

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
APPEAL NO. ADAK 16 OF 2018

IN THE MATTER BETWEEN

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

-versus-

CAROLINE JEPKURUI YATICH..... ATHLETE

DECISION

**Hearing** 27<sup>th</sup> February, 2019

**Panel** Mrs. Elynah Sifuna- Shiveka Deputy Chairperson  
Mr. Gabriel Ouko Member  
Mr. Gichuru Kiplagat Member

**Appearances:** Mr. Bildad Rogoncho, Advocate for the Applicant;

Miss Caroline J Yatich , the Respondent Athlete was not present.

## 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, International Level Athlete (hereinafter 'the Athlete')

## 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 her.
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 her.
5. On 4<sup>th</sup> November, 2017, CHINADA Doping Control Officers in an in-competition testing at the Xichang Marathon held in China collected a urine sample code number 6282419 from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 6282419 and B 6282419 in accordance with the prescribed WADA procedures.
6. The analysis of sample number A 6282419 was performed at the WADA-accredited Laboratory in Beijing, China. 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 Japhter K. Rugut, the ADAK Chief Executive Officer through a Notice of Charge dated 20<sup>th</sup> June, 2018. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 3<sup>rd</sup> July, 2018 and the option for Sample B analysis (see page 11 of the Charge Document).
9. The Athlete did not expressly request a Sample B analysis thus waiving her right to the same under IAAF Rule 37.5. Issues on the Athlete's response to appearance will be dealt with here below.
10. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule violation.
11. The Notice to Charge the Athlete was filed at the Tribunal on 22<sup>nd</sup> October 2018 by Ms. Damaris Ogama acting for the Applicant in which she request a panel be named for this matter.
12. On 24<sup>th</sup> October 2018 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 7<sup>th</sup> November 2018. A panel consisting of Mrs. Elynah Shiveka, Messrs Gabriel Ouko and Gichuru Kiplagat was appointed and the matter set to be mentioned on 7<sup>th</sup> November 2018 to confirm compliance with orders and for further directions.

13. Athlete via her email address [carolineyatch06@gmail.com](mailto:carolineyatch06@gmail.com) (see ADAK's copy of email dated 30<sup>th</sup> October 2018 was served. This was after Counsel for the Applicant was unable to physically reach the Respondent Athlete as she dodged any effort to be contacted through her phone number 0717392482 and 0728157522 by the Applicant's Counsel.

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

### III. The Hearing

15. 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.

16. 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

17. Mr. Rogoncho, 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.

18. According to Mr Rogoncho in his submission this matter was referred to ADAK by Athletics Integrity Unit on 7th June 2018. The

athlete had undergone a doping control process on 4th November 2017, during the Xichang Marathon in China. The athlete's sample had tested

positive for Norandrosterone.

19. For a while, ADAK could not trace the athlete. On 29th August 2018, the athlete was finally served with the ADRV Notice dated 20th June 2018. She was served via her email address [carolineyatich06@gmail.com](mailto:carolineyatich06@gmail.com) <<mailto:carolineyatich06@gmail.com>> . She was served by Advocate Erick Omariba after he had talked to her on phone. The athlete was given up to 5th September 2018 to file her response which she did not.
20. On 22nd October 2018, ADAK filed the Charge Document at the SDT. By this time the matter had been mentioned severally with ADAK requesting for time to trace the athlete.
21. On 24th October 2018, the undersigned informed the Tribunal that he had spoken with the athlete who had promised to appear before the Tribunal, which she did not. The matter was stood over to 7th November 2018.
22. On 7th November 2018, ADAK filed an Affidavit of Service sworn by Advocate Erick Omariba confirming that the athlete had been served with the Charge Document via her aforementioned email address and stating that the athlete had switched off her two mobile phone lines. In view of the service, ADAK requested for a hearing date and the matter was fixed for hearing on 6th December 2018.
23. On 6th December 2018 ADAK informed the Tribunal that the athlete's mobile phone was still off and as such requested for the matter to be stood over to 31st January 2019 to give the athlete another opportunity to be heard.
24. On 29th January 2019, the undersigned was able to reach the athlete on phone and she requested to have the matter adjourned to enable her attend the Tribunal. This information was communicated to the

Tribunal on 31st January 2019 and the matter was adjourned to 28th February 2019.

25. On the next hearing date, the undersigned filed an Affidavit of Service, stating that on 7th February 2019, he had called the athlete but her phone was off. That on 26th February 2019, he forwarded to the Athlete the hearing notice.
26. The conduct of the athlete in regard to this matter has been lackadaisical to say the least. The last time contact was made with the athlete was on 29th January 2019 when the undersigned spoke with the athlete about the hearing which was coming up on 31st January 2019. The athlete's phones have been off since that day.
27. The athlete is an international level athlete with networks and has competed globally. The least she could have done is make a follow up on this matter and find out how far the same has gone. Unfortunately, she has ignored this matter completely.
28. On 27th February 2019 when the matter last came up for hearing, ADAK invoked the provisions of Articles 3.2.5 of the Anti-Doping Rules 2016, on an athlete's refusal to attend hearing despite notification. ADAK requested for a Decision which is fixed for 28th March 2019.
29. 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 her regarding this case and deliberately refused to present herself before the Panel. The aforementioned behavior coupled with the Athlete's lack of response should lead a maximum 4 year sentence for the offence.

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

30. In absence of the Athlete the Panel had no evidence to rely on.

## V. Jurisdiction

31. 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

32. 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

33. 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 ADVR and the Burden and Standard of proof;*
- c. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADVR 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

34. The Applicant's Counsel has asserted that the Athlete has admitted the ADVR and accepted the consequences by her lack of response and behavior, and the Tribunal should proceed and impose a sanction as provided for under the rules. This 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*".**

35. A hearing was conducted in her 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 10 of the Charge Document which is a copy of the 'Admission of Anti-Doping Rule Violation' from the Athletics Integrity Unit signed on 04/11/2017 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 her 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. The athlete by her conduct and numerous chances given failed to provide any reason how the substance may have gotten into her system. 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 the Athlete would have been expected to have been more aware.

36. 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.

37. Accordingly, the Tribunal finds that the Athlete has not met his burden of proof.

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

38. 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.*

39. The Panel notes that the Athlete did not contest the provisional suspension and has not submitted her prompt admission in the window specified by ADAK and hence missed out on consideration for prompt admission considerations.

### **VIII. SANCTIONS**

40. 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.

41. 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**

42. 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.*

**Period of Ineligibility Start and End Date**

43. 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.*

44. 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.*

## **IX. ON THESE GROUNDS**

45. 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 4<sup>th</sup> November 2017;
- d. All results obtained by the Athlete from 4<sup>th</sup> November, 2017 inclusive of points and prizes are disqualified;
- e. The parties shall bear their own costs of these proceedings.

46. 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 \_\_\_ 28<sup>th</sup> day of \_\_\_ March \_\_\_, 2019

Signed:

**Mrs. Elynah Sifuna-Shiveka**



**Deputy Chairperson, Sports Disputes Tribunal**

Signed:

**Mr. Gabriel Ouko**



**Member, Sports Disputes Tribunal**

Signed:

**Mr. Gichuru Kiplagat**



**Member, Sports Disputes Tribunal**