

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING NO. 16 OF 2019

IN THE MATTER BETWEEN

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

-VERSUS-

WILLY KIPKEMOI ROTICHRESPONDENT

DECISION

HEARING : The Respondent waived hearing.

PANEL :	1. John Ohaga	Chairperson
	2. G.M.T. Ottieno	Member
	3. Mrs. Njeri Onyango	Member

APPEARANCES: Mr. Bildad Rogoncho, Advocate for the Applicant;

The Athlete was duly served but did not make any appearance or participate in these proceedings.

ABBREVIATIONS AND DEFINITIONS

The following abbreviation used herein have the indicated

ADAK –	Anti-Doping Agency of Kenya
ADR-	Anti-Doping Rule
ADRV-	Anti-Doping Rule Violation
AK-	Athletics Kenya
IAAF-	International Association of Athletics Federation
S.D.T-	Sports Dispute Tribunal
WADA-	World Anti-Doping Agency
WADC-	World Anti-Doping Code

All the definitions and interpretations shall be construed as defined and interpreted in the constitutive documents both local and international.

1. THE PARTIES

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter referred to as 'ADAK'), a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016, tasked with the responsibility of carrying out anti-doping activities in the Country in order to ensure and safeguard the right of athletes to participate in a doping free sport.
2. The Respondent is an adult Male of sound mind and a national level athlete (hereinafter 'the Athlete' or 'the Respondent').

2. JURISDICTION

- 2.1 The Sports Disputes Tribunal has Jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and section 31 and 32 of the Anti-Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

3. APPLICABLE LAWS

- 3.1 The Respondent is an International Athlete, the World Anti-Doping Code, the IAAF Competition Rules, IAAF Anti-Doping Regulations and the ADAK Anti-Doping Rules 2016 do apply to him.

4. BACKGROUND

- 4.1 The facts as set out in the Charge Document show that on 26th August, 2018, China Anti -Doping Authority (CHINADA) Doping Control Officers in an in-competition testing during the 2018 Inner Mongolia Hasuhai Grassland Marathon held in Hasuhai, China, collected two (2) urine sample from the Respondent. The Respondent, assisted by the Doping Control Officers, split the sample into two separate bottles, which were given reference Numbers A 6352734 (the "A Sample") and B 6352734 (the "B Sample") in accordance with the prescribed WADA procedures.
- 4.2 The Samples were transported to the WADA accredited Laboratory in Paris France "the Laboratory". The Laboratory analyzed the A Sample in accordance with the Procedures set out in the WADA International Standard for Laboratories (ISL).
- 4.3 The Laboratory analysis returned an Adverse Analytical Finding (AAF) and informed the IAAF Athletics Integrity Unity (AIU) and WADA of the same but some queries were raised. In consultation with WADA and the AIU, CHINADA decided on the need for further analysis to be conducted on the sample. To this end, the AIU wrote to the Respondent on 25th October 2018, informing him of the process of dealing with the 'B' Sample for further analysis. This Notice was remitted to the Respondent by e-mail to his address wrotich2009@yahoo.com.
- 4.4 Whereas the ISL does not require the presence of the athlete or his/ her representative to be present at the opening and splitting of the 'B' sample, the AIU by the letter of 25th October, 2018 gave the Respondent an opportunity to attend at his own cost, if he so elected, or to be represented during the process and subsequent analysis. They further notified him of the preferred dates and asked that should he elect to attend or be represented, he informs them of the preferred date from those given. He was required to give a response by Friday 2nd November, 2018.
- 4.5 The Respondent clearly did receive the email of 25th October 2018 with the letter above stated. On 28th October, 2018, he made a short response to the AIU, he wrote using the above stated e-mail address and stated;

"Hi, I'm Willy Rotich I don't understand"

- 4.6 On Monday the 29th October at 8:09 a.m. AIU did respond to his e-mail of 28th October 2019

"Dear Mr. Rotich,

Thank you for your e-mail.

A urine sample that you provided in China in August 2018 is to be subject further to further analysis. This requires your B sample to be opened and split into two separate samples, B1 and B2.

You must decide if you would like to be present at the Paris Laboratory for the opening and splitting of your B sample and if so, the date on which you will attend selected from the following:

Wednesday 7 November 2018

Friday 9 November 2018

Wednesday 14 November 2018

You must confirm if you will be present and on which of these dates by no later than Friday 2 November 2018.

Kind regards."

- 4.7 Again, it's clear that the Respondent received that e-mail as the email trail shows that on 21st November 2018 at 02:34, the Respondent replied to AIU and stated

"Hi. Good morning sir sorry. I don't have ticket and VISA to Europe I'm not coming sorry."

This is shown to have been sent from yahoo mail on phone.

- 4.8 To the above mail, AIU's response was done on 21st November 2018 at 21:19 it stated

"Thank you for your e-mail. The AIU shall instruct the Laboratory to perform the opening and splitting of the B sample in your absence.

Kind Regards."

- 4.9 The analysis of the B sample returned an Adverse Analytical Finding (AAF) for presence of a prohibited substance Prednisolone and Prednisone.
- 4.10 In terms of the existing Agreement between the IAAF and ADAK the AIU by an e-mail dated 17th December 2018, referred the matter to ADAK for result management and adjudication.
- 4.11 By a letter dated 23rd January 2019, the ADAK CEO Japhet K. Rugut issued a detailed Notice of Charge and Mandatory provisional suspension to the Respondent. The Respondent was informed of the process to be followed and was offered an opportunity to provide an explanation for the AAF on or by 6th February, 2019.
- 4.12 There being no response from the Respondent by the specified date, further effort was made to contact him. ADAK's senior Legal officer Mr. Bildad Rogoncho on 22nd February 2019 wrote an e-mail vide the available e-mail address (wrotich2009@yahoo.com). A follow up e-mail was also issued on 18th March, 2019 with a Notice of ADRV. There was no response to both e-mails.
- 4.13 On 8th March, 2019 the Applicant filed a Notice of Charge upon the Respondent, the same was reviewed by the Chairperson of the SDT who issued directions on 28th March, 2019 as follows;
 - i) The Applicant shall serve the Mention Notice, the Notice to Charge, the Notice of ADRV, the Doping Control form and all relevant documents on the Respondent within 15 days of the date hereof.
 - ii) The Panel Constituted to hear this matter shall be as follows:
 - a. John M Ohaga
 - b. Gilbert MT Ottieno
 - c. Mrs. J Njeri Onyango

iii) The matter shall be mentioned on **Thursday 28th March, 2019** to confirm compliance and for further directions.

- 4.14 When the matter came up for mention on 28th March, 2019, the Panel was informed that the Respondent had been served with the Notice of Charge but had not responded. The Applicant had filed the charge documents which had not yet been served. The Panel therefore directed that the Respondent be served with the charge documents and set a Mention date for 25th April, 2019 for further directions.
- 4.15 This matter came up next before the Panel on 27th June, 2019. The Panel was informed that the charge document had been served upon the Respondent but had not responded. The Applicant again requested for further time to try and reach the Respondent. This request was allowed and the matter was set for mention on 7th August, 2019.
- 4.16 On 7th August 2019, the Panel was informed that the Respondent had duly been served with the charge document and Notice of the Mention before the Tribunal. A further Mention was set for 29th August 2019 at 2:30 p.m. Service of mention was to be served.
- 4.17 On 29th August 2019, the Applicant had duly served the required mention Notice. The Panel reviewed the Affidavit of Service of Mr. Bildad Rogoncho Advocate, filed on 28th August, 2019 and was satisfied that various efforts had been made to reach out to the Respondent and to notify him of this matter and of the mention. There was no attendance or any response by the Respondent. The Panel was satisfied that the Respondent had had an opportunity to act but seemed uninterested in participating. The Applicant was granted leave to file written Submissions for the Matter to be determined on the basis of documents filed and written submissions. Mention was set for 19th September, 2019 to confirm compliance.
- 4.18 At the mention on 19th September 2019, the Applicant had filed its written submissions and requested for a date for decision, which was set for 16th October 2019 at 2:30 p.m. ADAK has preferred the following charge against the Respondent;

'Presence of a prohibited substance Prednisolone and Prednisone in the Athlete's sample.'

5. ADAK'S SUBMISSIONS

Roles and Responsibilities of the Athlete

5.1.1 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.*

5.1.2 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;

- *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

5.1.3 Article 7.10.2 of ADAK Rules states that if the Athlete or other person against whom an anti-doping rule violation is asserted fails to dispute

that association within the deadline specified in the notice sent by the Agency asserting the violation, then he/she shall be deemed to have admitted the violation, to have waived a hearing, and to have accepted the consequences that are mandated by these Anti-Doping Rules or (where some discretion as to consequences exists under these Anti-Doping Rules) that have been offered by the Agency.

- 5.1.4 The Applicant therefore submits that the Respondent athlete waived his rights by not being desirous of participating in the proceedings.

Proof of Anti-Doping rule violation

- 5.1.5 The Athlete is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. **Prednisolone and Prednisone** are Specified Substances and attract a 2-year sanction.

- 5.1.6 Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated in order to establish an ADRV.

- 5.1.7 Similarly, Article 10.2.1. the burden of proof shifts to the Athlete to demonstrate *no fault, negligence or intention* to entitle him or her to a reduction of sanction.

- 5.1.8 We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent herein.

Origin

- 5.1.9 In the instant case, the athlete has failed to establish the origin of the substance found in his system. He adamantly refused, declined and failed to respond to the charge and to participate in the proceedings of the Tribunal. It is the Applicant's contention that the Athlete herein has failed to establish origin.

- 5.1.10 Accordingly, the Applicant urges the Panel to find that the Athlete has not met his burden of proof and that the anti-doping rule violation therefore must be deemed to have been intentional since the inability of

him to establish the origin of the prohibited substance, automatically leads to the conclusion that he is guilty of an anti-doping rule violation.

Intention

5.1.11 On the outset, it is important to state that in the case of **CAS 2016/A/4716 Cole Henning v. South African Institute for Drug-free Sport (SAIDS)**, the Court held that;

"Identification of the Origin of the prohibited substance is a prerequisite to negate intention"

5.1.12 It is worthy to note that in the instant case; the Respondent has adamantly refused, declined and failed to disclose the origin of the prohibited substance and as such intention cannot be negated.

5.1.13 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.

5.1.14 The Applicant calls upon the Tribunal to find that the Respondent herein intended to cheat and therefore the reason why he injected himself with the substance.

5.1.15 It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on his evasive behavior in responding to the charge and lack of any desire to participate in the Tribunal's proceedings.

Fault/Negligence

5.1.16 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 Anti-Doping Rules.

5.1.17 The Applicant submitted 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 whatever

they injected themselves with did not contain any prohibited substance. He acted negligently and he is at fault.

- 5.1.18 It is clear from the foregoing that the Athlete ought to have known better the responsibilities bestowed upon him as an international level athlete. He was thus grossly negligent.

Knowledge

- 5.1.19 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.
- 5.2 ADAK therefore asks this Panel to issue Sanctions as set out under Article 2.1, Article 10.2.1.2 of the ADAK Anti-Doping Rules and issue a 4 year period of ineligibility where the ADRV involves a Specified Substance as the Agency Has established the ADRV was intentional.
- 5.3 It is the Applicant's position that under Article 7.10.2 of ADAK Anti-Doping Rules, if an athlete or other person against whom an anti-doping Rule violation is asserted fails to dispute the assertion within the deadline specified in the Notice sent by the Agency asserting the Violation, then he/she shall be deemed to have admitted the violation, to have waived a hearing and to have accepted the consequences that are provided by the Anti-Doping Rules or (where some discretion as to the consequences exists under the Anti-Doping Rules) that have been offered by ADAK.
- 5.4 In the instant case therefore, the Applicant submits that the Respondent athlete waived his rights by his failure or refusal to participate in these proceedings.
- 5.5 The Applicant further submits that the adamant refusal or failure to disclose the origin of the prohibited substance means that intention cannot be negated.

- 5.6 The Applicant therefore submits that the maximum sanction of 4 years ineligibility be imposed as no plausible explanation has been tendered for the ADRV.

6. JURISDICTION

- 6.1 The Sports Disputes Tribunal has Jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and section 31 and 32 of the Anti-Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

7. APPLICABLE LAW

- 7.1 The Respondent is an International Athlete, consequently the provisions of the WADC, the IAAF Competition Rules and the ADAK Anti-Doping Rules 2016 do apply to him.
- 7.2 Article 2 of the ADAK Anti-Doping Rules 2016 stipulates the definition of doping and anti-doping rules 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 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;"

8. MERITS

- 8.1 The Panel has reviewed this matter and is of the view that the issues that arise for determination are;
- a) Whether the Respondent Athlete was properly served and Notified of this matter;
 - b) Whether an ADRV has occurred and the attendant standard and burden of proof;
 - c) It the answer to (b) above is in the affirmative, whether the ADRV was intentional
 - d) What sanction can be imposed in the circumstances of this matter.

9. SERVICE

- 9.1 This Panel has reviewed the various documents filed by the Applicant; of significance is the Doping Control Form (DCF) No. 0157813 and the email trail between the AIU of IAAF and the Respondent.
- 9.2 The DCF, is the 1st document in the Applicant's bundle of documents. The DCF is shown to have been completed and signed appropriately by the Respondent. In this form, the Respondent provided his e-mail address together with other contact details. The e-mail address provided is wrotich2009@yahoo.com.
- 9.3 The Panel also observed that a letter of 25th October, 2018 issued by the AIU of the IAAF was issued and remitted to the Athlete Via the aforestated e-mail address found in the DCF. This was a letter notifying the Respondent of the AAF of his A Sample and the need to open and split his B Sample for further analysis.
- 9.4 The letter of 25th October, 2018 was sent to the Respondent on the same day at 11:17 p.m. as an attachment. The Athlete was to read the letter and respond by 2nd November, 2018. On 28th October, 2018 the email shows a Response by the Respondent (page 12 of the Charge documents) it shows

-----Original Message-----

From: Willy Kipkemoi <wrotich2009@yahoo.com>

Sent: 28 October 2018 10:50

To: RM <rm@athleticsintegrity.org>

Subject: Re: Sample 6352734 B Sample Splitting
Hi I'm Will Rotich I don't understand

- 9.5 On Monday, October 29 2018, 8:09 p.m.
RM <rm@athleticsintegrity.org> wrote:

Dear Mr Rotich,

Thank you for your e-mail.

A urine sample that you provided in China in August 2018 is to be subject further to further analysis. This requires your B sample to be opened and split into two separate samples, B1 and B2.

You must decide if you would like to be present at the Paris Laboratory for the opening and splitting of your B sample and if so, the date on which you will attend selected from the following:

Wednesday 7 November 2018

Friday 9 November 2018

Wednesday 14 November 2018

You must confirm if you will be present and on which of these dates by no later than Friday 2 November 2018.

Kind regards,

Athletics Integrity Unit

www.athleticsintegrity.org

- 9.6 Clearly the Respondent received that e-mail as the trail shows his response

From: Willy Kipkemai <wrotich2009@yahoo.com>

Sent: 21 November 2018 02:34

To: RM <rm@athleticsintegrity.org>

Subject: Re: Sample 6352734 B Sample Splitting

Hi good morning sir sorry I don't have ticket and visa to Europe I'm not coming sorry

Sent from Yahoo Mail for iphone

- 9.7 From the foregoing, this Panel is satisfied that the e-mail address wrotich2009@yahoo.com is a valid contact address of the Respondent.
- 9.8 The Panel further observes that the Applicant severally remitted Notices to the Respondent vide this e-mail Address. This Panel has in particular reviewed the e-mail trail starting 1st July 2019 through to 3rd April 2019

and more importantly, the Affidavit of service of BILDAD ROGONCHIO ADVOCATE sworn on 25th August, 2019 and filed at the Tribunal on 28th August, 2019. The said Affidavit details the various actions towards service of both the Notice of Charge and the charge documents as well as efforts to serve both Mention and Hearing Notices upon the Respondent. The Affidavit of 25 paragraphs on 3 pages did in the view of the Panel show to our satisfaction that the Respondent had duly been served with the Requisite notices and the Charge document sufficient to give him a chance if he so wished, to participate in these proceedings.

- 9.9 Consequently, the Panel on 29th August 2019 determined that the Respondent had properly been served and Notified of these proceedings and therefore allowed the Applicant to proceed with the matter in the absence of the Respondent. The Applicant elected to proceed on the basis of documents filed and written submissions. In so doing, the Panel relies on Article 8.3 of the WADA Code

"Waiver of Hearing: The right to a hearing may be waived either expressly or by the Athlete's or other Person's failure to challenge an Anti-Doping Organization's assertion that an anti-doping rule violation has occurred within the specific time period provided in the Anti-Doping Organization's rules."

10. OCCURANCE OF AN ADRV and BURDEN AND STANDARD OF PROOF

- 10.1 A urine Sample was collected from the Respondent by CHINADA DCO in the prescribed manner in an in- competition on 28th August, 2018 during the 2018 Inner Mongolia Hasuhai Grassland Marathon in Hasuhai China. The sample was in the usual manner split into the 'A' and 'B' Sample and remitted to a WADA Accredited Laboratory for testing. The Analysis returned an AAF for Prednisolone and Prednisone.
- 10.2 Prednisolone and Prednisone are a Specified substance listed as Glucocorticoids under Class S9 of WADA's 2018 prohibited List.
- 10.3 According to ADAK records, the Respondent did not have a Therapeutic Use Exemption ("TUE") to justify the presence of Prednisolone and Prednisone in his system.

- 10.4 By a Notice dated Wednesday 23rd January 2019, Mr. Japhet Rugut, the CEO of ADAK, issued a Notice of the ADRV to the Respondent wherein the Respondent was also notified of his provisional suspension. The elaborate process and consequences following ADRV Notice and Charge were clearly set out in the said Notice of 23rd January. The Notice was remitted to the Respondent vide e-mail by the Applicant. As already held above, this Panel is satisfied that that Notification was properly served upon the Respondent by such means.
- 10.5 The Panel has reviewed the Laboratory results contained in the test Report (at page 13 of the Charge document). The same retrieved an AAF for Prednisolone and Prednisone. The report notes that "both Corticosteroids are metabolite of each other, therefore it is not possible to determine which one was administered." This was the reason of the further test that was the subject of communication between the AIU and the Respondent that we have already set out above.
- 10.6 The further analysis of the B Sample carried out at the WADA accredited Laboratory in Paris France, also returned an AAF for Prednisolone and Prednisone similar to the results of 'A' Sample. Accordingly, the AIU notified ADAK to take up the result Management process.
- 10.7 The Applicant relies on the provisions of Article 3.2.1 "Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid. Any *Athlete* or other *Person* seeking to rebut this presumption of scientific *validity* shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge. CAS, on its own initiative, may also inform WADA of any such challenge. At WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of WADA's receipt of such notice, and WADA's receipt of the CAS file, WADA shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in such proceeding."
- The Panel is to a comfortable degree satisfied that the ADRV was proven on account of
- a) The Laboratory analysis of the 'A' Sample provided by the Athlete on 26th August 2018 which provided an AAF for presence in the Athlete's body of

- i. 59 Glucocorticoids/Prednisolone
 - ii. 59 Glucocorticoids/Prednisone
- b) There was no Applicable "TUE" to justify such presence.
- c) The available documents do indicate that despite Notification as provided under WADC's Article 7.3 (c) the Athlete/Respondent did not request for testing his 'B' Sample and in this instance, despite an extra opportunity granted to him by Notice, the 'B 1' sample further analysis which returned a similar AAF, the Athlete has not followed up further testing in any manner.

10.8 This Panel agrees with the Applicant's Submission derived from the Code that

"Where Use and Presence of a prohibited Substance has been demonstrated, it is not necessary that intent, fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an ADRV."

10.9 This Panel therefore holds that it is satisfied to a comfortable standard that there was an occurrence of an ADRV.

11. INTENT

11.1 The Applicant has both in the Charge and in its Submissions asked that the Athlete be sanctioned to a period of ineligibility of 4 years. This is guided by ADAK ADC Article 10 and WADC Rules as well as the Applicable IAAF Competition Rules. Article 10.2.1 of WADC provides for a period of ineligibility and requires that the Panel do examine the Respondent's intentionality in the ADRV.

11.2 As has been demonstrated above, the Panel is satisfied that the Respondent Athlete has since October 2018 been aware of the AAF of his sample. The Panel is also satisfied that the Athlete has properly been served with the Notice of the ADRV, Notice of the Charge filed at the SDT by the Applicant, the Charge document and various Notices of the mention and hearing of this matter. That despite being so served, the Athlete has failed, refused and/or neglected to make any response to the charge that can explain the AAF or the lack of intention to the ADRV. The Panel therefore has no basis to infer lack of Intention.

11.3 Article 10.2.1 of ADAK ADR (as well as the WADA Code) does provide

"The period of ineligibility shall be four years where:

10.2.1. 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."

- 11.4 In the present instance, the ADRV involves a specified substance [Glucocorticoids under 59] the Agency has established presence and in the absence of alternative explanation as to the origin, intentionality cannot be negated. In CAS 2016/A/4716-COLE HENNING VS- South African Institute of Drug Free Sport (SAIDS) the Court held that;

"Identification of the origin of the prohibited substance is a prerequisite to negate intention."

- 11.5 Article 3.2.5 of ADAK ADR provides that

'The hearing panel on an anti-doping rule violation may draw an inference adverse in 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 reasonable time in advance of the hearing to appear at the hearing [either in person or telephonically as directed by the hearing Panel] to answer questions from the hearing Panel or the Anti-Doping organization asserting the anti-doping rule violation.'

- 11.6 The above strict rule is made and enforced so as to avoid deliberate Circumstances of the anti-doping rules. [see CAS 2008/A/1488 P -VS- International Tennis Federation (ITF)]

- 11.7 This Panel finds that by his failure to attend or supply an explanation, the Athlete has failed to meet his burden of proof and from these circumstances the Panel also finds that the Athlete has failed to show lack of intention.

- 11.8 In the CAS decision in **WADA -VS- SINDIAN NADA & DANE PEREIKA [CAS 2016/A/4609]** it was observed;

"The finding that a violation was committed intentionally excludes the possibility to eliminate the period of ineligibility based on no fault or negligence or no significant fault or negligence"

12. SANCTIONS

12.1 Under Article 10.2 of the ADAK Anti-Doping Rules

"The period of Ineligibility for 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.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and ADAK can establish that the anti-doping rule violation was intentional."

12.2 The Tribunal issues the following sanctions in this matter.


- a) The ADRV has been sufficiently proved and the AAF admitted;
- b) The applicable sanction shall be a period of four (4) years with effect from 11th December, 2018;
- c) All results obtained by the Respondent from and including 3rd November, 2018 inclusive of any points and prizes are disqualified;
- d) Each party shall bear its own costs of these proceedings.

12.3 The right of appeal is as provided for under Article 13.2.1 of the WADC and Article 13 of the ADAK rules.

Dated at Nairobi this 16th day of October 2019



J Njeri Onyango, Member



John M. Ohaga, Chairperson



Gilbert MT Ottieno, Member