ineligibility commences on the date of the final decision following a hearing in accordance with Article 10.11 of the WADA Code. However, such period of ineligibility can commence at an earlier date in certain circumstances:

10.11 Commencement of Ineligibility Period

Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or,

if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

10.11.1 Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

5.14. The Respondent Athlete wishes to bring to the Panel's attention the various delays and confusion visited upon the Respondent as a result of poor result management by the Chinese Authorities who to date have not provided clear documentation or indication concerning the steps taken to notify the Respondent not only of the Adverse Analytical Finding but also a prompt Provisional Suspension. The duty to notify the

Respondent was later on imposed on the Applicant who issued a fresh Notice on the Applicant long after his sample was collected in Shenzhen, China on 1st November, 2015.

5.15. Such a delay according to the Respondent's counsel may result in a harsh consequence on the Respondent whereby any period following immediately after sample collection but before effective Notice of Adverse Analytical Finding and Provisional Suspension by ADAK may not be calculated or credited as part of the period of ineligibility.

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

"In any event, the Athlete is entitled to be credited with the six-month period of ineligibility already served, which ran from 4 July 2011 when she was provisionally suspended. However, in addition, by 2009 ADP

Art. 10.9.1 (which is reproduced in 2012 ADP) where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the IWF or Anti-Doping Organization imposing the sanction may start the period of ineligibility at an earlier date commencing as early as the date of sample collection or the date on which another anti- doping rule violation last occurred.

51. In the present case, there was an unconscionable delay in the commencement of this appeal brought about by the apparent unexplained failure of the IWF to comply with its obligation under Art. 8.1.6 of the 2009 ADP to notify WADA of the result of the hearing before the DHP. The Athlete was entitled to believe that the matter had been closed and to get on with her career. It would be unconscionable for her now to be required to serve any further period of ineligibility. In these circumstances the appropriate course is to commence the period of one year's ineligibility from the date of her sample collection on 13 May 2011."

Prayers

5.16. For the above reasons the Respondent requests that the Tribunal grants the following reliefs;

1. A substantial reduction from the standard

penalty should be allowed to the Respondent and that such penalty should be reduced to a prescribed minimum;

ii. Recognize and credit the period within which the Respondent has not been participating in athletics events as being the period of ineligibility starting from the date of his sample collection;

iii. All costs of the suit to be borne by ADAK (the Applicant in this matter);

iv. Any other relief that the Tribunal deems just and fair.

6. Applicant's Submissions

6.1. The Anti-Doping Agency of Kenya wishes to adopt and own the charge document dated 15th February, 2018 and the annexures thereto as an integral part of its submission.

6.2. The Athlete herein is charged with an Anti-Doping Rule Violation of **Presence of a prohibited substance Norandrosterone or its metabolites or markers in the athlete's sample** (hereinafter referred to as ADAK Rules) and rule 32.2 (a) and 32.2(b) of the IAAF competition rules 2016-2017.

6.3. Being an Elite Athlete, the result management was referred to ADAK by IAAF which in turn delegated the matter to

the Sports Disputes Tribunal as provided for in the Anti-doping Act No 5 of 2015 to constitute a hearing panel which the Respondent Athlete was comfortable with.

6.4. The matter was set down for hearing and the athlete was represented by Sarah Ochwada, an advocate of the High Court of Kenya, who filed his defence in the causes before the tribunal.

6.5. The matter came up for hearing and the parties presented their respective submissions and laid before the tribunal evidence and supportive documents for consideration.

Legal position

6.6. The applicant submits that under Article 3 of the ADAK ADR and WADC the rules provides that the Agency bears the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

6.7. The Court of Arbitration panels are not bound by the rules of evidence and may inform themselves in such manner as the arbitrators think fit. The Court has thus established jurisprudence around what may be deemed as comfortably satisfactory evidence.

6.8. The Court has established that the Anti-Doping Agencies bear the full burden to present reasonably, reliable evidence to persuade the panel that a violation had occurred, but this was, however, not a case where there

was an adverse analytical finding where a presumption is provided in favour of the anti-doping organization.

A. Presumptions

6.7. It is further provided at Article 3.2 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.*

B. What are the roles and responsibilities of the Athlete

6.8. 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 *Use*

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.

6.9. The Athlete herein 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*

C. Proof of Anti-Doping Rule Violation

6.10. The burden of proof expected to be discharged by the

Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

6.11. 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 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 having not declared treatment information on the Doping Control Form.

6.12. The respondent/athlete having admitted 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.

6.13. The athlete herein has the burden of demonstrating how the prohibited substance entered his body.

Intentional Violation

6.14. The Athlete was charged with the presence of **Norandrosterone** in his sample a violation of Article 2.1 of the ADAK ADR. **Norandrosterone** is a non-Specified Substance. The Athlete did not challenge this finding, or the presence of **Norandrosterone** in the urine sample he provided for testing.

6.15. 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".

6.16. The Applicant submits that the presence of a non-specified substance in an athlete's sample is a prima facie indication of the intention to cheat. This assertion is based on the unlikelihood of a non-specified substance entering into an athlete's body inadvertently.

6.17. For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, he/she did not know that his/her conduct constituted

an ADRV or that there **was no significant risk of an ADRV**. 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 to disprove intention.

6.18. The Applicant avers however that the athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance to disprove intention to cheat. It does not suffice to say that one did not know that the medication contained a banned substance but instead, the athlete must adduce concrete evidence to exclude intention. In **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that *'The athlete must demonstrate that the substance "was not intended to enhance" the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent. We accept the Respondent's submissions that Oliveira should not be followed'*

6.19. 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.

6.20. The Applicant proffers that the Respondent Athlete intentionally ingested substances containing prohibited substances with the intention to enhance his performance and has therefore failed to discharge his duty under the law. He has not sufficiently discharged his duty to disprove since he merely stated that he took medication known as Decabolin without further providing evidence on the same whether by way of prescription or proof of purchase. The respondent athlete also failed to give proof of the alleged pain he was experiencing on his knees. The above leads the Applicants to infer that the Respondent Athlete did indeed intend to cheat.

6.21. Further, the hardship experienced by the Applicant and other interested parties in locating the Respondent can be inferred as a ploy to escape facing his charges and a clear indication of his guilt with regards to his intention to cheat.

Origin

6.22. From the explanation given by the athlete, it is

alleged that he ingested medication. The Respondent Athlete did not address any link between the medication and the prohibited substance.

6.23. It is our submission that the athlete is required to prove the origin of the prohibited substance on a 'balance of probability'. The Balance of Probability standard entails that the athlete has the burden of convincing the panel that the occurrence of the prevailing circumstances is more probable than their non-occurrence.

6.24. In **Arbitration CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)** 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.

6.25. By neglecting to provide a link between the alleged ingested medications and supplements to the origin of the prohibited substance found in his sample, the

Respondent Athlete has failed to show the origin of the prohibited substance.

6.26. The Respondent Athlete claimed that he purchased the medications listed in his statement from an unnamed chemist. The athlete failed to provide any proof of the said purchase. The Respondent therefore failed to discharge his duty to show origin since there is no evidence to support his claim of purchase.

6.27. It is hence not clear if the athlete actually took the alleged medication and if so, if the said medication contained the prohibited substance in question.

Fault/Negligence

6.28. The athlete contends in his **evidence in chief** that he was under medication and he did not know the medication given to him contained the prohibited substance.

6.29. 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.* The applicant contends that there were no apparent means demonstrated by the Respondent Athlete showing any extra caution exercised when ingesting the alleged

medication. The Respondent failed, at the very least to show that he explained to the pharmacist prior to the alleged purchase of his active participation in sport. If he would have done so, it is probable that the pharmacist would have considered his profession prior to dispensing the alleged medication.

6.30. 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.

6.31. With regard to the preceding paragraphs, we submit that the athlete acted negligent and reckless as required under Article 22.1.4. of the ADAK ADR.

6.32. 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.

6.33. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before receiving any medication. He was thus grossly negligent.

Knowledge

6.34. 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.

6.35. Further the applicant contends that the Athlete, being an elite athlete and having participated in both local and international athletics competitions and is therefore aware of the worldwide fight against doping in sport.

6.36. 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.

6.37. ADAK submits that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a product 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.

6.38. 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.

6.39. The Applicant avers that the athlete is knowledgeable of the anti-doping movement and that he therefore intentionally neglected his duties under the ADAK Rules.

Sanctions

6.40. For an ADRV under Article 2.1, Article 10.2.1.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV does not involve a Specific Substance *"and the Agency ... can establish that the (ADRV) was intentional"*. Article 10.2.2: If Article 10. 2. 1 does not apply, the period of ineligibility shall be two years.

6.41. 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) 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.

6.42. In the circumstances, the Respondent has not adduced any evidence in support of the origin of the prohibited substance and has pleaded ignorance on knowledge of the medication containing a banned substance. We

submit that ignorance is no excuse and cannot be used to feign lack of intent to enhance performance. Bearing this in mind, we are convinced that the Respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADC.

6.43. In considering sanction on the athlete in **Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel further observed that *'When considering the appropriate sanction, it is necessary to bear in mind the words in the comment in the WADC to Article 10.4 which are reproduced in the comment to Rule 154. It is a relevant factor in the exercise of the discretion to consider the extent to which there was an attempt to verify that none of the constituent ingredients in the supplements to be consumed were on the prohibited list. The evidence establishes that whilst it was not on the ASADA website, had more exhaustive inquiries been made the athlete may have been able to locate information about the product which would have alerted him to the risk of violation if he used it.'*

Conclusion

6.44. Article (WADC 2.1.1) places emphasis on 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

6.45. We find that ideal considerations while sanctioning the athlete are:

a) The ADRV has been established against the athlete.

b) The admission made by the athlete concerning "Sample A".

c) The failure by the athlete to inform the pharmacist that he was an athlete and subject to anti-doping rules.

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

e) The knowledge and exposure of the athlete to anti-doping procedures and programs.

f) 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.

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

6.47. From the foregoing, we urge 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.

7. Discussion

7.1. We have carefully considered the matter before us and the Counsel's submissions and these are our observations;

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

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

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

7.4. Norandrosterone is a non specified substance which falls under Class S1-Anabolic Agents, of the 2015 WADA prohibited list. The Respondent's urine sample is alleged to have contained this prohibited substance during the Shenzhen International Marathon on 1st of November, 2016 in China.

7.5. It is not in dispute that this type of Anti-doping Rule Violation attracts a sanction of Ineligibility period of 4 years, a sanction that has been prayed for by the Applicant in this case.

7.6. In her submissions and arguments, the Respondent's Counsel put emphasis on consideration of this particular sanction with valid reasons on behalf of the Respondent Athlete.

7.7. The manner of notification of the Adverse Analytical Finding from the Anti-Doping Authorities and specifically miscommunication by the Chinese Authorities, caused undue delays in result management not attributable to the Respondent Athlete.

7.8. The WADA Code is clear on the principles that ought to be respected and the steps that also ought to be taken in order to notify an athlete about an Adverse Analytical Finding. The main principle being that of timeliness and promptness in issuing a notification of provisional suspension as captured in **Article 7.9.1 of the WADC**. This did not apply in the case of the Respondent Athlete herein.

7.9. The WADA Code do impose a formulaic approach of notification that if derogated from results into grave consequences for an athlete in light of the start of the period of ineligibility. Usually the period of ineligibility commences on the date of the final decision following a hearing in accordance with Article 10.11 of the WADC. However, such period of ineligibility can commence at an earlier date in certain circumstance as envisaged in **Article 10.11.1** of the WADC;

> *Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.*

7.10. Therefore, as a panel we shall put into consideration the arguments and submissions presented by both parties in arriving at a reasoned and fair decision under the circumstances.

8. Decision

8.1. WADA Code Article 10.2 'Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method' is applicable in this matter.

8.2. WADA Code Article 10.2.1 expressly states 'The period of Ineligibility shall be four years where Article 10.2.1.1 applies

and as we quote ' 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.' In this matter it is relevant.

8.3. The Tribunal therefore finds that the full period of ineligibility of four years shall apply from the date of the Sample Collection which was on 1st November, 2015.

8.4. The results of the Shenzhen International Marathon in Shenzhen, China of 1st November, 2015 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code are hereby disqualified.

8.5. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and ADAK ADR.

8.6. Each party to bear its own costs.

8.7. Any other prayers or motions are dismissed.

Dated and delivered at **Eldoret** this **day of 29th November, 2018.**

Signed:
Mrs. Elynah Sifuna-Shiveka

Shiveka.

Deputy Chairperson, Sports Disputes Tribunal

Signed:
Mr. Gichuru Kiplagat

Member, Sports Disputes Tribunal

Signed:
Mr. Peter Ochieng

Member, Sports Disputes Tribunal