

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO.31 OF 2018

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

-versus-

JACKLINE NABWIRE BARASA..... RESPONDENT

DECISION

Hearing: 7th March, 2019

Panel: Njeri Onyango Panel-Chairperson
GMT Ottieno Member
Gichuru Kiplagat Member

Appearances: Mr.Rogoncho for the Applicant
M/S Muhalia H/B for Mr.Simuyu for the
Respondent

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 an elite female international level athlete.

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 16/10/2018.
4. The Applicant brought charges against the Respondent that on 18/05/18 the Respondent was at Moi Air Base Eastleigh, Nairobi County when the Applicant's Doping Control Officers collected a Urine Sample from the Respondent and split the sample into two separate bottles which were given reference numbers A4162953 (A Sample) and B4162953 (B Sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. Both samples were taken to WADA accredited laboratory in Doha, Qatar (hereinafter referred to as "the laboratory").The Laboratory analysed the A Sample as per the WADA International Standard for Laboratories and an Adverse Analytical Finding revealed the presence of prohibited substance *terbutaline*.
6. *Terbutaline* is listed as a Beta-2 Agonists under S3 of the 2018 WADA Prohibited List.
7. The findings were communicated to the Respondent by Mr. Japheth K Rugut, ADAK Chief Executive Officer vide Notice of Charge and

Provisional Suspension dated 20/07/18 for the Respondent to offer an explanation.

8. The letter also informed the athlete of his right to request for Sample B analysis and other avenues for sanction reduction including prompt admission and requesting for a hearing.
9. The Respondent responded vide three letters dated 02/07/18, 03/07/18 and 23/10/18. He denied the charges and stated that he did not know how the EPO entered his body.
10. The Applicant contends that there is no departure from the international standards for laboratories that could reasonably have caused the AAF. Similarly, they claim that there is no departure from the International Standards for Testing and Investigations that could reasonably have caused the AAF.
11. Subsequently, ADAK preferred the following charges against the Respondent:

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

12. The Applicant further stated that the Respondent had no TUE recorded at IVF for substances in question and there is no apparent departure from the IVF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused the adverse analytical finding.
13. 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.
14. The Applicant prays that:
 - a) The Respondent be sanctioned to a four-year period of

ineligibility as per Article 10 of ADAK and the WADC Rules.

b) Costs, as per WADA Article 10.10

The Response

- 15.The Respondent through the firm of Musyoka Murambi and Associates filed a defence and list of documents both dated 25/10/18 as well as a witness statement dated 05/11/18. She stated that she is a retired international veteran volleyball player who played for the national team for ten years. She stated further that she has represented Kenya on various editions of Africa Cup of Nations, World Championships and World Cup.
16. She further stated that in her sporting life she has undergone various anti-doping tests which tests returned negative outcomes. She also stated that she is officially retired from the national team duties and competitive volleyball and she was now mentoring young players.
17. The Respondent noted that on 03/05/18 while training at Nyeri Show Ground together with her team mates she fell suddenly sick with severe headache, coughs, rashes and a swollen face.
18. She stated that had to seek medical attention from the team doctor one Captain Dr.Oloo of Laikipia Air Base who prescribed various medication to wit *diclofenac* and *flugone*.
19. However, she did not improve and on 07/05/18 she went back to the same doctor who changed the medication to *Bro-Zedex*.
20. On or about 18/05/18 ADAK took some urine sample from her at Eastleigh Airbase which tests later returned an AAF of *terbutaline*. She was served with a Notice of Charge and Mandatory Provincial Suspension by ADAK.

21. She contested the charges saying that she never used any prohibited substances or it markers and that she only took medication in good faith as prescribed to her by the doctor.

Hearing

22. On 07/03/19 the matter was heard. The Applicant relied on the charge document and annexures.

23. The Respondent proceeded to testify and adopted all the documents filed in her defence with the Tribunal.

24. She confirmed that she had only attended an anti-doping training once and she was surprised that the prescribed medication *Bro-Zedex* syrup had the prohibited substance.

25. She stated that though she had played occasionally for KDF, she last played in April 2018. She denied that she knowingly lied to the Doping Control Officers from ADAK that she was not a player but admitted to not informing Captain Dr. Oloo that she was an athlete who played volleyball.

26. The parties also filed written submissions.

Discussion

27. These are our findings based on the matter before us and the written and oral submissions by both parties.

28. 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."

29. *Terbutaline* is a specified substance and is listed as a *Beta-2 Agonists* under S.3 WADA's 2018 prohibited list.
30. The Respondent's explanation that she was a retired athlete cannot hold. Her testimony in fact revealed her active participation in volleyball even though intermittent. She is an elite international athlete who knew or ought to have known that anything she ingested may have adverse effects on his career and take precaution. She is therefore under duty to abide by the Code and all other regulations on doping as an active sports personality.
31. However, we note that the Applicant has not to our comfortable satisfaction proved the Respondent's ADRV to have been intentional as per Article 10.2.3 of WADC.
32. In our assessment of the degree of fault we have looked at the totality of circumstances. We have assessed the Respondent's conduct on the basis of: the Respondent's professional experience; her age; her 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. We have also looked at the pertinent legal provisions more specifically Article 10.5.1.1 of WADC.
33. We have also had occasion to look at the case law relied by parties in particular **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF, Periera-CAS 2016/A/14609 and CAS 2017/A5317 Aleksei Medvedev v. Russian Anti-Doping Agency (RUSADA)**. In the **Medvedev** case for example the court stated that:

"...the circumstances considered must be specific and relevant to explain the Athlete's departure from the expected standard of behaviour."
34. The Respondent disclosed *Bro-Zedex* medication that contained the prohibited substance on the Doping Control Form. We also note that

she does not have a previous recorded ADRV. Additionally, we take cognisance of the fact that *terbutaline* is a specified substance. We find to our comfortable satisfaction that there is no significant fault on the part of the Respondent.

CONCLUSION

35. 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 14 months from 03/08/2018 pursuant to Article 10.2.2 of the WADA Code;
 - b. Each party to bear its own costs;
 - c. Orders accordingly.
2. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

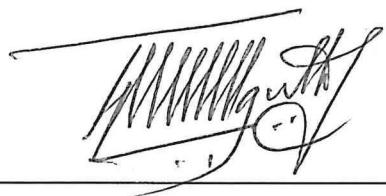
Dated and delivered at Nairobi this 1st day of August, 2019.

Signed:
Njeri Onyango



Panel-Chairperson, Sports Disputes Tribunal

Signed:
GMT Ottieno



Member, Sports Disputes Tribunal

Signed:
Gichuru Kiplagat



Member, Sports Disputes Tribunal