

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 24 OF 2018

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

-versus-

MARVIN MUKOSWA OKELLO.....RESPONDENT

DECISION

Hearing: 28th November, 2018

Panel: Mrs.Elynah Sifuna- Shiveka Deputy Chairperson
Mr. Gichuru Kiplagat Member
Ms. Mary Kimani Member

Appearances: Messrs Bildad Rogoncho and Erick Omariba for
Applicant
Mr. Marvin Mukoswa Okello Respondent Athlete,
Representing himself

1. The Parties

- 1.1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
- 1.2. The Respondent is a male adult competing in the sport of Body Building as an elite athlete.

2. Background And The Applicant's Case

- 2.1. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 5th November, 2018.
- 2.2. The Applicant brought charges against the Respondent that on 5th May, 2018, ADAK Doping Control Officers in an in-competition testing during the Kenya Bodybuilding Federation Mr. Greater Western Bodybuilding Championship in Kisumu County, Kenya collected a urine sample from the Respondent. Aided by the DCO, the Respondent split the Sample into two separate bottles, which were given reference numbers **A 4162668** (the "A Sample") and **B 4162668** (the "B Sample") in accordance with the prescribed World Anti-Doping Agency (WADA) procedures.
- 2.3. According to ADAK, both Samples were transported to WADA accredited laboratory of in Doha, Qatar. The Laboratory analyzed the 'A' Sample in accordance with the procedures set

out in WADA's International Standard for Laboratories (ISL). The 'A' Sample returned an Adverse Analytical Finding (AAF) revealing the presence of a prohibited substance *Furosemide* which is prohibited under the 2018 WADA Prohibited List as an S5-Diuretics and Masking Agents.

- 2.4. The findings were communicated to the Respondent Athlete by Mr. Japhter K. Rugut EBS, the ADAK, Chief Executive Officer vide a Notice to Charge and Mandatory Provisional Suspension dated 17th July, 2018. In the said communication the Respondent Athlete was offered an opportunity to provide an explanation for the same and was given a deadline of 31st July, 2018 by which he should have responded.
- 2.5. The same letter also informed the athlete of his right to request for the analysis of the 'B' Sample; and other avenues for sanction reduction including prompt admission and requesting for a hearing and gave a deadline of 31st July, 2018 for the same.
- 2.6. The Respondent Athlete, vide an undated letter responded to the charges. He apologized and further stated that during the event period he fell ill and took some drugs namely Ciprofed-500 and Amoxin. He however failed to disclose the medication he was under while filling in the Doping Control Form and neither did he produce a receipt for proof of purchase of the medication.

3. Charges

3.1. The Anti-Doping Agency of Kenya (ADAK) therefore, is preferring the following charge against the Respondent Athlete:

Presence of a prohibited substance Furosemide in the athlete's sample. Furosemide is a specified substance under class S5-Diuretics and Masking Agents of 2018 WADA prohibited list and as read together with Article 4(1) of the ADAK Anti-Doping Rules and the presence and use of prohibited substances or its metabolites or markers in an athlete's sample, constitutes an anti-doping rule violation.

3.2. The Applicant further stated that the Respondent Athlete's Adverse Analytical Finding (AAF), was not consistent with any Therapeutic Use Exemption (TUE) for the substances in question and there is no apparent departure from WADA International standards for laboratories and international standards for testing and investigations that could have caused the AAF as outlined in Article 3.2.3 of the WADC.

3.3. Furthermore, the Applicant asserts that there is no plausible explanation by the Respondent Athlete to explain the AAF.

3.4. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55, 58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act 2016 as amended.

3.5. The Applicant prays that:

a) All competitive results obtained by the Respondent

Athlete from and including 5th May, 2018 until the date of determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals, points and medals), as per **Article 10.1 of ADAK ADR**.

- b) The Respondent Athlete Marvin Mukoswa Okello be sanctioned to a four-year period of ineligibility as provided by **Article 10 of WADC and ADAK ADR**
- c) Costs, as per **WADA Article 10.10**.

4. Preliminary Matters

4.1. The matter was first brought to the Tribunal vide a notice to charge addressed to the Chairman of the Sports Disputes Tribunal dated 31st August, 2018 by Ms. Damaris Ogama for the Applicant (ADAK). The matter was however, filed on 4th September, 2018 at the Tribunal. The notice also requested the Tribunal to constitute a hearing panel to whom the charge documents and any relevant materials were to be served.

4.2. Upon reading the notice to charge dated 31st August, 2018

filed at the Tribunal, the Tribunal directed and ordered that the Applicant should serve the mention notice, the notice to charge, the notice of ADRV, the Doping Control Form and all other relevant documents on the Respondent within 15 days of the date hereof.

- 4.3. A panel comprising Mrs. Elynah Sifuna-Shiveka, Messrs Gichuru Kiplagat and Gabriel Ouko was constituted and the matter was to be mentioned on Wednesday 3rd October, 2018 to confirm compliance and for further directions.
- 4.4. On 3rd October, 2018 when the matter came up for mention the Counsel for the Applicant Mr. Rogoncho confirmed to the Tribunal that the notice and directions had been served on the Respondent Athlete who resides in Kitale. He asked the Tribunal to allow the Respondent Athlete 30 days to prepare to attend before the Tribunal. The request was granted and the matter was to be mentioned on 7th November, 2018 for further directions.
- 4.5. On 7th November, 2018 during the mention of the matter, Mr. Omariba confirmed having filed the Charge Document

on 6th November, 2018 but admitted that he was yet to serve the same on the Respondent Athlete. Further mention of the matter was slated for 21st November, 2018 to confirm compliance.

4.6. On 22nd November, 2018 when the matter came up for mention Mr. Rogoncho for the Applicant confirmed having served the Respondent Athlete. He requested for the hearing of the matter to be scheduled for the following week on 29th November, 2018 since the Tribunal was sitting in Eldoret for the first time and the Respondent Athlete is based in Kitale it was going to be convenient to all parties. Rogoncho was asked to proof evidence of service. The matter was heard on 28th November, 2018 in Eldoret, Uasin Gishu County, Kenya under a new panel comprising Mrs. Elynah Sifuna-Shiveka (Chair), Ms. Mary Kimani and Mr. Gichuru Kiplagat.

5. Respondent's Arguments/Submissions

5.1. The Respondent, Marvin Mukoswa Okello who was in attendance was sworn in and testified in Kiswahili the national

language in Kenya and understood by all parties.

5.2. He gave a brief history of himself disclosing that he is 29 years old, married with 2 children; a boy aged 6 and a girl aged 3. He dropped out of school in class 8. He is body builder but also works as an agent in a bus company called Nyaugenya based in Kitale Office, Transzoia County.

5.3. He started bodybuilding in 2003 but competitively towards end of 2007. He has won two events namely Mr. Environment in 2014 held in Kitale and sponsored by the Transzoia County and Mr. Kwanza in 2017 also staged in Kitale. Other events where he has featured include Mr. Kenya, Mr. Kisumu, Mr. Modern Fitness, Mr. Nairobi, Mr. Muscle Mania to mention just but a few. He also revealed that he has competed once outside the country and that was in Kampala, Uganda.

5.4. He submitted that he competed in the Mr. Greater Western bodybuilding championships staged at Aga Khan hall in Kisumu held on 5th May, 2018 which included players from neighbouring Uganda. During this event he finished 2nd overall behind winner Derrick Olara of Uganda.

5.5. He revealed that during this event in Kisumu he was tested and was confident because he knew he was clean. However, he noted that before the competition he took medicine to cure a cold and also to relieve fatigue. He stated that he had sent his wife to a chemist to purchase three types of drugs namely Cold cap, Amoxin and Ciprofred 500g. He recalled that the morning of the competition he had taken Ciprofred. He also revealed that he took his test without any problem because ADAK had given them enough water. He further stated that a lady from ADAK explained to him what it entails.

5.6. He proffered that he has never used supplements since reading the Flex magazine, articles therein discourages bodybuilders from the usage of the same because most supplements contain banned substances. He asserted that he has never gone through any ADAK training but learnt about anti-doping rules through whatsapp and other social media platforms.

5.7. He submitted that as a bodybuilder he relies on training very hard and observing his diet strictly in order to perform well. He informed the panel that normally he takes 8 meals a day.

5.8. Asked why he didn't record the medication he had taken on the Doping Control Form, he responded that he didn't that he was supposed to have written all the medication he had taken in the last 7 days.

5.9. The Respondent posited that he suspects that he might have ingested the banned substance furosemide unknowingly through the cold drugs that he had taken. The respondent was remorseful during his submissions and asked for forgiveness.

6. Discussion

6.1. We have carefully considered the matter before us and gone through the documents presented before the Tribunal and these are our observations.

6.2. 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 organisations. (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 2013, and the Agency's Anti-Doping Rules, amongst other legal sources.”

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

6.4. Furosemide which falls under Diuretics and Masking agents is a prohibited substance under Class S5 of the 2018 WADA prohibited list. The Respondent’s urine sample is alleged to have contained this prohibited substance at the time of the Kenya Bodybuilding Federation Mr. Greater Western Bodybuilding championships on 5th May, 2018 in Kisumu County, Kenya.

6.5. According to Articles 3 and 10.2.1.2 of the WADA Code, when the Anti-Doping Rule Violation (ADRV) involves a specified substance (such as Furosemide), the Anti-Doping Organization (ADO) in this case is the Applicant has the burden of proof to establish that the anti-doping rule violation was intentional. The standard of proof here is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

6.6. The Applicant though has the onerous duty to establish whether in fact the ADRV by the Respondent was intentional. Article 10.2.3 of the WADA Code defines “intentional” to mean:

“...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 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 used *Out-of-Competition* in a context unrelated to sports performance."

6.7. Whereas the Respondent carries much of the blame for the ADRV we find that the Applicant has not established the ADRV by the Respondent to have been intentional as they did not provide evidence to that effect.

As much as furosemide is a class S5 of the 2018 WADA Prohibited List is a specified substance, it nonetheless is prohibited at all times *In* and *Out-of-Competition* and the Applicant failed to establish an intentional ADRV on

the part of the Respondent. Therefore WADC Article 10.2.2, comes into play in this matter.

6.8. On the question of no significant fault the case of **CAS 2016/A/4643 Maria Sharapova v. International Tennis Federation** is instructive. CAS stated thus:

“The issue whether an athlete’s fault or negligence is ‘significant’ has been much discussed in the CAS jurisprudence, ... These cases offer guidance to this Panel. It is, however, to be underlined that all those cases are very ‘fact specific’ and that no doctrine of binding precedent applies to the CAS jurisprudence. Indeed, the TADP itself, while defining the conditions for the finding of the NSF, stresses the importance to establish it ‘in view of the totality of the circumstances’ and therefore paying crucial attention to their specifics”

6.9. The critical components used to assess the degree of fault on the part of an Athlete are: the Athlete’s professional experience; his age; the perceived and actual degree of risk; whether the athlete suffers from

any impairment; the disclosure of medication on the Doping Control Form; the admission of the ADRV in a timely manner; any other relevant factors and specific circumstances that can explain the athlete's conduct. The relevant legal provision is WADA Code Article 10.5.1.1.

- 6.10. The Respondent Athlete failed to record on the Doping Control Form that he had taken Cold cap, Amoxin and Ciprofred to cure the cold and relieve fatigue although in the undated letter of pardon he captured the said medication. He asserted that he purchased those from a chemist impervious that they might have contained the prohibited substance. However, the Tribunal notes that he is a first time offender.
- 6.11. The panel also observed and noted that ADAK needs to spread the gospel of anti-doping to other sports disciplines, since it is evident that its lacking.

7. Decision

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

- a) The period of ineligibility for the Respondent body builder shall be for 2 years from the date of the provisional suspension on 31st July, 2018, pursuant to Article 10.2.2 of the WADA Code;

- b) The disqualification of the Kenya Bodybuilding Federation Mr. Greater Western Bodybuilding championship results of 5th May 2018 and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
- c) Each party to bear it's own costs;
- d) The right of appeal is provided for under Article 13 of the WADA Code and ADAK ADR.
- e) Any other prayers and motions are dismissed.

Dated and delivered at Nairobi this 1st__ day of August, 2019.

Signed:

Mrs. Elynah Sifuna-Shiveka



Deputy Chairperson, Sports Disputes Tribunal

Signed:

Ms. Mary Nyakobi Kimani



Member, Sports Disputes Tribunal

Signed:

Mr. Gichuru Kiplagat



Member, Sports Disputes Tribunal