REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI DOPING NO. 27 OF 2017

IN THE MATTER BETWEEN

ANTI- DOPING AGENCY OF KENYA……APPLICANT

-versus-

IRENE JEPTOO KIPCHUMBA…….. ATHLETE

DECISION

Hearing : 15th March 2018

Panel : Mrs. Njeri Onyango - Panel Chair
Ms. Mary N Kimani - Member
Mr. GMT Ottieno - Member

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

The Athlete was absent and 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 female adult of presumed sound mind, an Elite and International Level Athlete whose address of service is through Mobile Phone number +254 792 43 53 05 (hereinafter '**the Athlete**').

II. Factual Background

3. The Athlete describes herself as a 'hustler', a slang term that loosely translates to one who engages in casual employment; 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 her.
4. On 19th March, 2017, during the Yuanan Marathon Race 2017 held in China CHINADA Doping Control Officers in an In-competition testing collected a urine sample from the Athlete. These were split into two separate bottles in accordance with the prescribed WADA procedures were given reference numbers A 6154673 (the "**A Sample**") and B 6154673 (the "**B Sample**").
5. The Samples were sent to a WADA accredited Laboratory in Seibersdorf LABOR GmBH, Austria. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance Prednisolone.

6. 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.
7. The findings were communicated to the Athlete by Mr. Japhter Rugut the Chief Executive Officer of ADAK through a Notice and probable Provisional Suspension dated 15th September, 2017. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 22nd September, 2017and the option for Sample B analysis (see page 11-12 of the Charge Document).
8. The Athlete responded to the Notice from IAAF stating that after falling ill on arrival in China she had gone to a pharmacy and explained her ailments and was given medicine which she thought was what had got her into the problem. She also stated she would really have liked to bring the medication as an exhibit.
9. The Athlete did not request a Sample B analysis thus waiving her right to the same under IAAF Rule 37.5 and confirmed that the results would be the same as those of sample A in any event.
10. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule violation and referred to the Sports Disputes Tribunal.
11. Notice to charge was filed at the Tribunal on 4th October 2017 and a panel comprising Mrs. Njeri Onyango, Ms. Mary Kimani and Mr. GMT Ottieno appointed to listen to the matter.
12. At mention on 18th October 2017 attended by Counsel for the Applicant the panel was informed that the Athlete who was absent was served on 15th September 2017 and a second service attempted on 6th October 2017 to serve ADRV Notice and Directions of the Tribunal. It was heard that the

Athlete communicated and said she would be unable to attend the Tribunal proceedings because her mother was admitted in hospital. Another mention was scheduled for 15th November 2017.

13. A Charge Document was duly prepared and filed by ADAK's Advocates to which the Athlete did not lodge a formal reply beyond her aforementioned explanation.
14. On 15th November 2017, the Tribunal received the Charge document. At mention held on same day, again, only Counsel for the Applicant was present and he said he had been in touch with Athlete and he requested that pro bono Counsel be appointed for the Athlete. The Tribunal ordered the matter be mentioned on 7th December 2017 and in the meantime it nominated Mr. Nabutola A. Wanjala as pro bono Counsel and ordered he be so notified.
15. At mention on 7th December 2017 it was reported by Counsel for the Applicant that he had duly served the Notice for mention to Mr. Nabutola representing the Athlete (see copy thereof received by said Counsel on 21st November 2017) but Counsel for the Athlete was absent therefore another mention was scheduled for 17th January 2018.
16. Once again on 17th January 2018 only Counsel for Applicant was present. He said that Mr. Nabutola the pro bono Counsel for the Athlete had indicated that he was unable to reach the Athlete. Applicant's Counsel also said prior to service, the Athlete had been evasive and he was of the opinion that she was deliberately trying to frustrate her matter therefore he requested leave to file her directly. Order was granted by Tribunal to serve Athlete physically and should that fail the same be effected through her known telephone number and appropriate affidavit filed to demonstrate effort made to trace and serve by 15th February 2018.

17. The Tribunal received a copy of an Affidavit of Service from Applicant on 15/01/2018, attached to which were copies of a trail of mobile phone correspondence between it and the Athlete including evidence of service via Whatsapp on 6th February 2018. At mention on 15th February 2018, Counsel for Applicant said he was ready to proceed with the hearing in the absence of the Athlete. However the Tribunal declined to hear the matter bearing in mind Counsel had been appointed for the Athlete and ordered that Mr. Nabutola be requested to officially withdraw from the case after which exparte hearing could proceed. A mention was slated for 28/02/2018 to confirm compliance and set date for hearing.
18. During the mention on 28th February 2018, Counsel for the Applicant exhibited a copy of the email he had written to Counsel for the Athlete (and copied the Tribunal) requesting him to communicate whether he intended to proceed with the matter. The Tribunal set 15th March 2018 as date for the hearing. Meanwhile it ordered the Applicant to effect direct service of Notice of hearing to the Athlete and file due comprehensive affidavit of service to enable panel proceed with the hearing.
19. On 15th March 2018 the Applicant filed with the Tribunal the due affidavit attached to it the following: email correspondence by the Applicant's Counsel to Counsel for the Athlete dated 7th March 2018 (EGO 1), a formal response from Mr. Nabutola Wanjala dated 8th March 2018 notifying he would not enter appearance nor prosecute matter on behalf of the Athlete (EGO 3) and the WhatsApp Service of Notice for hearing sent on 7th March 2018 to Athlete (EGO 2).

III. The Hearing on 15th March 2018 – Exparte

20. At the hearing ADAK was represented by Mr. Erick Omariba Advocate while the Athlete was absent and was unrepresented.
21. ADAK has preferred the following charge against the Athlete: -

    Presence of a prohibited substance *prednisolone* or its metabolites or markers in the athlete's sample in violation of 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.
22. Mr Omariba, Counsel for the Applicant, stated that the Athlete took part in the Yuanan Marathon, China. Her urine sample collected by CHINADA DCOs and sent to accredited laboratory in Austria returned the presence of Prednisolone, an S9 in the WADA 2017 Prohibited List.
23. The Athlete's response indicated she had been using the substance. The Athlete evidenced this in a text message plus a photo of the medicine albeit written in Chinese Language, (see last two unnumbered pages of the Charge Document).
24. No TUE was recorded with ADAK or IAAF hence ingestion by Athlete was considered an AAF.
25. No clear or plausible explanation was advanced for the presence of Prednisolone in the Athlete's sample therefore there is no reason to believe that the same was used for any other reason other than improve performance.
26. Counsel for the Applicant referred the panel to the Athlete's explanation in which she said she visited a chemist in China after experiencing leg swellings and it sold her the medication which she was directed to swallow, 2 tabs 3 times a day.

27. The Applicant's Counsel further observed that it was clear the Athlete had a problem in her body and in a bid to clear the pain she sought this particular medication, which meant that the Athlete was unfit for the race so to perform took medication, pointing to fact that the particular substance was taken to enhance performance.
28. Whereas the Athlete's AAF involved a Specified substance which would ordinarily attract two years, the Applicant prayed that the Athlete's ADRV be considered under Article 10.2.1.2 since it argued that *"when the Athlete knew she could reduce pain with this medicine, she intentionally used it to clear her pain hence attracts 4 years"*.
29. Further, the Applicant referring the Panel to Article 3.2.5 prayed it draw an adverse inference against the Athlete as she had been very evasive (a) evading even her pro bono lawyer (b) was full of excuses e.g. on 18th October 2017 told Agency official that her mother was sick etc.
30. Applicant also prayed for disqualification of Athlete's result of 19th March 2017 and all subsequent results.

A. Athlete's Submissions

31. In the absence of the Athlete we shall treat her texted 'explanations' submitted via Whatsapp as her 'submissions' and for avoidance of doubt we shall set her explanation verbatim, see last page (unnumbered) attached to the Charge Document:

"Good evening Mr. Eric. Have received your message. Didn't heard you when you called me coz my phone have a problem. So regarding the issue of the case,I would like to inform you that I will not manage to come there.simply because, I cannot raise the amount of fare coming there and going back home at this time.am an hustler and I don't have job. To be honest,I want to explain to you about the issue of the medicine I took in China."I traveled to China for a marathon and when I

arrived there,my legs were so pain and swelling a lot.I had to go to a pharmacy and explained what am feeling and that is the medicine that I was given.the pharmacist told me to take 2 tablets 3 time a day and that's what I did.so after I run, they did doping and I think that is what got me this problem. "But I want to apologize for it because I didn't knew that they prescribed me wrong medicine because it could haven't been like this.Thanks Irine. 13.21

I really liked to come there with this medicine and you can see it.please understand my situation. 13.26"

32. At the second last page (unnumbered) attached to Charge Document was a snap shot of a medicine bottle held in a palm whose inscription was in Chinese. We note that all of the Athlete's communications have not been aptly dated by the Applicant to enable the Panel adjudge promptness.
33. It is also noted that the Athlete was notified six months after the race/test, (see Notice date 15th September, 2017) therefore it is rather interesting that she seemed to have retained the apparently unfinished medication ostensibly bought in China.
34. The Applicant in its Charge Document dated 14th November 2017 prayed that:
    (a) *"All competitive results obtained by Irene Jeptoo Kipchumba from and including 19th March 2017 until the determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals points and prizes,* ***Article 10.1 ADAK ADR***
    (b) *Irene Jeptoo Kipchumba be sanctioned to a Two year period of ineligibility as provided by ADAK Anti-Doping Code,* ***Article 10 of ADAK and WADC*** *Rules.*
    (c) *Cost, Article* ***10.10****"*

IV. Jurisdiction

35. 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.

V. Applicable Law

36. 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.**

VI. MERITS

37. The Tribunal will address the issues as follows:

    a. *Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*
    b. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*

c. *Whether there should be reduction based on the Athlete's prompt admission;*

d. *The Standard Sanction and what sanction to impose in the circumstance.*

A. The Occurrence of an ADRV, Burden and Standard of Proof

38. With regard to the Athlete's ADRV, the Tribunal notes that there is no evidence that the Athlete requested for her sample B to be tested by 22nd September 2017 deadline given in the Agency's Notification thereby a waiver ensued and subsequent confirmation of ADRV as under Article 2.1.2:

> **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; or, where...**

39. 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 her body.

40. 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.*

41. 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.

B. Was the Athlete's ADRV intentional?

42. 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.***

43. 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.

44. The Panel in the present case aligns with the Panel in CAS 2016/A/4377 that the Athlete must establish how the substance entered her body and that to establish the origin of the prohibited substance it is not sufficient for an Athlete "*merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question*".

45. The Athlete explained she bought and used this medication when she arrived in China meaning the Specified Substance was used in-competition hence it could safely be presumed to be intentional use unless the Athlete can demonstrate otherwise.

46. The Panel noted that the Athlete's DCF was sparsely filled out. For instance, it was noted that at number 3 of Doping Control Form, '*Information for Analysis*' under '*List any prescription medication or supplement including vitamins and minerals taken over the past 7 days (include dosage where*

possible) if necessary continue on a supplementary report form,' the Athlete left the space blank as she did the following No. 4. The DCF itself is printed in Chinese beside which are English translations but any Chinese hand writings by the Doping Control Officer for example, were not translated.

47. Gauging from the Athlete's letter rendered verbatim earlier we note her command of English just about sufficed. The DCO who assisted Athlete fill in this form, as seemed to be the custom, filled it in his national language so even our non-Chinese language-literate Panel for example cannot decipher (specifically) the untranslated comments jotted down by Doping Control Officer on this athlete's DCF. Further, we cannot be sure that there was adequate communication between the DCO and Athlete which could have ensured comprehensive understanding of necessary information required to be filled out on the DCF.

48. The inscriptions on medicine bottle submitted as evidence by the Athlete (mentioned earlier) equally were not translated. What if perchance the characters printed on medicine container on the palm of hand of snap shot submitted by the Athlete corresponded to the medication the Athlete claimed to have purchase in a pharmacy in China and that medication turned out to be the substance found in her test results?

49. This is the first time the Athlete was confronted with an ADRV; her side of the story etched in the Whatsapp is a probability and unless the snap-shot medication is translated and adjudged not to be related to the Prohibited Substance found in her test results, it is this Panel's opinion that simple as the Athlete's explanation is, it seems credible; it actually seems unrehearsed.

50. From her written explanation we also deduced that the Athlete's knowledge about anti-doping was not up to par as she seemed to believe

that it was the pharmacy that had issued her with the wrong medicine when in actual fact it was the Athlete, in complete disregard of the rule of strict liability who indeed purchased and used the proscribed medicine. That she knew taking the Specified Substance constituted an ADRV or knew there was significant risk her conduct might constitute an ADRV and manifestly disregarded that risk, the Athlete denied that was the case and it was up to the Applicant to prove the violation was intentional.

51. The Applicant on the other hand contended that the Athlete was unwell and resorted to using banned medication to enable her compete, "*that it was clear the Athlete had a problem in her body and in a bid to clear the pain she sought this particular medication, which meant that the Athlete was unfit for the race so to perform took medication, pointing to fact that the particular substance was taken to enhance performance,*" which was also a probable scenario. Equally, the Panel is cognizant, as per WADC's interpretation regarding 'intentional', '*Note: Specified substances are more susceptible to a credible, non-doping explanation;*' and it may well have been that the Athlete was unwell and took the medication to address ill health rather than to enhance performance just as she laid it out in her explanation.

52. Regarding the prayer by the Applicant that the Panel rule adversely against the Athlete in view of her persistent no-show at the Tribunal including avoidance of the pro bona Counsel appointed by the Tribunal to act on her behalf, this Panel is hesitant to oblige the Applicant because the Athlete's written reason seemed to be linked more to financial inability than outright refusal to comply.

53. In light of the above, the Panel finds that the Athlete proved on the balance of probability the origin of the prohibited substance; accordingly, the Panel finds that the Athlete has met her burden of proof.

C. Reduction Based on the Athlete's Prompt Admission?

54. Article 10.6.3 of the ADAK ADR, 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… […].*

Without an apt dating of the Athlete's explanation by the recipient, that is the Applicant, it is not possible to arrive at a decision regarding promptness or otherwise of the Athlete's admission in this particular case.

VII. Sanctions

55. With respect to the appropriate period of ineligibility, Article 10.2 of the ADAK ADR provides that:

> **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 […]**
>
> **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.**

DECISION

56. In view of all considerations pertaining to this case, the following orders commend themselves:
    a. The ADRV has sufficiently been proven;
    b. The applicable sanction is set at Article 10.2.2 of the WADC;
    c. The Athlete's period of Ineligibility shall be for a period of 2 years with effect from 22nd September 2017 being the date the Athlete was provisionally suspended;
    d. All results obtained by the Athlete from March 19th, 2017 inclusive of points and prizes are disqualified;
    e. The parties shall bear their own costs of these proceedings.
57. 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 rules.

Dated at Nairobi this 28th **day of** *March*, **2019**

Signed:

Mrs. Njeri Onyango

Panel Chairperson, Sports Disputes Tribunal

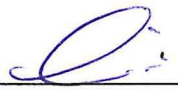
Signed:

Mr. G.M.T Ottieno

Panel Member, Sports Disputes Tribunal

Signed:

Ms. Mary Kimani



Panel Member, Sports Disputes Tribunal