

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
APPEAL NO. ADAK 22 OF 2017

IN THE MATTER BETWEEN

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

-versus-

HILLARY KIPKOSGEI YEGO..... ATHLETE

DECISION

**Hearing** : 6<sup>th</sup> December 2017

**Panel** : Mr. John M Ohaga - Chair  
Mrs. Njeri Onyango - Member  
Ms. Kimani Mary - Member

**Appearances:** Mr. Erick Omariba, Advocate for the Applicant;

Mr. Hillary K. Yego, the Respondent Athlete was unrepresented.

## **I. 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 male adult of presumed sound mind, an Elite, International Level Athlete (hereinafter 'the Athlete').<sup>6</sup>

## **II. Background**

3. As an Elite and International Level Athlete, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
4. As an Elite and International Level Athlete, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
5. On 19<sup>th</sup> March, 2017, CTADA Doping Control Officers in an in-competition testing at the New Taipei City Wan Jin Shi Marathon held in Taiwan collected a urine sample code number 6184715 from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 6184715 and B 6184715
6. The analysis of sample number A 6184715 was performed at the WADA-accredited Laboratory in Tokyo, Japan. 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") indicating the presence of a prohibited substance Norandrostrone.
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. The findings were communicated to the Athlete by Thomas Capdevielle the IAAF Anti-Doping Administrator through a Notice dated 20<sup>th</sup> April, 2017. In the said communication the Athlete was

offered an opportunity to provide an explanation for the AAF by 27<sup>th</sup> April, 2017 and the option for Sample B analysis (see page 10 of the Charge Document).

9. The Athlete responded to the Notice from IAAF stating that he had used Voltaren as a pain killer to relieve fatigue in muscle and pain. Further *“this was not a deliberate use of prohibited substance whatsoever, it was to cure joint injury that had persisted for quite a time, am ready to face disciplinary action if need be; thanks hope my request will be considered in respect to mention above matter”*, the Athlete wrote.
10. On further probing from Laura Gallo, Coordinator - Results Management and Kyle Barber, Intelligence Officer at IAAF's Athletics Integrity Unit he admitted use of Nandrolone also revealing details of mode of purchase and usage (see page 18-25 of the Charge Document).
11. Additionally the Athlete submitted *“Acceptance of Provisional Suspension”* and *“Admission of Anti-Doping Rule Violation”* forms, both duly signed on 28/04/2017 (see page 12-13 of the Charge Document) thus *‘voluntarily and knowingly’* waived all rights to challenge the analytical findings of the Tokyo laboratory in any disciplinary hearing, appeal or other proceeding in relation to sample number 6184715.
12. The Athlete did not expressly request a Sample B analysis thus waiving his right to the same under IAAF Rule 37.5. However the Athlete's response in regard to a request for a hearing is debatable and shall be addressed later.
13. The response and conduct of the Athlete was evaluated by IAAF and it was deemed to constitute an Anti-Doping Rule violation and referred to ADAK for Results Management.
14. The Notice to Charge the Athlete was filed at the Tribunal on 12<sup>th</sup> September 2017 by Ms. Damaris Ogama acting for the Applicant in which she request a panel be named for this matter.
15. On 14<sup>th</sup> September 2017 the Tribunal gave directions that the Applicant serve the Mention Notice, Notice to Charge, Notice of the ADRV,

Doping Control Form and all relevant documents on the Respondent Athlete by Wednesday 20<sup>th</sup> September 2017. A panel consisting of Mr. John Ohaga, Mrs. Njeri Onyango and Ms. Mary Kimani was appointed and the matter set to be mentioned on 27<sup>th</sup> September 2017 to confirm compliance with orders and for further directions.

16. *Lead File Needed to show how hearing was slated for 9/11/17 then again set for 30/11/17 and finally heard on 6<sup>th</sup> Dec 2017.*

17. A Charge Document was duly prepared and filed by ADAK's Advocates at the Tribunal on 11<sup>th</sup> October 2017 and same served on the Respondent Athlete via his email address see page-as it appears in lead file-ADAK's copy of email dated 24<sup>th</sup> October 2017. This was after Counsel for the Applicant was unable to physically reach the Respondent Athlete as dodged any effort to be contacted through his phone number see page-lead file-- copy of printout showing numerous calls made on various days by the Applicant's Counsel.

18. The Respondent Athlete did not present a response to the Charge Document and instead reportedly went underground.

### **III. The Hearing**

19. The matter came up for hearing and the Counsel of the Applicant presented his submissions and laid before the Panel evidence and documents in support of his case for consideration.

20. ADAK has preferred the following charge against the Athlete: -

**Presence of a prohibited substance Norandrosterone or its metabolites or markers in the Athlete's sample which constitutes as anti-doping rule violation under Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2(b) of the IAAF rules.**

### **IV. Submissions:**

#### **A. Applicant's Submissions**

21. Mr. Omariba, Counsel for the Applicant, informed the Panel that the Agency had preferred charges against the Athlete and he would adopt the Charge Document as presented.
22. He submitted that the Athlete is an international level athlete and the Notice of ADRV had been presented by IAAF (and the Notice of AAF was communicated by the IAAF Anti-Doping Administrator). He was informed vide the letter appearing at page 9 of the Charge Document. He highlighted the Athlete's response which appears from Page 14 of the Charge Document.
23. He cited the Athlete's admission in page 13 as irrefutable evidence of commission of an ADRV that attracted a 4 year suspension. He also said the Athlete had accepted the consequences thereto in his response on page 28 of the Charge Document, further he stating that the Athlete had confirmed that he had taken Nandrolone and Voltaren, (see page 25 of Charge Document).
24. Counsel for the Applicant said that if the Athlete truly suffered the ailment he alleged he had he should have asked for a Therapeutic Use Exemption (TUE) as required by IAAF protocol.
25. Failure on the part of the Athlete to demonstrate that he had any pressing medical reason to resort to the use of the prohibited substance dispelled the recourse to the plea of lack of intention. The Athlete, he reiterated was not able show that fault could be assigned to a different party hence negligence lay solely on the Athlete.
26. The rules required the Agency to prove by any reliable means that the Athlete had committed an ADRV and in this case, Counsel for the Applicant wished to rely on the results drawn from the Accredited Laboratory in Tokyo.
27. He asked the Panel to draw an adverse judgment against the Athlete in the face of the fact that the Athlete neglected to proffer an explanation, continued to evade the Applicant's attempt to engage him regarding this case and deliberately refused to present himself before the Panel. The aforementioned behavior coupled with the Athlete's

written admission inextricably moored down the Athlete, the Applicant's Counsel contended.

#### **B. Athlete's Submissions**

28. In absence of the Athlete the Panel will rely on the Athlete's written responses attached to the Applicant in the Charge Document.

#### **V. Jurisdiction**

29. The Sports Disputes Tribunal has jurisdiction 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.

#### **VI. Applicable Law**

30. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

**The following constitute anti-doping rule violations:**

**2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample***

**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.**

**2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's A Sample* where the *Athlete***

waives analysis of the B Sample and the B Sample is not analyzed...

## VII. MERITS

31. The Panel will address the issues as follows:

- a. *Whether there was a waiver of hearing by the Athlete;*
- b. *Whether there was an occurrence of an ADRV and the Burden and Standard of proof;*
- c. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
- d. *Whether there should be reduction based on the Athlete's prompt admission;*
- e. *The Standard Sanction and what sanction to impose in the circumstance.*

### A. Waiver of Hearing

32. The Applicant's Counsel at number 15 of his Charge asserted that under rule 7.10.1 the having admitted the ADRV and accepted the consequences, there was no need for a hearing and the Tribunal should proceed and impose a sanction as provided for under the rules. Even though rule quoted by the Applicant seems unfamiliar in the Code the contention shall be accepted by the Panel in light of WADC in Article 8.3 in regard to Waiver of Hearing which states that, **"The right to a hearing may be waived either expressly or by the Athlete's or other Person's failure to challenge an Anti-Doping Organization's assertion that an ant-doping rule violation has occurred within the specific time period provided in the Anti-Doping Organization's rules"**.

33. Additionally, the Athlete's email to Laura Gallo dated 13<sup>th</sup> June 2017 (see page 16 of the Charge Document) recorded verbatim, read as follows, "...Well i think i have exhausted whetver i will come and put across in the hearing in the next two months; No i don't need to request for a hearing; Thanks hope to hear from you". The Athlete's written statement seems

scrambled. The first part of his statement shows an intent to attend a hearing in the next two months while the latter part seems to state no need for such a hearing.

34. The non-appearance behavior he has exhibited on the other hand seems to tally with the totality of his statement, that is, having stated he had exhausted whatever he would have come to put across in the hearing he went ahead to deliberately absent himself from all the sittings. It is the view of the Panel that the fact that the Athlete rendered his 'explanations' in writing and also communicated about no need to attend a hearing as he felt he had exhausted his grounds, an adverse inference need not accrue as requested by the Applicant.
35. Regardless of what the Athlete intended to communicate in his response to the issue of waiver of hearing, a hearing was conducted in his absence, after numerous proper services, thus fulfilling requirements stipulated in WADC's Article 8 concerning right to fair hearings.

#### **B. The Occurrence of an ADRV and the Burden and Standard of Proof**

36. With regard to the Athlete's ADRV, the Panel notes that it is undisputed that the Athlete's A Sample revealed the presence of the prohibited substance Norandrosterone.
37. In addition to the positive analytical lab results proof of the Athlete's admission is attached by the Applicant in its Charge Documents on page 13 of the Charge Document which is a copy of the 'Admission of Anti-Doping Rule Violation' from the Athletics Integrity Unit signed on 28/04/2017 by the Athlete.
38. In the present case, the Athlete bears the burden of proof that the ADRV was not intentional (Article 10.2.1 of the ADAK ADR) and it naturally follows that the Athlete must also establish how the substance entered his body.
39. Pursuant to Article 3.1 of the ADAK ADR, the standard of proof is on a balance of probability. The Article provides as follows:

*[...] Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability.*

40. The Panel notes that this standard requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51.

#### **A. Was the Athlete's ADRV intentional?**

41. The main relevant rule in question in the present case is Article 10.2.3 of the ADAK ADR, which reads as follows:

*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. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. 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 unrelated to sport performance.*

33. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

*'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.*

*Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional, for specified substances, it is also four years if an ADO can prove the violation was intentional.*

*Note: Specified substances are more susceptible to a credible, non-doping explanation; non-specified substances do not have any non-doping explanation for being in an athlete's system.*

34. In the Athlete's explanation in page 19 of the Charge Document the Athlete corresponded as follows: *"5. injection i did myself through google process 6. As i was reading over on the google search process on joint injury medication and treatment there were quite recommendation websites and among was nandrolone and its benefits on joint healing"*. It is evident that the Athlete deliberately sought for and used the prohibited substance.
35. Being an international-level athlete to whom the issue of doping is not a foreign term and at 30 years old the Athlete would have been expected to have been more alert and at the very least he should have applied for a TUE if indeed he required proscribed medication.
36. Further, if he was intelligent enough to surf through the websites and find Nandrolone then in equal measure he ought to have been able to surf therein and access the WADA Prohibited List against which to countercheck his self-medication prowess. From the aforementioned we infer that the Athlete was not only manifestly careless about the risk he put himself and his career in but also grossly negligent.
37. Analyzing the chain of communications between the Athlete and the AIU officers it is our judgment that if the Athlete did not know the culprit was in the Nandrolone he could have admitted its use as early as when he confessed to have used Voltaren but apparently he dilly dallied until pushed to a corner.

38. The Panel in the present case aligns with the Panel in CAS 2016/A/4377 that the athlete must establish how the substance entered his body and that to establish the origin of the prohibited substance it is not sufficient for an athlete "*merely to protest their innocence...*", which is what the Athlete resorts to when pressed by the relevant ADO to reveal the full details that caused his ADRV.
39. In the Athlete's step by step guided admission he said had injected himself with Nandrolone once "*through google search process*" and that "*no any doctor helped me get it*. He went on to say that he had purchased only 2ml – all of which he used - through a vendor online for 30 Dollars. Nevertheless, no concrete evidence in the form of purchase receipts was adduced, neither did he name the actual website from which he sourced the prohibited substance despite being asked to do so by Kyle Barber, instead launching into a tirade of protestations of innocence, (see page 17 of the Charge Document).
40. Further, the Athlete harped about using the prohibited substance for treatment purposes yet produced no doctor's prescription to support his claim. In absence of such concrete evidence, the Panel views his claims as a ploy to evade the requirement to furnish the relevant ADO with the source and/ or person(s) who administered the prohibited substance on him and summarily dismisses his claims.
41. In CAS 2014/A/3820, the Panel made the following comments: *In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation. In CAS 2010/A/2230, the Panel held that: to permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules... more must sensibly be required by way of proof given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body.* Therefore the Athlete fails to prove to the comfortable satisfaction of the Panel the source/ how the prohibited substance got into his body.

42. The Panel notes that the Athlete, in an obvious case of selective amnesia, did not declare treatment information on the DCF despite the alleged treatment having been self-administered and therefore being in his full knowledge. In his interview with the AIU intelligence officer we note he carefully weaves around admitting use of the prohibited substance, at first only conceding to the use of only Voltaren and it's only after being persistently queried does he finally admit having knowingly used Nandrolone.
43. Accordingly, the Tribunal finds that the Athlete has not met his burden of proof.

#### **B. Reduction Based on the Athlete's Prompt Admission?**

44. Article 10.6.3 of the RADO ADR, that reads as follows:

*10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1*

*An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 f .4, by promptly admitting the asserted anti-doping rule violation after being confronted by the RADO-Member Signatory or its Delegate Organization, and also upon approval and at the discretion of both WADA and the RADO-member Signatory or its Delegate Organization, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.*

45. The Panel notes that the Athlete did not contest the provisional suspension and has not been engaged in any activity related to athletics since the finding was communicated to him. However, he signed and/or submitted his prompt admission one day later than the window specified by the relevant ADO and hence narrowly missed out on consideration for prompt admission considerations.

## VIII. SANCTIONS

46. We find Article 10.2 of the ADAK Rules relevant in determining the sentence to be imposed. It stipulates the sanction of Ineligibility where there is Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method. It provides as follows:

**10.2 *Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method***

**The period of *Ineligibility* for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:**

**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.**

**10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and ADAK can establish that the anti-doping rule violation was intentional.**

**10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.**

47. The Panel notes that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete can establish that the ADRV was not intentional.

### **Disqualification**

48. Article 10.8 of the ADAK ADR reads as follows:

*Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*  
*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive*

*sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes.*

49. The Tribunal notes that even though the athlete has not taken part in any games since his sample tested positive, his was an in-competition test therefore disqualification of results must be inclusive of the competition which produced the positive sample.

### **Period of Ineligibility Start and End Date**

50. With respect to the sanction start date, the Tribunal is guided by Article 10.11 of WADC and ADAK ADR which provides as follows:

*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.*

51. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

*If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.*

52. In this case, the sample collection was made on 19<sup>th</sup> March 2017, and the Athlete was provisional suspended on 27<sup>th</sup> April 2017. It follows, therefore, that the Athlete should receive "credit" for the period of ineligibility already served. In this regard, the Tribunal determines that the Athlete's period of ineligibility, if imposed, shall commence as

from the date of his provisional suspension (that is 27<sup>th</sup> April 2017) thus giving him full credit for time already served in accordance with Article 10.1.3 of ADAK ADR.

#### IX. ON THESE GROUNDS

53. In these circumstances, the following orders commend themselves to the Tribunal:

- a. The ADRV has sufficiently been proven;
- b. The applicable sanction is set at Article 10.2.1.1 of the WADC;
- c. The Athlete's period of Ineligibility shall be for a period of 4 years with effect from 27<sup>th</sup> April 2017 being the date the Athlete was provisionally suspended;
- d. All results obtained by the Athlete from 19<sup>th</sup> March, 2017 inclusive of points and prizes are disqualified;
- e. The parties shall bear their own costs of these proceedings.

54. The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this 27<sup>th</sup> day of February, 2019

Signed:

John M Ohaga, FCI Arb



Chairman, Sports Disputes Tribunal

Signed:

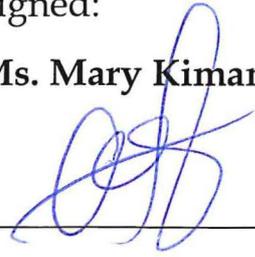
Mrs. Njeri Onyango



**Member, Sports Disputes Tribunal**

Signed:

**Ms. Mary Kimani**



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**Member, Sports Disputes Tribunal**