

REPUBLIC OF KENYA



**THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL**

APPEAL NO. ADAK CASE NO. 14 OF 2018

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

-versus-

ABIGAEL JEROP..... RESPONDENT

JUDGEMENT

Hearing: 15th November 2018

Panel: Elynah Shiveka Chairperson
Gichuru Kiplagat Member
Gabriel Ouko Member

Appearances: Mr. Rogoncho for Applicant
Abigael Jerop the Respondent present

1. The Parties

- 1.1 The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016. Represented in this matter by Counsel Rogoncho.
- 1.2. The Respondent is a female athlete competing in national and international events. She is representing herself.

2. Background

- 2.1. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 4th September, 2018.
- 2.2. The Applicant brought charges against the Respondent that on 1st April, 2018 the Respondent was at the HongJiang GuCheng Half Marathon held in Hong Jiang China when CHINADA Doping Control Officers collected a Urine Sample. Aided by the Doping Control Officer, the respondent split the sample into two separate bottles, which were given reference numbers as follows; A 6290008 (the "A Sample") and B 6290008 (the "B Sample") under the prescribed World Anti-Doping Agency (WADA) procedures.
- 2.3 The sample A was subsequently analysed at the WADA accredited laboratory of Lausanne in Switzerland and an Adverse Analytical Finding (AAF) disclosed the presence of prohibited substance Salbutamol which are listed as Beta-2 Agonist Endogeneous Anabolic Androgenic steroids (AAS)

under S3 Anabolic Agents of WADA's 2018 prohibited list. This is according to the test report dated 3rd May, 2018 and availed to this tribunal.

2.4. The findings were communicated to the Respondent athlete by one Japhter K. Rugut, EBS the Chief Executive Officer of Anti-Doping Agency of Kenya (ADAK) vide a notice of charge and and provisional suspension dated 25th May, 2018.

2.5. In response to the notice of Adverse Analytical Finding, the athlete through an undated letter addressed to the Chief Executive of ADAK acknowledged the use of Salbutamol tablets during the said period without the requisite TUE and admitted having used for 5 years for the asthma condition that sge suffers from.

3. Charges

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

Use and Presence of a prohibited substance Salbutamol in the athlete's sample.

Use of a prohibited substance Salbutamol which are specified substances under class S3 are Anabolic Agents, of the 2018 WADA prohibited list and were of exogenous origin. Under Article 2.1 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 Applicant further stated that the Respondent had no Therapeutic Use Exemption (TUE) recorded at the IAAF for 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 states that there is no plausible explanation by the respondent to explain the adverse analytical finding.

3.3. 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.

3.4. The Applicant prays that:

- a) All competitive results obtained by Abigael Jerop from and including 1st April, 2018 until the date of the determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals , points and prizes) as per Article 10.1 of the ADAK ADR.
- b) Abigael Jerop be sanctioned to a two year period of ineligibility as provided by the ADAK Anti-Doping Code Article 10 of ADAK and WADC Rules.
- c) Costs, as per WADA Article 10.10

4. The Respondent's Arguments/Submissions

4.1. The Respondent represented herself in the case and was present at the hearing and requested to be heard '*viva voce*'.

4.2. The respondent's was informed by the tribunal of her rights and once she acknowledged her understanding when on to take an oath. She then went ahead to confirm her name, date of birth in 1988 and that she was born in Nandi District in a place called Kipkaren. She confirmed that she had gone to school to the level of Standard 8 at the primary level.

4.5. The Respondent further told the panel that she is 30 years old, single and that she has two children, a boy who is 15 years old and girl who is 10 years old. She stated that she started running in 2012 and this is her only source of income.

4.6. The Respondent informed the panel that she had mainly been running in local races, mainly cross country and 10km races. She stated that in 2015 she had participated in a marathon in China but that she was unable to finish the race because it was winter at the time and the freezing conditions and the rain and wind forced her to stop at the 28km mark because her chest was too tight for her to continue.

4.7. The Respondent confirms that in March 2018 she went to to compete in four races in China. The first race was on 25th March 2018, a marathon. She won the race and had a doping test done. She assumes that her tests had no adverse findings as she never heard back from them.

4.8. The respondent states that her second race was in 1 April 2018. It was a half marathon. She was second in the race and was tested once again. The third race in which she competed was on 8th April 2018 she was 7th and was not tested. The 4th race was on 15th April 2018, a half marathon, and she was 3rd and was further tested.

4.9. The respondent then travelled back to Kenya after the last race. After three weeks when she had not heard back from her manager Rogers Okello on why she had not received her monies for the races, she was informed by him that her test results findings had reported an adverse finding. She therefore could not be paid any money for any of the races.

4.10. The respondent then states that she received a call from one Mr Omariba who is a counsel for ADAK informing her that he had her letter. She met Mr Omariba on 30 May 2018 at which she time she confirms having received the Notice of Charge and the Provisional Suspension letter.

4.11. The counsel for ADAK, Mr Rogoncho, referred the athlete to page 15 of the Charge document and she confirmed that she is the one who wrote the letter to admitting that she had taken salbutamol tablets. She was also referred to page 17 of the charge document that confirms that as late as 4th June 2018 she had a prescription for Salbutamol beclomethasone inhaler for asthma from the Iten County Referral Hospital. The athlete goes on to explain that looking back to her early childhood she had always had asthma that was triggered when it was cold and wet, as well as when it was dusty. She states that her parents used to try and give her traditional herbs to treat the illness but it persisted.

4.12. The respondent moved from her Sugoi home to Iten in 2014 in order to be able to train with more competitive athletes. It was while she was in Iten that on the one occasion she felt her chest was "tight" she went to seek treatment at Kapkesum dispensary. When she informed the nurse who was attending to her of her symptoms she was told she had Asthma and was prescribed Salbutamol tablets.

4.13. The respondent presented to the tribunal the prescription of June 2016 from Dr. Mugalla, Head of Iten District Hospital that is part of the Charge document on Page 17, as well as the Spirometry tests of 4 April 2018 confirming her asthmatic condition.

4.14. When the Respondent was referred to her admission letter on Page 15 of the charge document, she stated that she had never known of the existence of TUE, and stated that she now wanted to apply for the same. When she was asked by a member of the tribunal if she was the one who wrote the letter she stated that she was assisted in writing it at the Iten District Hospital. When interrogated on her knowledge of Information Technology she stated it was very limited.

4.15. The Respondent was asked why she had stated that she took Vitamin B Complex only and not Salbutamol and she stated that she did not think there was anything wrong with doing so and therefore not necessary to state as much. She avers that she took it only because of the “tight” chest and the wheezing that happened after the race on 25 April 2018.

4.16. The respondent prays for forgiveness since her use of Salbutamol was not done to enhance her performance.

5. Discussion

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

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

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

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

5.4. The Athlete respondent has admitted beyond any reasonable doubt that the prohibited substance found in her sample was ingested by her but not intentionally to enhance her performance but for medical reasons.

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

5.6. The panel is of the view from the foregoing that there are unchallenged facts. These are:

i) That the athlete Respondent has not in any way challenged the validity of the process of sample collection, handling, transportation and testing.

ii) The laboratory finding for the AAF for Salbutamol has been admitted and the Respondent in deed waived the right for the testing of the "B" sample.

iii) Salbutamol is listed as a prohibited substance under S3 of the 2018 WADA prohibited list.

5.7 The issues that then render themselves for discussion, review and determination are;

i) Whether the ADRV was inadvertent

ii) The applicable period of ineligibility

iii) Whether the Respondent can benefit from any reduction

iv) What period of ineligibility to impose and any other orders.

5.8 In regards to the origin of the offending substance, it is the duty of the Respondent to establish the same and how it entered her body. In this case the athlete has readily submitted that she took salbutamol tablets after her first race in China on the evening of 25 March 2018.

5.9 In view of the admission it is the panel's view that the ADRV has been established in the prescribed manner (**Article 3.2**) and thus from that point the burden shifts to the Respondent to demonstrate that such ADRV occurred without the any fault or negligence on her part.

5.10 From the Respondent's evidence at the hearing she has clearly stated how the substance got into her system from taking Salbutamol tablets. The athlete has at the earliest opportunity admitted her guilt and went out of her way to get assistance in getting the hospital to help her write the letter accepting her fault and not requesting for her Sample B to be retested.

5.11 The athlete has provided sufficient proof from her doctor to show that she actually suffers from asthma. The fact that she suffers from asthma is not a factor that the Applicant felt the need to disapprove. In fact at some point during the tribunal hearing itself, it was obvious to the panel that the respondent actually was in the middle of an asthma attack. The wheezing and the breathlessness of the athlete was evident to the panel.

5.12 The athlete's level of education is of a very low level when it is considered she only got to Standard 8 at the primary level. She would therefore would not be automatically expected to have the knowledge to know the substances she was not allowed to use or that she needed to seek a TUE for her asthma. Her rural setting upbringing suggest that her parents did not know what she was suffering from and what treatment she should seek. In that setting knowledge of Information Technology would be very limited.

5.13 This panel is convinced that the Respondent **HAS** demonstrated to the comfortable satisfaction of this panel, (see **Maria Sharapova** -[**case 2016/A/4643**]) that the ADRV occurred without intent on her part or after the exercise of due diligence compatible with her level of knowledge. Therefore this panel deems WADC's Article 10.2.2 applicable in her case: 'If Article 10.2.1 does not apply, the period of *Ineligibility shall be two years.*'

6. CONCLUSION

6.1 As discussed above the panel is more inclined to believe that the ADRV arose from a lack of knowledge and not deliberate action or an act of total and reckless abandon of duty of care expected of her and imposed by the applicable Anti-Doping Rules and thereby find that there is no significant fault OR NEGLIGENCE.

Having Considered this matter in totality, the evidence of the Respondent, the admission and the fact that there were reasons adduced to seek "treatment", this Panel is convinced that there are grounds for reduction of the Period of ineligibility as under WADC's Article 10.5 (10.5.1) and specifically Article 10.5.1.1 *Specified Substances*: Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*. Accordingly, we are of the view that the *Athlete's* period of ineligibility be reduced to 1 year due to the mitigating circumstances and being a first offender.

DECISION

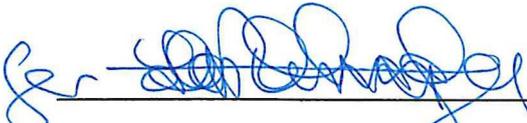
This Panel therefore holds as follows:

- i. The ADRV has been sufficiently proved. There are however grounds for reduction of sentence. The Respondent shall be ineligible for a period of 1 years with effect from 1 April 2018 (the date of provisional suspension).
- ii. All result obtained by the Respondent from 1 April 2018 inclusive of points and prizes are disqualified.
- iii. The parties shall bear their own costs of these proceedings.

Dated and delivered at Nairobi this 16th day of January, 2019.

Signed:

Elynah Shiveka



Deputy Chairperson, Sports Disputes Tribunal

In the presence of:

1. Gabriel Ouko

2. Gichuru Kiplagat