CAS 2019/A/6157 World Anti-Doping Agency v. Anti-Doping Agency of Kenya & Rose Jepchoge Maru

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Prof. Jens Evald, Professor in Aarhus, Denmark, Sole Arbitrator

in the arbitration between

WORLD ANTI-DOPING AGENCY, Montreal, Canada

Represented by Mr. Ross Wenzel and Mr. Anton Sotir, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland

Appellant

and

THE ANTI-DOPING AGENCY OF KENYA, Nairobi, Kenya

Represented by Mr. Bildad Rogoncho, Senior Legal Officer and Ms. Damaris Ogama, Head of Legal Department, both Anti-Doping Agency of Kenya, Nairobi, Kenya

First Respondent

MS. ROSE JEPCHOGE MARU, Eldoret, Kenya

Second Respondent

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The Appellant is an international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.

2. The Anti-Doping Agency of Kenya (the "ADAK" or the "First Respondent") is the National Anti-Doping Organization of Kenya.

3. Ms. Rose Jepchoge Maru (the "Athlete" or the "Second Respondent") is a Kenyan long distance international-level-athlete.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' submissions filed in the context of this appeal as well as those made in the course of the hearing. Additional facts and allegations found in the Parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceeding, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On 29 April 2018, on the occasion of the METRO Marathon in Dusseldorf, Germany, the Athlete underwent an in-competition doping control.

6. The analysis of the A Sample revealed the presence of erythropoietin (EPO).

7. EPO is a non-specified substance prohibited at all times under class S2 (Peptide Hormones, Growth Factors, Related Substances, and Mimetics) of the 2018 World Anti-Doping Agency Prohibited List.

8. The Athlete waived her right to the analysis of the B Sample.

9. On 20 June 2018, ADAK notified the Athlete of the positive finding and provisionally suspended her.

10. On 28 August 2018, the Athlete sent her explanations, whereby she admitted the adverse analytical finding and charges brought against her by ADAK.

11. On 6 November 2018, the Sports Disputes Tribunal of Kenya (the "SDT") declared the Athlete ineligible for a period of two years starting from 20 June 2018. In addition, the results achieved by the Athlete starting from 29 April 2018 were disqualified with all respective consequences, including forfeiture of medals, points and prize money.

12. WADA received the complete case file from ADAK on 31 January 2019.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 20 February 2019, the Appellant filed its Statement of Appeal against the Decision of the Sports Disputes Tribunal of Kenya (the "Appealed Decision") with the Court of Arbitration for Sport (the "CAS"), in accordance with Articles 47 et seq. of the Code of Sports-related Arbitration (the "CAS Code"). In its Statement of Appeal, the Appellant requested that this appeal be submitted to a Sole Arbitrator.

14. On 25 February 2019, the CAS Court Office opened this procedure and invited the Appellant to file an Appeal Brief within ten (10) days following the expiry of the time limit for the appeal. In the same letter, the Respondents were invited to inform the CAS Court Office within five (5) days of receipt of the letter by courier, whether they agree to the appointment of a Sole Arbitrator.

15. On 1 March 2019, the Appellant requested an extension to the time limit for filing of the Appeal Brief until 11 March 2019 (which corresponded to a five-day extension).

16. On 4 March 2019, and on behalf of the CAS Secretary General, the CAS Court Office granted the Appellant until 11 March 2019 to file its Appeal Brief.

17. On 11 March 2019, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief and invited the Respondents to submit to the CAS an Answer within twenty (20) days upon receipt of the letter by courier.

18. On 27 March 2019, the First Respondent requested a ten-day extension of the time limit for filing its Answer.

19. On 1 April 2019, and given that the Appellant did not object to the First Respondent's request and the Second Respondent did not comment on the question within the deadline provided, the CAS Court Office granted the First Respondent a ten-day extension of its deadline to file the Answer.

20. On 17 April 2019, the CAS Court Office acknowledged receipt of the First Respondent's Answer, filed on 11 April 2019. In the same letter, the Parties were informed that the CAS Court Office had not received any answer by the Second Respondent within the given time limit. The Parties were further invited to inform the CAS Court Office whether they preferred a hearing to be held or for the Panel/Sole Arbitrator to issue an award based solely on the Parties' written submissions.

21. On 23 April 2019, both the Appellant and the First Respondent requested a hearing to be held. The Second Respondent did not submit any preference regarding the question of a hearing.

22. On 27 May 2019, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division and in accordance with Article R54 of the CAS Code, constituted the Panel as follows: Prof. Jens Evald, Professor of law in Aarhus, Denmark, Sole Arbitrator.

23. On 6 June 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing in this matter, which would be held on 4 July 2019 in Lausanne, Switzerland.

24. By email of 17 June 2019, the Second Respondent informed the CAS Court Office that she would not attend the hearing as she could not afford the expenses of travel and accommodation. By letter of 18 June 2019, the CAS Court Office informed the Athlete that she may attend the hearing by means of Skype or a conference call, but the Athlete never accepted that offer.

25. On 20 June 2019 and 24 June 2019, respectively, the Appellant and the First Respondent returned the signed Order of Procedure. The Second Respondent did not return a signed Order of Procedure but did not raise any objections to its content either.

26. On 4 July 2019, a hearing was held in Lausanne, Switzerland. In addition to the Sole Arbitrator and Ms. Carolin Fischer, Counsel to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr. Ross Wenzel, Counsel;
- Mr. Anton Sotir, Counsel.

For the First Respondent:

- Mr. Bildad Rogoncho;
- Ms. Damaris Ogama.

27. The Parties were given ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

28. Before the hearing was concluded, all Parties expressly stated that they had no objections to the overall conduction of the proceeding, and confirmed that their right to be heard and to be treated equally in this arbitration proceeding had been observed.

29. The Sole Arbitrator confirms that he carefully took account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarized or referred to in the present arbitral Award.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant's submissions

30. The Appellant's submissions, in essence, may be summarized as follows:

- An Anti-Doping rule violation (the "ADRV") occurred on the basis of Article 2.1 of the ADAK Anti-Doping Rules (the "ADAK ADR");

- The Athlete does not dispute the analytical results of her sample conducted by the Cologne WADA-accredited laboratory, but rather admitted the adverse analytical finding and charges brought against her by ADAK;

- According to Article 10.2.1.1 ADAK ADR, the period of ineligibility shall be four years;

- The ADRV involves a non-specified substance prohibited at all times. In order to reduce the sanction, the Athlete must establish that the ADRV was not intentional and it therefore follows that the Athlete must establish how the substance entered her body;

- Even if an athlete in exceptional cases might be able to demonstrate a lack of intent when she/he cannot establish the origin of the prohibited substance, there are no exceptional circumstances in this case which show to the relevant standard of proof that the ADRV was not intentional;

- The Athlete has not established the origin of EPO in her system:

  - It is not sufficient for an athlete merely to make protestations and to suggest that the prohibited substance must have entered his or her body inadvertently. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question, cf. CAS 2014/A/3820 and CAS 2016/A/4676;

  - It is not sufficient for an athlete to simply find a potential source. An athlete must also demonstrate that the source could have caused the actual adverse finding, cf. CAS 2010/A/2277;

  - As regards the Athlete's explanation before the SDT, i.e. that the prohibited substance must have entered her body when she "was given three injections, two small syringes and one big syringe" from a "chemist" of an unknown supplement; that the injection procedure was organised and recommended by her friend who explained (according to the Athlete) that "there is no stronger supplement more than that [the Athlete] had bought and most athletes use them"; that the intake must have occurred on the occasion of these alleged injections eleven days before the Athlete competed in the METRO Marathon in Dusseldorf, Germany in April 2018, the Appellant holds that there is no evidence supporting the Athlete's explanation, no evidence of the injection procedure, no testimony from her friend who recommended the injections, or the chemist who administered them, no proof of purchase, no information as to what substance was used, in what dosage etc. The Athlete did not even ask for the name of the substance(s) that were to be injected. The product was not disclosed on the Doping Control Form. There is not

even any proof that the injections given to the Athlete contained EPO. The explanation relies solely on the Athlete's word and assumptions.

- In view of the CAS case law regarding the strict nature of the duty of athletes to establish the origin of the prohibited substance in their system, it is clear that the Athlete has manifestly not satisfied her burden in that regard. Therefore, the Athlete has failed to meet her burden to demonstrate that the violation was not intentional;

- Even if the Athlete's explanation were accepted, the ADRV must nonetheless be considered intentional. In this context the Athlete's conduct would fall at least within the ambit of the second limb of Article 10.2.3 ADAK ADR ("Indirect Intention"). Indirect Intention is subject to two requirements: i) the Athlete knew that there was a significant risk that her conduct might constitute or result in an ADRV, and ii) she manifestly disregarded that risk;

- The SDT considered that the Athlete's explanation was sufficient to establish that she did not act with Indirect Intention, more particularly that she did not perceive the significant risk that her conduct could result in an ADRV. In fact, the SDT accepted that *"having considered the circumstances as set out in the letter, is of the view that the athlete had no intention to cheat or to unduly enhance her performance. The athlete has thus established origin and to our comfortable satisfaction demonstrated that her conduct was unintentional"*;

- The Appellant strongly disagrees with the finding of the SDT for the following reasons:

  - The Athlete admitted that she did not know the name of the "supplement";

  - The Athlete took the substance several days before the competition, when she was preparing for the marathon. Her friend even agreed to be paid later for the supplement, *"since he wanted me to prove that it works"*.

  - It appears from the Athlete's explanation that she took the substance because her friend advised her that it is *"a stronger supplement"* compared to the supplements taken by the Athlete before. The Athlete was specifically seeking to improve her performance in contemplation of the marathon.

- The Athlete must satisfy the Sole Arbitrator that she did not perceive the significant risk that she might be committing an ADRV when the unknown (and powerful) substance was injected into her body. Any athlete in the circumstances described above would have perceived the obvious risk.

- Moreover, it is evident that the Athlete did not act with any diligence at all to prevent the risk from materializing. She admitted that she was given injections without knowing the content of the syringes.

- The Athlete cannot be held to have satisfied her burden of proof to rebut the presumption of intentionality. Therefore, the ADRV must be deemed intentional and the Athlete sanctioned with a four-year period of ineligibility.

31. The Appellant makes the following requests for relief, asking the CAS:

(1) The Appeal of WADA is admissible.

(2) The decision dated 6 November 2018 rendered by the Sports Disputes Tribunal of Kenya in the matter of ADAK v Rose Jepchoge Maru (doping case no. 19/2018) is set aside.

(3) Rose Jepchoge Maru has committed an anti-doping rule violation.

(4) Rose Jepchoge Maru is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Rose Jepchoge Maru before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

(5) All competitive results obtained by Rose Jepchoge Maru from and including 29 April 2018 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

(6) The arbitration costs shall be borne by ADAK, or, in the alternative, by the Respondents jointly and severally.

(7) WADA is granted a significant contribution to its legal and other costs.

B. The First Respondent's submissions

32. The First Respondent's submission, in essence, may be summarized as follows:

- The Athlete has committed an ADRV and has the burden of establishing that the violation was not intentional;

- The Athlete has established the origin of the prohibited substance found in her body by narrating how the substance entered her body;

- The Athlete has clearly and specifically offered substantial assistance. The SDT took cognizance of the Athlete's admission, her substantial assistance coupled with her demeanor, character and history in arriving at the reduced sanction;

- The Athlete's explanation has since been investigated and preliminary findings established confirming the Athlete's explanation and the suspects in a Doping ring are awaiting arraignment in court;

- The Athlete has discharged her burden of proof sufficiently i) through the substantial assistance given and ii) by establishing the origin of the prohibited substance;

- The Athlete did not willingly ingest the prohibited substance. She was duped by an individual who is now subject of criminal investigations in Kenya. The Athlete had initially declined to take the substance and she only agreed to be injected after incessant persuasions and nudging from someone who misled her to believe that the injection was just another safe supplement. Her conduct was bereft of intention, whether direct or indirect;

- The Athlete acted out of naivety and she did not disregard any risk since the same was unbeknown to her;

- Antagonizing the Athlete at this critical stage will be counterproductive to the fight against doping in sport, both in Kenya and the world as a whole. The Athlete has undertaken to testify in court against the perpetrators of doping in Kenya and the Athlete is keen on leading this charge to fruition;

- The present appeal is premature, untimely and rushed since investigations into the substantial assistance offered by the Athlete are ongoing and preliminary indications are that there is credible, sufficient and compelling evidence against the suspects and finally that the Athlete herein is and will be a key witness in the said criminal trial and therefore any further alienation of the said witness will be catastrophic.

33. The First Respondent makes the following requests for relief, asking the CAS:

1. *The Appellant's Appeal* ***be dismissed with costs to the First Respondent.***

2. *The Decision dated 6th November 2018 rendered by the Sports Disputes Tribunal of Kenya in the matter of ADAK v Rose Jepchoge Maru (Anti-Doping case no. 19/2019)* ***is upheld.***

3. *The Arbitration costs be borne by WADA or, in the alternative, by the Appellant and the Second Respondent jointly and severally.*

4. *The First Respondent be granted a contribution to its legal and other costs as the Sole Arbitrator shall deem fit.*

C. The Second Respondent

34. The Second Respondent failed to submit an Answer in the matter at hand, despite having been duly given the opportunity to do so by the CAS Court Office, in accordance with Article R55 of the CAS Code.

V. JURISDICTION

35. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."

36. Article 13.2.1 of the ADAK ADR states that *"Appeals Involving International-Level Athletes or International Events*
In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS."

37. The jurisdiction of CAS is not contested by the Respondents.

38. Hence, it follows that CAS has jurisdiction to adjudicate and decide the present dispute.

VI. ADMISSIBILITY

39. Pursuant to Articles 13.1.3 *cum* 13.2.3 of the ADAK ADR, WADA has a right of appeal against the SDT Decision directly to the CAS if no other party has appealed the final decision within the ADAK's process.

40. Article 13.7.2 ADAK ADR states that *"the filing deadline for an appeal or intervention filed by WADA shall be the later of: (a) Twenty-one days after that last day on which any other party in the case could have appealed, or (b) twenty-one days after WADA's receipt of the complete file relating to the decision".*

41. WADA received the case file on 31 January 2019 and WADA's deadline to file its own appeal cannot be earlier than 21 February 2019. The appeal was filed on 20 February 2019. The appeal, therefore, was filed within the 21 days set out in Article 13.7.2 of the ADAK ADR. The appeal complied with all other requirements of Article R47 of the CAS Code.

42. It follows that the appeal is admissible.

VII. APPLICABLE LAW

43. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body, which has issued the challenged decision is domiciled or according to the rules of

law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

44. In accordance with Article R58 of the CAS Code, the applicable regulations to this case are the ADAK ADR.

45. As the "seat" of this arbitration is Lausanne, Switzerland, Swiss Law governs all procedural aspects of this proceeding.

VIII. MERITS

46. The sole issue for determination by the Sole Arbitrator is the appropriate length of the Athlete's period of ineligibility under the ADAK ADR. All factual determinations and rulings of the SDT that have not been contested by either party in this proceeding are not reviewed by the Sole Arbitrator.

47. The Sole Arbitrator will address the issues as follows:

A. The Occurrence of an ADRV and the Standard Sanction

B. Burden and Standard of Proof

C. Was the Athlete's ADRV intentional?

D. Reduction Based on Substantial Assistance?

E. Reduction based on the Athlete's Prompt Admission?

F. Sanctions

A. The Occurrence of an ADRV and the Standard Sanction

48. With regard to the Athlete's ADRV, the Sole Arbitrator notes that it is undisputed that the Athlete's A Sample revealed the presence of EPO, a non-specified substance prohibited at all times under class S2 (Peptide Hormones, Growth Factors, Related Substances and Mimetics) of the 2018 Prohibited List.

49. Furthermore, the Sole Arbitrator notes that the SDT ruled that an ADRV was established pursuant to Article 2.1 ADAK ADR, which was not disputed by the Athlete, and is confirmed by the First Respondent in its Answer.

50. With respect to the appropriate period of ineligibility, Article 10.4.2.1.1 ADAK ADR provides:

The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 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.

...

10.2.2 If Article 10.2.1 does not apply, the period of ineligibility shall be two years.

51. The Sole Arbitrator notes that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete (or other Person) can establish that the ADRV was not intentional.

B. Burden and Standard of Proof

52. In the present case, the burden of proof that the ADRV was not intentional bears on the Athlete, cf. Article 10.2.1 ADAK ADR and it naturally follows that the Athlete must also establish how the substance entered her body.

53. Pursuant to Article 3.1 ADAK ADR, the standard of proof is the balance of probabilities:

"[...] 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 a balance of probability."

54. The Sole Arbitrator notes that this standard requires the Athlete to convince the Sole Arbitrator 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.

C. Was the Athlete's ADRV intentional?

55. The main relevant rule in question in the present case is Article 10.2.3 of the ADAK ADR, that 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 Used Out-of-Competition in a context unrelated to sport Performance."

56. 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 disregarded 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."*

57. The Sole Arbitrator in the present case aligns with the panel in CAS 2016/A/4377, at para. 51, *that* the Athlete, as she bears the burden of establishing that the violation was not intentional, must establish how the substance entered her body, and at para. 52, *that* to establish the origin of the prohibited substance it is not sufficient for an Athlete *"merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question".*

58. In CAS 2014/A/3820, at para. 80, the panel made the following comments:

*"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide **actual evidence** as opposed to mere speculation. In CAS 2010/A/2230, the Panel held that: [t]o permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body."*

59. The Sole Arbitrator observes that before the Sports Dispute Tribunal of Kenya the Athlete asserted *that* the prohibited substance must have entered her body when she was given three injections, two small syringes and one big syringe, from a chemist of an unknown supplement, and *that* the injection procedure was recommended by a friend, who misled

her to believe that the injection was just another safe supplement. The Sole Arbitrator notes that the Athlete did not provide any documentation supporting her assertions as she has offered i) no evidence of the injection procedure, ii) no testimony from the friend who allegedly misled her to take the injections, iii) no testimony from the chemist who administered the injections, iv) no receipt or other proof of purchase, and v) no information as to what substance was used and in what dosage. The Sole Arbitrator holds that the Athlete's explanations are unsubstantiated as they have virtually no evidentiary basis supporting them. The Sole Arbitrator finds that the Athlete did not prove on the balance of probability how the prohibited substance entered her body or the origin of the prohibited substance.

60. The Sole Arbitrator is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the panels considered that an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. In CAS 2016/A/4676, at para. 72, it is, *inter alia*, stated that *"the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare"*. The Sole Arbitrator finds, however, that there are no exceptional circumstances in the present case which show on the balance of probability that the ADRV was not intentional (without the Athlete having to establish the origin of the prohibited substance).

61. Even if the Sole Arbitrator were to follow the Athlete's explanation that the presence of EPO resulted from an injection administered by an unknown chemist, the Athlete would still not meet her burden of proof that the ADRV was not intentional because her conduct would fall within Article 10.2.3 ADAK ADR (Indirect Intention), cf. CAS 2016/A/4609, at para. 63 where the Sole Arbitrator held the following in respect of Indirect Intention:

"63. Even before the introduction of the legal concept of "intent" in the 2015 edition of the World Anti-Doping Code, CAS panels already elaborated on the concept of 'indirect intention' or 'dolus eventualis' and the Sole Arbitrator sees no reason to deviate therefrom:

> *"'[...] the term "intent" should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behavior as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behavior is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent.' (CAS 2012/A/2822, para. 8.14*
>
> *'[...] the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per "dolus eventualis", the Panel finds that the Appellant's*

approach indicates an intent on the part of the Appellant to enhance his athletic performance within the meaning of Art. 10.4 IWF ADP.' (CAS 2011/A/2677, para. 64)."

62. Further, the Sole Arbitrator aligns with the CAS 2017/A/5178 where the panel concluded that *"if the ampoules were the source of the AAF, they must be qualified as highly suspicious and that an athlete applying a minimal duty of care would never have applied or used them. Thus, if one were to follow the [athlete's] submission his behavior would have to be qualified as intentional within the meaning of Art. 10.2.1.1 in conjunction with Art. 10.2.3 of the IWF ADP"*.

63. The Sole Arbitrator observes that the SDT in its decision, at paras. 7.1 – 7.9, *inter alia*, describes the Athlete's behavior as *"clearly not a demonstration of the diligence called for under the strict liability requirements of the WADC"*, that it was *"imprudent, reckless and very negligent"* and that *"[t]he signs of danger were all there for her to see"*.

64. Accordingly, the Sole Arbitrator finds that the Athlete has not met her burden of proof, and the ADRV must be deemed to be intentional. The Athlete must therefore be sanctioned with a four-year period of ineligibility under the ADAK ADR.

D. Reduction based on Substantial Assistance?

65. The First Respondent contends that the Athlete's four-year period of ineligibility may be reduced based on the Athlete's substantial assistance pursuant to Article 10.6.1.1 ADAK ADR.

66. The Appellant holds that the issue of the Athlete's substantial assistance was not part of the SDT procedure and that the First Respondent has not adduced any evidence in this regard.

67. The Sole Arbitrator observes that the SDT in its decision, at para. 6.10, states the following on the Athlete's substantial assistance:

"The applicant ADAK informed the Tribunal that the [Athlete] has provided substantial assistance and ADAK is satisfied with the same. ADAK for that reason did not make any submissions on the matter and electing to let the panel make a decision based on the charge documents which contained the letter of explanation of 28th august 2018. It would then appear to us from this scenario that ADAK is satisfied with the explanation given as to the origin of the substance and the manner in which it got into her body." (Sic)

68. Further, the Sole Arbitrator observes that the SDT in its decision rules as follows:

"8.1.e. Considering the panel's finding on the degree of fault, further considering the substance leading to the AAF and the manner of entry to the body, this panel is of the view that the [Athlete] may benefit from prompt admission made as her fault is significant.

8.2. The [Athlete] shall therefore serve a period of ineligibility of two years with effect from 20th June 2018 being the date of notification and provisional suspension."

69. The Sole Arbitrator notes that in the present case, the First Respondent seeks relief on the ground that the Athlete provided substantial assistance. The Sole Arbitrator observes that the First Respondent did not make any submissions on the Athlete's substantial assistance before the SDT. Furthermore, the Appealed Decision is based on the Athlete's prompt admission (and not the Athlete's substantial assistance). It follows that the question of the Athlete's substantial assistance has not been adjudicated by the SDT as first instance.

70. The Sole Arbitrator notes that the criterion set out in Article 10.6.1.1 ADAK ADR for a result management authority to suspend a part of the period of ineligibility imposed on the Athlete has not been met in the present case. Pursuant to Article 10.6.1.1 ADAK ADR, a part of the otherwise applicable period of ineligibility may only be suspended with the approval of WADA or the applicable International Federation (the "IF"). Neither WADA nor the relevant IF have given their approval to suspend a part of the Athlete's period of ineligibility. Furthermore, the First Respondent has not provided any factual background for the assistance allegedly provided by the Athlete except that according to the First Respondent, she is a key witness in a criminal trial in Kenya. The Sole Arbitrator holds that the Athlete's alleged substantial assistance has not been sufficiently substantiated in the present case. It follows that the four-year period of ineligibility imposed on the Athlete cannot be reduced based on substantial assistance. The Sole Arbitrator notes that WADA at the hearing confirmed that the Athlete at a later stage may apply to WADA for a reduction of the otherwise applicable period of ineligibility.

E. Reduction based on the Athlete's Prompt Admission?

71. In its request for relief, the First Respondent asked the CAS, that *"[t]he Decision dated 6th November 2018 rendered by the Sports Disputes Tribunal of Kenya [...]* ***is upheld***". The Sole Arbitrator observes that the SDT in its decision reduced the Athlete's period of ineligibility based on her prompt admission. The Sole Arbitrator notes that Article 10.6.3 ADAK ADR provides 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 [...], by promptly admitting the asserted anti-doping rule violation after being confronted by ADAK, and also upon approval and at the discretion of both WADA and ADAK, 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.

72. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.2 "Prompt admission", p. 24) provides the following guidance:

"Under Article 10.6.3, 'prompt admission' no longer automatically reduces a potential four-year ADRV for an AAF to two years. Now, both WADA and the ADO with results management authority (RMA) must approve a reduction."

73. The Sole Arbitrator notes that WADA has not approved a reduction of the Athlete's four-year period of ineligibility and therefore it follows that the four-year period of ineligibility imposed on the Athlete cannot be reduced based on her prompt admission.

F. Sanctions

1. Disqualification

74. 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 of the resulting Consequences including forfeiture of any medals, points and prizes."

75. The Sole Arbitrator rules that pursuant to Article 10.8 of the ADAK ADR, all competitive results obtained by the Athlete from and including 29 April 2018 are disqualified, with all resulting consequences, including forfeiture of medals, points and prizes.

2. Period of Ineligibility Start Date and Credit for Provisional Suspension/Period of Ineligibility served

76. With respect to the sanction start date, the Sole Arbitrator is guided by Article 10.11 of the 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."

77. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility Served" 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."

78. In this case, sample collection was made on 29 April 2018, and according to the Appealed Decision, the Athlete was provisionally suspended on 20 June 2018. It is not contested that the Athlete has complied with the terms of the Provisional Suspension. It follows that the Athlete is entitled to receive a credit for the period of Provisional Suspension. Furthermore, by means of the Appealed Decision, the Athlete had been imposed a period of ineligibility of two years, which she has complied with since the date of its imposition, i.e. 6 November 2018. Accordingly she shall also receive a credit for the period of ineligibility already served. In conclusion, the Sole Arbitrator determines that the Athlete's four-year period of ineligibility shall commence as from the date of her Provisional Suspension (i.e. 20 June 2018), thus giving her full credit for time already served in accordance with Article 10.11.3 of the ADAK ADR. In order to avoid any misunderstanding, the period of ineligibility shall start on the date of commencement of the provisional suspension, and not on the date of the Appealed Decision by the SDT as foreseen in Article 10.11 of the ADAK ADR. Such method is applied for practical reasons by constant CAS jurisprudence (cf. amongst others CAS 2017/O/5039, para. 121 or CAS 2016/A/4676, para. 91).

IX. COSTS

79. Since this Appeal is brought against a disciplinary decision issued by a national sports body, pursuant to Article R64.2 of the CAS Code, the costs of the proceeding shall be borne by the Parties. The Appellant has paid the entire advance of costs.

80. Article R64.4 of the CAS Code provides:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:
- the CAS Court Office fee,
- the administrative costs of the CAS calculated in accordance with the CAS scale,
- the costs and fees of the arbitrators,
- the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,
- a contribution towards the expenses of the CAS, and
- the costs of witnesses, experts and interpreters."

81. Article R64.5 of the CAS Code provides:

"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the Parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

82. The Sole Arbitrator notes that the First Respondent as a National Anti-Doping Organization is the only organization permitted to carry out anti-doping activities in Kenya. In the present case, the First Respondent prosecuted the case before the Sports Disputes Tribunal. Based on the above, the Sole Arbitrator holds that the First Respondent bears the responsibility for the Decision, and ensuring that legally proper and justified decisions are rendered.

83. Considering the outcome of this case (the Appellant's appeal is upheld in substance and the SDT Decision is set aside) as well as the facts set out in the above paragraph, the Sole Arbitrator determines that the costs of this arbitration, to be calculated by the CAS Court Office and separately communicated to the Parties, shall be borne by the First Respondent.

84. For the same reasons, the Sole Arbitrator further determines that the First Respondent shall pay a total amount of CHF 4,000 (four thousand Swiss Francs) to the Appellant as contribution for the legal costs and other expenses incurred by the Appellant in this arbitration proceeding.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 20 February 2019 by the World Anti-Doping Agency against the 6 November 2018 Decision of the Sports Disputes Tribunal of Kenya is upheld.

2. The Decision rendered by the Sports Disputes Tribunal of Kenya on 6 November 2018 is set aside.

3. A period of four (4) years ineligibility is imposed on Ms. Rose Jepchoge Maru, starting on 20 June 2018, start date of her Provisional Suspension.

4. Ms. Rose Jepchoge Maru is disqualified from the METRO Marathon in Dusseldorf (Germany) held on 29 April 2018, with all the resulting consequences including forfeiture of any medals, points, and prizes.

5. All competitive results of Ms. Rose Jepchoge Maru from 29 April 2018 until 20 June 2018 are disqualified, with all the resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes, and appearance money).

6. The costs of arbitration, to be determined and notified to the Parties by the CAS Court Office, shall be borne by the Anti-Doping Agency of Kenya.

7. The Anti-Doping Agency of Kenya is ordered to pay a total amount of CHF 4,000 (four thousand Swiss Francs) to the World Anti-Doping Agency as contribution to its legal costs and other expenses that has incurred in this proceeding.

8. All further and other requests for relief are dismissed.

Seat of arbitration: Lausanne
Date: 25 September 2019

THE COURT OF ARBITRATION FOR SPORT

Jens Evald
Sole Arbitrator