

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO.30 OF 2018

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

-versus-

MORRIS MUSILWA MAFUNYA..... RESPONDENT

DECISION

Hearing: 21st March, 2019

Panel: Elynah Shiveka Vice-Chairperson
Peter Ochieng Member
Edmond Gichuru Member

Appearances: Mr.Rogoncho for Applicant
No Appearance by Athlete

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a body builder and an elite male athlete competing in national and international events.

Background and the Applicant's Case

3. The proceedings have been commenced by way of filing a charge document against the Respondent by the Applicant dated 20th November, 2018.
4. The Applicant brought charges against the Respondent that on 5th May, 2018 while in an in-testing competition during the Kenya Body Building Federation Mr. Greater Western Body Building Championship in Kisumu County, Kenya the Respondent was requested to give a urine sample to Doping Control Officers. The urine sample was split into two separate bottles with references or Sample codes A 4162674 (Sample "A") and B 4162674 (Sample "B") under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The sample was subsequently analysed at the WADA accredited laboratory of Doha, Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance *Furosemide* which is prohibited under the 2018 WADA Prohibited List (S5-Diuretics and Masking Agents).
6. The findings were communicated to the Respondent by the Chief Executive Officer of the Applicant vide letter dated 20/07/18 but to date the Respondent has failed to respond to the charges.
7. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substance *Furosemide* in the athlete's sample.

8. The Applicant further stated that the Respondent had no TUE recorded with the Applicant consistent with the WADA International standards. Furthermore, the Applicant states that there is no plausible explanation by the Respondent to explain the adverse analytical finding.
9. 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.
10. The Applicant prays that:
 - a) The disqualification of all competitive results obtained by the Respondent from and including 05/05/18 including forfeiture of medals as per Article 10.1 of the ADAK ADR.
 - b) Sanction to a four year period of ineligibility as provided for by WADA Code Article 10.
 - c) Costs, as per WADA Article 10.10

The Response

11. The Respondent never filed any response despite repetitive service of filed tribunal documents on several occasions.

Hearing

12. When the matter first came up for hearing on 22/11/18 it was adjourned to 13/12/18 to allow service of documents to the Respondent. However, on 13/12/18 the Applicant again informed the Tribunal that it has not been able to effect service as it could not trace the Respondent. The Applicant again requested for an additional 21 days to trace the Respondent in Kitale. The Tribunal acceded to the request and fixed the matter for mention on 17/01/19.

13. On 17/01/19 the Applicant indicated that it had served the Respondent via the WhatsApp medium. The Tribunal fixed the matter for 07/02/19 for directions. The matter was again adjourned to 20/02/19. On 20/02/19 the Tribunal directed the Applicant to again effect service together with a hearing notice for 14/03/19.

14. On 14/03/19 having made several attempts to serve the Respondent without success the Applicant requested the Tribunal to proceed and determine the matter on the basis of Article 3.2.5 of WADC.

Discussion

15. We have carefully considered the matter before us and also taken into account of Article 3.2.5 of WADC, the Respondent having refused to participate in these proceedings despite several attempts to serve him. We apply our mind as follows.

16. 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, and the Agency's Anti-Doping Rules, amongst other legal sources.”

17. Indeed, our decision will be guided by the Anti-Doping Act, the WADA Code and other legal sources.

18. *Furosemide* which falls under Diuretics and Masking agents is a prohibited substance under Class S5 of the 2018 WADA prohibited list that came into effect on 01/01/2018. The Respondent's urine sample is alleged to have contained this prohibited substance at the time of the Kenya Body Building Federation in Kisumu on 05/05/18.

19. 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.
20. The Respondent has offered no rebuttal and has completely ignored these present proceedings despite evidence of service on several occasions. We can only conclude that from the Respondent's conduct and adamancy and without any contrary material placed before us the Respondent had every intention to commit the ADRV. 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 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 rebuttedly 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 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."

21. Article 3.2.5 of WADC provides:

"The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to

answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.”

22. Even though the athlete stated that he had used “Power Play” in his Doping Control Form, his attendance or response would have helped this Tribunal navigate the contours of the case and perhaps earn him reduction on the ineligibility period.
23. Since we have made a finding on the ADRV by the athlete’s to have been intentional we find it not necessary to address the question of “negligence” or “no significant fault”.
24. We must be stern with athletes who dope and especially those who willingly fail to honour summons to appear or fail to file responses in such proceedings making a mockery of the whole anti-doping process.

CONCLUSION

25. In these circumstances, the following orders commend themselves to the Tribunal:
 - a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 4 years from 03/08/18 pursuant to Article 10.2.2 of the WADA Code;
 - b. The disqualification of the Kenya Body Building Federation Mr. Greater Western Body Building Championship results in Kisumu County, Kenya of 05/05/18 and resultant medals and cash prizes and any subsequent event pursuant to Articles 9 and 10 of the WADA Code;
 - c. Parties have a right of appeal;
 - d. Each party to bear its on costs;
 - e. Orders accordingly.

2. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

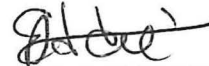
Dated and delivered at Nairobi this 29th day of August, 2019.



Mrs. Elynah Shiveka, Vice-Chairperson



Mr. Peter Ochieng, Member



Mr. Gichuru Kiplagat, Member

