

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
APPEAL NO. ADAK 27 OF 2018

IN THE MATTER BETWEEN

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

-versus-

BONIFACE ONTUGA MWERESA..... ATHLETE

DECISION

**Hearing** : 14 February, 2019

**Panel** : Gabriel Ouko - Chair  
Mary Kimani - Member  
Gichuru Kiplagat - Member

**Appearances:** Mr. Bildad Rogoncho, Advocate for the Applicant;  
Mr. Dennis Mungai, Advocate for, the Respondent Athlete who was 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 male 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 him.
4. On 8<sup>th</sup> June 2018, ADAK Doping Control Officers in an in-competition testing at the KDF Athletics Championships held at the Safaricom Stadium in Kasarani in Nairobi, Kenya collected a urine sample code number 4162912 from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 4162912 and B 4162912 in accordance with the prescribed WADA procedures.
5. The analysis of sample number A 4162912 was performed at the WADA-accredited Laboratory in Doha, Qatar. 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 Higenamine.
6. Higenamine is listed as a Beta 2 Agonists under S3 of the 2018 WADA Prohibited List.
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> July 2018. In the said communication the Athlete was offered an opportunity to provide an

explanation for the AAF by 3<sup>rd</sup> August 2018 and the option for Sample B analysis (see page 12 of the Charge Document).

9. The Athlete did not expressly request a Sample B analysis thus waiving his right to the same under IAAF Rule 37.5. The Respondent responded via email dated 27<sup>th</sup> July 2018. He confirmed the charges and stated further that he used Yeah Buddy supplement after seeing the supplement being openly used at the 2018 Commonwealth Games and assumed that it was not a prohibited substance listed in the WADA prohibited list. He also states that he used Neuro-Forte supplement which he indicated on the Doping Control Form; declaration of medical use and blood transfusion.
10. The response and conduct of the Athlete were evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule violation. ADAK is therefore preferring the following charge against the athlete: "Presence of a prohibited substance Higenamine in the athlete's sample".
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 requested a panel be named for this matter.
12. On 24<sup>th</sup> October 2018 the Tribunal was informed by ADAK that the athlete had been served and was present in court. He confirmed that he had been served. The athlete requested for legal representation from the Tribunal on a pro-bono basis and the Tribunal set a mention date for 8 November 2018 to seek a counsel who could help represent the athlete. The matter was subsequently mentioned on 15 November 2018 but Mr Njogu who was to represent the athlete did not appear and a further mention date of 6<sup>th</sup> December 2018 was given.
13. On 6 December 2018 a notice of appointment was received at the Tribunal from Messrs Mohammed Muigai Advocates. On the same day Mr. Dennis Mungai appeared during the mention and requested 21 days to file his response and the matter was fixed for mention on 24 January 2019.

14. On 24 January 2019 counsel for the Athlete confirmed having filed response to charge and also confirmed that they preferred to have an oral hearing for the athlete to articulate his position. The matter was set for hearing for the 14<sup>th</sup> February 2019. The Athlete was to file his witness statement before 7<sup>th</sup> February 2019. A panel consisting Gabriel Ouko, Mary Kimani and Gichuru Kiplagat was appointed to hear the matter.

### **III. The Hearing**

15. The matter came up for hearing on 14 February 2019. The Applicant was represented by Mr. Rogoncho, while the Respondent was represented by Mr. Mungai.
16. The Respondent confirmed that he understood the charges. Mr. Mungai requested that that the Statement of the Witness of 31 January 2019 be adopted, as well as the response to the charge.
17. Mweresa confirmed that he was a 400m runner, but that he participated also in 100m and 200m races. He stated that on 20 July 2018 he was informed by ADAK of the AAF and given until 3<sup>rd</sup> August 2019 to state how the substance had gotten into his body. He subsequently sent an email to ADAK on 27 July 2018 in response. In his view that showed his cooperation with ADAK.
18. When asked by Mr. Mungai how the substance got into his body, he said he did not know but through research and through a call from Sarah from ADAK he got to know that the substance was higenamine, which is a substance he had not known about before and that it was from Yeah Buddy a supplement that he had taken.
19. In his testimony he confirmed that the test was done during the KDF Championships in Kasarani. After the races he was tested and given a Doping Control Form, in which he stated he had used Yeah Buddy.
20. Mweresa confirmed that he attended Doping awareness classes in 2017 on different occasions on different topics. However, in his view they did not talk

about all drugs and supplements to be avoided. He stated that he had never heard of Higenamine before but through research found that it was added on to the WADA list in January 2017.

21. Mweresa stated that he went to the Commonwealth Games in 2018 and that while at the warm up track he saw "Yeah Buddy" for the first time placed on a seat; he did not know to whom it belonged,. After coming back to Kenya while out with his family at the TRM Mall on Thika Road, he saw the Yeah Buddy product on display in the Healthy U Shop. It caught his eye and he took the interest to know what it was about since it was described as an energy drink.
22. The Athlete stated that the product was not taken for performance enhancement and that he was sorry and wished the Tribunal would give him a reduced sentence since he was the sole bread winner for his family and parents.
23. Mr. Rogoncho then took the Athlete through his cross examination. The athlete stated that he lived in Zimmerman, Kasarani. That he worked with the Kenya Defence forces in Nanyuki, Laikipia Air base. He was 25 years old and married with one child. He had worked for 6 years. His education level was to Form Four and he got a C- in his final grading at the Nyamira Technical Secondary School.
24. Mweresa stated that he started racing in 2010 and by 2011 represented Kenya in the High school games in Mbarara, Uganda. He stated that he has raced locally in many places including Nairobi, Kisii, Uasin Gishu and Mombasa. In international races he had been to the Penn Relay in 2012, World Championships in 2017 in London, 2018 Commonwealth Games in Australia, 2016 All Indoors in Portland USA, as well as Indoor games in Belgium and Spain. Participated in the African games in 2015.
25. The Athlete stated that he had been tested many times in his career, 12-15 times. He is therefore aware of what is being done and the process. He stated that the first time he attended training on doping was around 2016/17, he could not remember the exact period. But had attended approximately 8 such training sessions.

26. He stated that he knew a bit about doping and that there were banned products. He stated that if one was sick and was taking medication then they needed to inform the Doping Control Officers what medicine they were using.
27. He stated that when he was informed of the AAF he checked using his phone on the substance that had been found on his sample.
28. He stated that he did not buy Yeah Buddy because he was sick but because he got tired during training and was looking for something to help with recovery. He stated that after using the product he was slower and that it did not help him as he had intended.
29. The Athlete stated that he did not look at all the writings on the labels of the bottle and the fact that he had seen it in the Commonwealth Games made him think that there were no risks in taking it. He stated that he asked the shop attendant about the product telling him that he was an athlete and was assured the product was safe. He however did not bother to check the label and research on the internet. He stated that he will never make assumptions again. He however added that he genuinely stated all the products that he had taken on the form.
30. He admitted that he took the Yeah Buddy on his own volition. He stated that he was an experienced athlete and that he understood English and was well travelled. He confirmed that he had good education and had gone for numerous anti-doping classes.
31. On his re-examination by Mr. Mungai the Athlete stated he mainly knew about EPO and steroids and that higenamine was new to him. He stated ADAK are the ones who gave him the print out with the products that he had taken.
32. At the end of the hearing the parties agreed that the Respondent be given 14 days to put in their written submissions and ADAK were to have 14 days thereafter to respond. On 14 March 2019 the same was confirmed to have been done by both parties.

#### **IV. Submissions:**

##### **ADAK Written Submissions**

33. The Anti-Doping Agency of Kenya wishes to adopt and own the charge documents dated 22<sup>nd</sup> October 2018 and the annexures thereto as an integral part of its submissions.
34. The Athlete herein is charged with an Anti-Doping Rule Violation of Presence of a prohibited substance Higenamine in contravention of the ADAK ADR (herein referred to as ADAK Rules)
35. The Athlete is an International Level Athlete and therefore the result management authority vests with IAAF 's AIU which delegated down to ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2015 to constitute a hearing panel which the athlete was comfortable with.
36. The matter was set down for hearing and the Athlete was represented by Mr. Mungai Advocate who filed his defence in the cause before the Tribunal.
37. The matter came up for hearing, the athlete testified, and the parties presented their respective submissions and laid before the tribunal evidence and supportive documents for consideration.

##### **Background/Facts**

38. The respondent is a Male Athlete hence the IAAF competition rules, IAAF Anti-Doping Regulations, the WADC and the ADAK ADR apply to him.
39. On June 28<sup>th</sup>, 2018, ADAK<sup>1</sup> Doping Control Officers in an in- competition testing during the KDF Athletics Championships held at the Safaricom Stadium Kasarani in Nairobi county, Kenya, collected a urine sample from the Respondent. Assisted by the DCO, the respondent split the Sample into two separate bottles, which were given reference numbers A 4162912 (the "A Sample") and B 4162912 (the "B Sample") in accordance with the prescribed WADA procedures.

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<sup>1</sup> ADAK-Anti- Doping Agency of Kenya

40. Both Samples were transported to the WADA accredited Laboratory in Doha, Qatar. 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") for the presence of a prohibited substance **Higenamine**.
41. The Doping control process was carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations<sup>2</sup>
42. The findings were communicated to the Athlete by Japhter K. Rugut EBS the Chief Executive Officer of the Anti-Doping Agency of Kenya through a Notice of Anti-Doping Rule Violation dated July 20<sup>th</sup>, 2018. In the said communication the athlete was offered an opportunity to provide an explanation for the same by August 3<sup>rd</sup>, 2018.
43. The Respondent Athlete in his response, to the letter, vide email dated July 27<sup>th</sup>, 2018, confirmed the charges and stated further that **he used yeah buddy supplement** after seeing the supplement being openly used at the 2018 Commonwealth Games and assumed that it was not a prohibited substance listed in the WADA prohibited list. He also states that he used Neuro-Forte supplement which he indicated on the Doping Control form; declaration of medical use and blood transfusion. (**page 15 of the Charge Document**)
44. The response of the Respondent was evaluated by ADAK and it was deemed to constitute an anti-doping rule violation and referred to the Sports Disputes Tribunal for determination.
45. Charge documents were prepared and filed by ADAK's Advocates and the Athlete presented a response thereto.
46. The matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules and the matter is pending determination resulting to a request for submissions by both parties.

### Legal Position

47. The applicant submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

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<sup>2</sup> <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-ISTI-Final-EN.pdf>



## Presumptions

48. It further provided at Article 3.2 that facts relating to anti-doping rule violation may be established by **any reliable means** including **admissions** and the methods of establishing facts and sets out the presumptions. Which include;
- a) ***Analytical methods or decision limits ...***
  - b) *WADA accredited Laboratories and other Laboratories approved by WADA are **presumed to have conducted sample analysis** and custodial procedures in accordance with the international standards for laboratories*
  - c) *Departures from any other International Standards or other anti-doping rule or policy set forth in the code or these Anti-Doping **Rules which did not cause an Adverse Analytical Finding** or other anti-doping rule violation shall **not invalidate** such evidence or results.*
  - d) *The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of pending appeal shall be irrefutable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.*
  - e) *The hearing panel in a hearing ....*

## Roles and Responsibilities of the athlete

49. That under Article 22.1 the Athlete has the following Roles and responsibilities;
- a) To be knowledgeable of and comply with the anti- doping rules,
  - b) To be available for *Sample* collection always,
  - c) *To take responsibility, in the context of anti-doping, for what they ingest and use,*
  - d) To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-doping rules,
  - e) To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed and Anti-Doping rule violation within the previous 10 years,
  - f) To cooperate with Anti-doping organizations investigating Anti-doping rule violations.

50. The athlete herein is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;

*“The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including;*

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- *Character and education*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity”*

#### Anti-doping Agency of Kenya position

51. The burden of proof expected to be discharged by the Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

52. In his defence, the Respondent made a number of admissions and a few general denials. In his **evidence in chief** the respondent made the following admissions;

- a) He admitted to being aware of the existence of energy boosting prohibited substances and methods.
- b) He **admitted that he is aware of sample collection rules** as he has been an active participant in athletic events, and he underwent his first testing during the World Juniorship athletics event in Spain in 2012.
- c) He admitted having undergone sample collection for over 12 times in this athletics career.
- d) He admitted that he would have used the supplement even after reading the ingredients of the supplement as he had seen it being used internationally and it was being sold in a well-recognized shop in Kenya.
- e) He **admitted to attending an average of 8 Anti-Doping workshops**.
- f) He admitted to not being sick when he visited Healthy U store to buy the supplement.

59. The Applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional.

60. It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on his inability to prove his knowledge on the overall fight against doping as premised by his participation in both local and international events. The respondent also demonstrated his ability to conduct research on doping matters as evidenced by his oral submissions during the hearing clearly detailing his knowledge and interaction with the WADA prohibited list.

### Origin

61. From the explanation given by the athlete, he confirmed the presence of the prohibited substance in his sample through ingestion of Yeah Buddy supplement, as he stated. He freely declared the substances he had taken in the form so provided at testing.

62. In that regard, we do submit that the origin of the prohibited substance has been established.

### Fault/Negligence

63. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

64. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body. In the instant case the athlete did not take any tangible precautions to ensure that the supplement he ingested did not contain any prohibited substance. He acted negligently and he is at fault.

*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 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*

65. In CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26 the panel observed that *'the athlete's fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.'*<sup>5</sup>The applicant contends that the athlete in this case fell short of this requirement as he failed to carefully consider the various supplements and cross check. This lack of consideration is evidenced by the glaring absence of the mention of any particular substance by name. This suggests that the athlete is not keen on upholding his duties under the rules and regulations.<sup>6</sup>

66. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before ingesting Yeah Buddy supplement. He was thus grossly negligent.

### **Knowledge**

67. The applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

68. Further, the Applicant contends that the Athlete has had a long career in athletics, and it is only questionable that he has had no exposure to the crusade against doping in sports. In his Evidence-in-Chief, the athlete stated that he has participated in over 5 local competitions and 5 international competitions where his sample was tested. This compounded by the fact that the athlete did indeed admit that he had attended several anti-doping workshops and as such is an athlete who is fully conversant with the anti-doping crusade.

69. The Applicant holds that an athlete competing at a national and international level and who also knows that he is subject to doping controls as a consequence

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<sup>5</sup> CAS 2012/A/2804<> <http://jurisprudence.tas-cas.org/layouts/15/osssearchresults.aspx?u=http%3A%2F%2Fjurisprudence%2Ecas%2Eorg&k=CAS%202012%2FA%2F2804#k=CAS%202012%2FA%2F2804>

<sup>6</sup> <https://jurisprudence.tas-cas.org/Shared Documents/2804.pdf>

of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances

70. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product.
71. In Arbitration **CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** the panel observed that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of athlete's intention to enhance sport performance.<sup>7</sup>

### Sanctions

72. For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance "and the agency ... **can establish that the (ADRV) was intentional**". If Article 10.2.1 does not apply, the period of ineligibility shall be two years.
73. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his degree of culpability with a view of Eliminating or reducing his period of suspension.
74. In the circumstances, the Respondent has confirmed the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADAC to warrant sanction reduction.

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<sup>7</sup> <https://jurisprudence.tas-cas.org/Shared Documents/A2-2011.pdf>

75. Article (WADA 2.1.1) emphasizes that it is an athlete's personal duty to ensure that no prohibited substance enters his or her body and that 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 by the analysis of the athlete's sample which confirms the presence of the prohibited substance.
76. We find that ideal considerations while sanctioning the athlete are:
- A. The ADRV has been established as against the athlete.
  - B. Failure by the athlete to take caution when ingesting unknown supplements.
  - C. The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint themselves with anti-doping policies
  - D. The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was as a result of his negligent acts.
77. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.
78. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the athlete to 4 years ineligibility.
79. It is our submission that ADAK has made out a case against the Athlete and that there was indeed an Anti-Doping Rule Violation by the Athlete and a sanction should ensue.

### **Respondent's Written Submissions**

80. Respondent has been charged with the commission of an anti-doping rule violation (ADVR), for the presence of *Higenamine* in the urine sample provided by the Respondent on 8<sup>th</sup> June 2018, in violation of Article 2.1 of the Anti-Doping Rules (ADR).

81. The Respondent has not disputed any step of the process and readily admitted to the ADVR in his email of 27<sup>th</sup> July 2018. [Please refer to page 15 the Applicant's charge document] and promptly admits to the charge.

82. Hearing of the matter was conducted and concluded on 14<sup>th</sup> February 2019 where the Respondent adduced his evidence and cross-examined. The Applicant did not call any witness(s).

### **Facts and Evidence Adduced**

83. From the Examination in Chief and the subsequent Cross-Examination the following facts emerged;

- a. The Respondent has been co-operating with the Applicant and offered an explanation for the ADVR through an email dated 27<sup>th</sup> July 2018;
- b. The Respondent averred that he used *Yeah Buddy*, a pre-work out supplement on the 3<sup>rd</sup> day of the Kenya Defence Forces Championships;
- c. The Respondent became aware of *Higenamine* after googling and finding out that it was one of the ingredients contained in the *Yeah Buddy* supplement, after being informed of the ADVR;
- d. The Respondent averred that he had seen the supplement being used openly during the 2018 commonwealth games in Australia;
- e. The Respondent purchased the supplement after he saw it being sold at Healthy U, Thika Road Mall Branch, a dietary supplement store;
- f. That he enquired from the attendant about the supplement and he was informed that it was safe;
- g. It was not his intention to use the supplement to gain a competitive edge over other competitors but for recovery purposes;
- h. During the Kenya Defence Forces championships, the Respondent had indicated in the doping control form dated 8<sup>th</sup> June 2018 as per anti-doping regulations, that he had used the supplement alongside *Nuero*

*Forte*. At this point he had not heard of *Higenamine* or know that it was an ingredient in *Yeah Buddy* supplement;

- i. That during his research on *Higenamine* he discovered that it was added to the prohibited list only in January 2017, merely 12 months before the start of the 2018 Commonwealth games;
- j. That *Higenamine* did not come up during the anti-doping education and awareness programmes conducted between April-September 2017;
- k. That although he's an athlete with experience having started competitive running when he was in Form 3, the first anti-doping and awareness programmes that he attended were between 2016-2017.

84. Article 2.1 of the Anti-Doping Rules provides that the presence of a prohibited substance or its metabolites or markers in an athlete's sample constitutes an anti-doping rule violation.

85. Article 2.1.1 further provides that it is each athlete's 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

86. The Anti-doping rules give guidance for the application of the above provisions. Comment to Article 2.1.1 states that; Anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various Court of Arbitration for Sport decisions as "Strict Liability". An athlete's fault is taken into consideration in determining the consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by the Court of Arbitration for Sport.

[Emphasis added]

No significant fault or Negligence



87. The ADR defines No Fault or Negligence as:

*The Athlete.....establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she has used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the prohibited substance entered his or her system.*

88. No Significant Fault or Negligence is defined as:

*The Athlete...establishing that his or her fault or negligence, when view in the totality of the circumstances and taking into the account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the prohibited substance entered his or her system.*

89. Fault is defined as:

*Any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of fault include, for example, the Athlete's experience, whether the Athlete or other Person is a Minor, special consideration such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level or risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour...*

90. In *Arbitration CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic*, the panel held that in order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person

*in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities...*

91. The panel further held that *matters which can be taken into account in determining the level of subjective fault can for example be: an athlete's youth and/or inexperience; language or environmental problems encountered by the athlete; the extent of anti-doping education received by the athlete (or the extent of anti-doping education which was reasonably accessible by the athlete); any other "personal impairments" such as those suffered by (i) an athlete who has taken a certain product over a long period of time without incident, (ii) an athlete who has previously checked the product's ingredients; (iii) an athlete who is suffering from a high degree of stress; (iv) an athlete whose level of awareness has been reduced by a careless but understandable mistake.*

92. The Respondent avers that the likely cause of the Adverse Analytical Finding is the *Yeah Buddy* supplement that he took on 8<sup>th</sup> June 2018.

93. The Respondent admits if he had conducted an online search before using the supplement he would have found out it contains *Higenamine*. However, the Respondent avows it did not occur to him to conduct a search on the supplement after he saw it being used openly during the 2018 commonwealth games in Australia.

94. Further, the supplement was being sold in a dietary supplement store in Kenya which informed his decision to assume it was safe and clean. The Respondent further listed the supplement in the doping control form he filled in 8<sup>th</sup> June 2018 and readily admitted to using the supplement when confronted with the Adverse Analytical finding.

95. The Respondent avows that the first time he learnt of *Higenamine* was after the Adverse Analytical Finding. The Respondent further avows that although he had undergone anti-doping awareness, *Higenamine* has never been mentioned in the anti-doping classes he has attended. The Respondent further notes that *Higenamine* was only added to the prohibited list in 2017. [Please refer to page 4-12 of the Respondent's List of Documents]

96. The Respondent submits that although he's an athlete with experience having started competitive running when he was in Form 3, the first anti-doping and awareness programmes that he attended were between 2016-2017.
97. The Respondent avows that all these circumstances diminished his level of vigilance on the use of supplement, and contributed to the low risk wrongly perceived by him when using it.

#### **Commencement and Period of Ineligibility**

98. The Respondent avers that the violation of the ADR was not intentional. He further avers that he promptly admitted the ADRV after being confronted by the Agency with the Adverse Analytical Finding. Further, the Respondent has been on a provisional suspension which he has respected.
99. In the Arbitration case *CAS/2015/A/3945 Sigfus Fossdal v. International Powerlifting Federation (IPF)*, the panel stated that *a precondition for having the period of ineligibility either eliminated or reduced is that the athlete should establish how the prohibited substance entered his or her system. The burden of proof is on the athlete and this should be established on the balance of probabilities.*
100. Further in Arbitration *CAS 2015/A/4129 Demir Demirev & 9 others v. International Weightlifting Federation (IWF)* the panel held that *...under the applicable anti-doping rules, in order to benefit from an eliminated or reduced sanction, the burden of proof is placed on the athlete to establish that the violation of the anti-doping rules was not intentional and/or that he/she bears no fault or negligence or no significant fault or negligence. The balance of proof is the balance probability.*

#### **Conclusion and prayers**

101. In conclusion, the Respondent avers that the violation of the anti-doping rules was not intentional. On a balance of probability, the Respondent avers that his

actions before and after the notification of the ADVR do connote an athlete who was seeking to gain an undue advantage over other athletes.

102. The Applicant humbly submits the when considering the appropriate sanction, that the Honourable Tribunal be guided by the aforementioned authorities. The Applicant prays for a substantial reduction of the maximum sanction allowed, pursuant to Articles 10.5.1, 10.11.2 and 10.11.3 of the Anti-Doping Rules.

### **Jurisdiction**

103. 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.

### **Applicable Law**

104. 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...**

### **Merits**

105. The Panel will address the issues as follows:

- a. *Whether there was an occurrence of an ADVR and the Burden and Standard of proof;*
- b. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
- c. *The Standard Sanction and what sanction to impose in the circumstance.*

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

106. 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 Higenamine.

107. 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 15 of the Charge Document which is a copy of the email sent by the athlete admitting to having used yeah buddy supplement.

108. However, in the present case the substance is a specified substance and for ADAK to succeed in getting the four year ban requested the intention needs to be proven by the applicant first and the athlete picks the burden thereafter.

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

109. 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.*

110. 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.*

111. The athlete knew exactly how the substance got into his system. It is evident that the Athlete deliberately sought for and used the prohibited substance.

112. 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.

113. In our view as a tribunal it is our view that ADAK has established an ADRV and proven the gross negligence of the athlete in the circumstances. The athlete

on the other hand over assumed his use of yeah buddy to be "safe" and did not cross check as would be expected of an international athlete, who is well educated. He however promptly admitted, cooperated, listed the substance in his DCF – hence establishing origin.

## V. Sanctions

114. 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.

### **Disqualification**

115. 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**

116. 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.*

117. 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.*

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



- a. The ADRV has sufficiently been proven; The applicable Art in this case for a specified substance being 10.2.1.2. However in view of the fact that intention was not comprehensively proven to warrant the maximum four years it is our view that a shorter sentence is warranted.
- b. The Athlete's period of Ineligibility shall be for a period of 2 years with effect from 20<sup>th</sup> July 2018;
- c. All results obtained by the Athlete from 8<sup>th</sup> June 2018 inclusive of points and prizes are disqualified;
- d. The parties shall bear their own costs of these proceedings.

119. 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 17<sup>th</sup> day of July, 2019

Signed:

Gabriel Ouko

  
\_\_\_\_\_  
Member, Sports Disputes Tribunal

Signed:

Mary Kimani

  
\_\_\_\_\_  
Member, Sports Disputes Tribunal

Signed:

Gichuru Kiplagat

  
\_\_\_\_\_  
Member, Sports Disputes Tribunal