REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. AD 09 OF 2019

IN THE MATTER BETWEEN

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

-versus-

JOAN NANCY ROTICH..... ATHLETE

DECISION

Hearing : 25th July 2019

Panel :

Mrs. Elynah Sifuna	-	Chair
Ms. Mary N Kimani	-	Member
Mr. GMT Ottieno	-	Member

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

The Athlete represented herself.

I. The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter '**ADAK**' or '**The Agency**') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016.

2. The Respondent is a female adult of presumed sound mind, an Elite and International Level Athlete, Email Address: joanrotich34@gmail.com (ID No. 26304335, 0723594244), hereinafter **'the Athlete'**.

II. Factual Background

3. The Athlete stated that she a self-managed athlete; as an Elite and International Level Athlete, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.
4. On 11th January 2019, OADC Doping Control Officers in an in- competition testing during the Ooredoo Marathon in Doha, Qatar collected a urine sample from the Respondent Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 4249142 (the **"A Sample"**) and B 4249142 (the **"B Sample"**) in accordance with the prescribed WADA procedures.
5. All the Samples were sent to a WADA accredited Laboratory in Doha, Qatar. The Laboratory analyzed the A Samples in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The analysis of the A Samples returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance Norandrosterone, (see test reports in page 8-9 of the Charge Document).
6. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.
7. The findings were communicated to the Athlete by Mr. Japhter Rugut, the ADAK Chief Executive Officer through a Notice and mandatory Provisional Suspension dated 13th February, 2019. In the said

communication the Athlete was offered an opportunity to provide an explanation for the AAF by 27th February, 2019 the option for Sample B analysis (see page 12-14 of the Charge Document).

8. The Athlete accepted the charges in her letter dated 20th February 2019, stating among others that, *"When I received the ADRV notice on 18th February 2019, I saw the substance that was found in my body, I remembered I had used a supplement called decadura bolin. I goggled the supplement and found that it contained the substance that had been found in my body. I did not write the supplement after the race because I had finished taking it on November 2018 and because we had told to write medicine used in 3 weeks only."*, (see copy of her letter in page 15 of the Charge Document).
9. The Athlete did not request a Sample B analysis thus waiving her right to the same under IAAF Rule 37.5
10. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule Violation. A Notice to Charge dated 20th February 2019 was filed by ADAK on 20th February 2019 and on the same date the Tribunal issued the following directions
    (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form and all relevant documents on the Athlete within 15days from date of directions.
    (ii) The Panel constituted to hear this matter shall be as follows; Mrs. Njeri Onyango Panel Chair, Gilbert M.T. Ottieno, Member and Peter Ochieng, Member
    (iii) The matter to be mentioned on 21st March 2019 to confirm compliance and for further directions.
11. At the mention on 21st March 2019 Mr. Rogoncho appearing for the Applicant told the Tribunal that the Athlete had been served in accordance

with its directions. Further, the Athlete was present in court. The Athlete said she understood the charge and that she was prepared to defend herself unrepresented. The matter was set for mention on 17th April 2019.

12. It was 27th June 2019 that the matter was actually mentioned with Mr. Rogoncho for Applicant present and the Athlete absent. Counsel for Applicant requested for a hearing date. The Tribunal order that the matter be listed for hearing on25th July 2019 with a hearing notice to issue from ADAK.
13. On 25th July 2019 the hearing was conducted by a revised panel consisting of Mrs. Elynah Shiveka as Panel Chair, Mr. GMT Ottieno, and Ms. Mary Kimani, as members. The Athlete represented herself while the Applicant was represented by Mr. Rogoncho. At the end of the hearing Mr. Rogoncho said he would file his written submissions by 08/08/2019 and the decision was to be delivered on 19/09/2019.
14. The Applicant filed its submissions on 7th August 2019 at the Tribunal which were recorded at a mention held on 8th August 2019 where the Athlete was absent while Mr. Rogoncho appeared for the Applicant.

III. <u>The Hearing</u>

15. At the hearing ADAK was represented by Mr. Bildad Rogoncho, Advocate while the Athlete appeared in person and made her representations.
16. ADAK has preferred the following charge against the Athlete: -

> **Presence of a prohibited substance *Norandrosterone* or its metabolites or markers in the athlete's sample in violation of Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2(b) of the IAAF rules.**

IV. Submissions

17. Below is a summary of the main relevant facts and allegations based on Parties submissions (written included).

A. Applicant's Submissions (Summary)

18. The Applicant submitted that the Athlete's AAF *"was not consistent with any applicable TUE recorded at IAAF for the substance in question and there is no apparent departure from the IAAF Anti-doping Regulations or from WADA International Standards for Laboratories which may have caused adverse analytical findings."*

19. That the Athlete *"did not request a sample B analysis thus waiving her right to the same under IAAF rule 37.5 and confirmed that the results would be the same with those of sample A in any event."*

20. The Applicant detailed the presumptions as provided under Article 3.2 in regard to sample analysis at WADA accredited laboratories. The Roles and responsibilities of the Athlete as provided by Article 22.1 of the Code were enumerated by the Applicant, highlighted amongst these being (a) knowledge/compliance of ADR, (c) responsibility in context of anti-doping for what they ingest/use & (d) to inform medical personnel of the their Code obligations/ensure any medical treatment received did not violate ADR.

21. It was the Applicant's position at its No. 22 (a) – (e) that the Athlete admitted not crosschecking; that Athlete was well aware of doping control process having been tested multiple times; that *"She admitted to her lack of interest whatsoever regarding the fight against doping as she has never attended any anti-doping workshop but has seen articles of it online"*; that Athlete

admitted use of supplements and having participated in numerous professional competitions as early as 2010.

22. Notable submissions included Nos.23-26 in regard to proof of ADRV; No. 23 stated, *"The Athlete is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. Prednisone is a Specified Substance and constitutes to a 2-year sanction."*

23. In regard to Intention, the Applicant in its Nos. 30 & 31 submitted as follows:

- *30. "The Applicant contends that it is an established standard in CAS jurisprudence that the Athlete bears the burden of establishing that the violation was not intentional.*
- *31. It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on her inability to prove her knowledge on the overall fight against doping as premised by her participation in both local and international events. The respondent also demonstrated her ability to conduct research on doping matters as evidenced by her oral submissions during the hearing clearly detailing her knowledge on articles on the fight against doping."*

24. Further the Applicant submitted in its No. 32 that *"From the explanation given by the athlete, she confirmed the presence of the prohibited substance in her sample through ingestion of Deca-Durabolin tablets, that she bought at a supplement shop in Indonesia."* Additionally its No.33 read; *"In that regard, we do submit that the origin of the prohibited substance has been established."*

25. On fault/negligence the Applicant quoted the Code's Article 2.1.1 and CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26 & PERIERA-CAS 2016/A 14609 stressing the Athlete's personal duty to ensure she committed no ADRV.

26. On the issue of knowledge it was the Applicant's contention 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 wherever 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."* Stressing the Athlete's long national/international career of 9 years, the Applicant held that the said Athlete *"... who also knows that she is subject to doping controls as a consequence of her participation in the national and/or international competitions cannot simply assume as a general rule that the products/medicines she ingests are free of prohibited/specified substances"* In its No 42; *"We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product." "No. 43 In Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL) the panel observed that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of athlete's intention to enhance sport performance.[9]"*

27. In its No. 44 the Applicant again referred to the "specified substance" but most notable were its Nos. 45-46 hereby paraphrased: *"45. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body*

(ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension." "46. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/ negligence on her part as required by the ADAK rules and WADAC to warrant sanction reduction" CONTRADICTORY TO NO. 33

28. In its conclusion the Applicant submitted that the ADRV had been established against the Athlete; that it be considered by Panel that the Athlete failed to take caution when ingesting unknown supplements; also to be taken into consideration was the knowledge and exposure of the athlete to anti-doping procedures/programs and/or failure to take reasonable effort to acquaint themselves with anti-doping policies and finally that the Athlete had failed to give any explanation for her failure to exercise due care in observing the products ingested/used and as such the ADRV was as a result of her negligent acts. The Applicant prayed the maximum sanction of 4 years Ineligibility *"as no plausible explanation has been advanced for the Adverse Analytical Finding."*

B. Athlete's Submissions

29. At the Hearing held on 25th July 2019 the Athlete told the Panel that was a resident of Nakuru town; that she was now 32 years old and had pursued an athletic career from 2010; that she was unmarried and had 2 children aged 12 and 8 years.

30. Among the races the Athlete had participated in were Kisumu, Standard Chartered, Ndakaini, Kwala Lumpar Marathon but she did not garner top positions. She also said she had never been selected for the Kenyan Team.
31. Other countries she had raced in were Netherlands, China and Indonesia and stated that 2012 was her first international outing. The Athlete also said she was first tested in 2013 and has since been tested about 10times.
32. The Athlete told the court that she did not know what she was not supposed to use as she had not attended ADAK training and only read on internet the little she knew about doping in sports. She said she once was managed by an agent but he did not teach her about doping.
33. Restating the information she had provided in her letter on folio 15 of the Charge Document, the Athlete said she bought supplements in Jakarta, Indonesia at the start of July 2018, 120 tablets which she used for 3 months while waiting for a race that didn't happen.
34. Later after the AAF came to light, she Goggled and found out that the proscribed supplement was in the decadura bolin which she bought while walking the streets of Jakarta while awaiting a race that did not materialize.
35. This was the first AAF to confront her in her entire career. She told the panel that she used other supplements among them, Energy G, VO2 Max tablets, Enduro caps etc. and she had been buying her supplements at Hilton.
36. The Athlete said she saw the Prohibited List for the 1st time when the AAF was notified to her.

V. Jurisdiction

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

VI. Applicable Law

38. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

> **2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample***
>
> **2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.**
>
> **2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A *Sample* where the *Athlete* waives analysis of the B *Sample* and the B *Sample* is not analyzed ...**

VII. MERITS

39. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

40. The Tribunal will address the issues as follows:

a. ***Whether there was an occurrence of an ADVR, the Burden and Standard of proof;***

b. ***Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***

c. ***Whether there should be reduction based on the Athlete's prompt admission;***

d. ***The Standard Sanction and what sanction to impose in the circumstance.***

A. The Occurrence of an ADRV, the Burden and Standard of proof.

41. As used in WADC's Article 3.1:

> ***The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.***

42. The Applicant relied on Article 3.2.1 *"Analytical methods or decision limits approved by WADA [...]"* and the Panel was comfortably satisfied that there was breach of Article 2.1 of ADAK ADR by the Athlete on account of the following facts:

(i) The laboratory analysis of the A Sample provided by the Athlete on 11th January 2019 resulted in the AAF for presence in the Athlete's body of Norandrosterone, *"which is listed as an*

endogenous AAS under S.1.1B of the 2019 WADA prohibited list", a non-specified substance prohibited **in-and out-of-competition** under the Prohibited List;

(ii) The Athlete had no Therapeutic Use Exemption to justify such presence;

(iii) The Athlete after Notification as under WADC's Article 7.3 (c) did not request for a test of her B Sample, and failing such request the B Samples analysis were deemed waived thereby confirming the A Samples results.

43. Therefore on issue of establishment of ADRV, suffice it to conclude 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."*

B. Was the Athlete's ADRV intentional?

44. ADAK having established the occurrence of the ADRV, the burden shifted to the Athlete since the proscribed substance was a non-Specified Substance. In this case then, the Athlete bears the burden of proof that the ADRV was not intentional (Article 10.2.1.1 of the ADAK ADR)

45. Pursuant to WADC's Article 3.1:

> [...]. ***Where the Code places the burden 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.***

46. The main relevant rule in question in the present case is Article 10.2.3 of the ADAK ADR, which reads as follows:

As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. [...]

47. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

> *'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.*
>
> *Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional, [...].*

48. An ADRV having been established by the Applicant, it was up to the Athlete i.e., *"unless an athlete can establish that the violation was not intentional, [...]"*, to prove on a balance of probabilities that despite the substance being found in her system, she did not ingest it intentionally see CAS 2016/A/4377 WADA v. IWF & Yenny Fernanda Alvarez Caicedo, *"para 51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered her body. The Athlete is required to prove her allegations on the "balance of probability". This standard, long established in the CAS jurisprudence, requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence. E.g., CAS 2008/A/1515, at para. 116".*
49. Further the Panel in Yenny speaks to the Athlete's burden in paras "52; *To establish the origin of the prohibited substance, CAS and other cases make clear that 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."

50. The Athlete in this case did not deny the ADRV and in her letter dated 20.02.2019 she penned the following; *"When I received the ADRV notice on 18th February 2019, I saw the substance that was found in my body, I remembered I had used a supplement called decadura bolin. I goggled the supplement and found that it contained the substance that had been found in my body. I did not write the supplement after the race because I had finished taking it on November 2018 and because we had told to write medicine used in 3 weeks only."*

51. Her as-a-matter-of-fact written explanation correlated with the oral narration she had rendered during the hearing. However as noted by the Applicant, *"No. 11 [...} She however did not recall the name of the shop where she bought the supplement from and/or present any receipts to confirm such purchases."*

52. From the Athlete's statements, she took the proscribed substance from around July 2018 for 3 months. It is noted that the Athlete's relevant travel document was not requisitioned to confirm if indeed the timelines and amount traced in her body were consistent with her statements. In regard to the Athlete not remembering name of shop or possessing receipts for said supplements, it was possible that since the test that produced the AAF was conducted a couple of months after her supplement purchase and in another country, she may have not remember name and might have also thrown away the receipts not to mention that likely there was a language barrier.

53. Nevertheless as averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF):**

To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.
A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

54. Therefore, despite the Athlete's demeanor during the hearing when alluding to factual purchase of the proscribed substance in a foreign country this Panel agrees with the view of **CAS 2006/A/1067 IRB v Keyter** at para. "14, *The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred.* ***The Panel, therefore, finds that the Respondent's explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test"***. ***[Our Emphasis]***

55. This view is further supported by CAS 2017/A/5248 WADA v. Africa Zone V RADO & ADAK & Eliud Musumba Ayiro para. 55. "*The Sole Arbitrator notes that pursuant to established CAS case law, apart from extremely rare cases (see CAS 2016/A/4534, CAS 2016/A/4676, and CAS 2016/A/4919),* ***an athlete must establish how the prohibited substance entered their system in order to discharge the burden of establishing the lack of intention*** *(e.g. CAS 2016/A/4377, paragraph 51). To establish the origin of the prohibited substance, it is not sufficient for an athlete to merely protest their innocence and suggest that the substance must have entered their body inadvertently from a supplement, medicine, or other product. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete has taken has contained the substance in question. For*

example, details about the date of intake, the location and route of intake, or any other details about the ingestion are necessary."

56. Additionally the Athlete admitted to be a regular partaker of supplements which she said she usually bought at a shop on Hilton building. The dangers associated with contaminants in regard to such products is hardly a novel subject in doping circles and therefore the Athlete having been in elite participation for at least 5 years, she by then should have known to be extra careful especially with foreign sourced, (from the streets so to speak) product. Ingesting a total 120 tablets of a supplement she had not "with utmost caution" investigated was a gigantic risk the Athlete undertook and she could well have had the indirect intention of committing the ADRV; as averred in CAS 2016/A/4609 WADA v. Indian NADA & Dane Pereira para "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 intent" 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 behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour 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)"

57. In light of this, the Tribunal finds that the Athlete did not prove on the balance of probability how the prohibited substance entered her body/ the

origin of the prohibited substance, an important accessory to establishing her lack of intention in commission of her ADRV. Accordingly, the Tribunal finds that the Athlete has not met her burden of proof.

58. Turning to the written arguments rendered by the Applicant, put side by side the Applicant's submissions in its Nos. 33 &46 seemed contradictory and if not so, then the Applicant seemed to acknowledge that in terms of intention, the Athlete had managed to advance a plausible explanation in regard to origin (see its No. 33) even though the Athlete was not able to adduce concrete evidence in support of the origin of the prohibited substance to enable her demonstrate no fault/negligence in order to benefit from further reductions associated therewith (see its No.46)

59. It is with a lot of concern the Panel noted the repeated reference in the Applicant's submissions to the substance in this particular case being a specified substance and in its No. 23 the Applicant quoted the substance to be Prednisone whereas the test result documents indicated it to be Norandrosterone. At their submissions on sanctions applicable Nos. 44-45, the Applicant continued to treat the AAF as involving a specified substance. It is our hope that all these were genuine typos acquired in the process of cut/pasting information because anything else would amount to sheer inattention to the details of the particular case. This carelessness brought with it doubt that the Athlete's crucial bona-fide information had been captured by the Applicant and therefore it was her genuine information which fully reflected the Athlete's true status and therefore the said information could be used to arrive at a just judgment of this particular Athlete's AAF.

60. Regarding No Fault/Negligence - No Significant Fault/Negligence, since as already concluded above, the Athlete, being responsible for her anti-

doping rule violation under Article 2.1 of the WADC, did not discharge the burden of establishing a lack of intention, the Tribunal does not deem it necessary to assess whether the Athlete may have had no fault or negligence in committing the anti-doping rule violation: see Bisluke 'para. *81. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had no fault or negligence in committing an anti-doping rule violation.'*

61. In regard to elimination/reduction or suspension of period of Ineligibility or other consequences for reasons other than fault as contemplated by WADC's Article 10.6 also see Bisluke 'para. *91. [...] Turning to the present proceedings, the Respondent has not demonstrated to this Tribunal in the first instance, that his case ought to be categorized as a very rare case that falls outside the realm of WADA Code which the ADAK Rules are based on. Secondly, the Respondent has not gone a step further to produce sufficient evidence to be weighed on a balance of probability that would demonstrate the rareness of his case.'*

C. Reduction Based on the Athlete's Prompt Admission?

62. Reference is made to Article 10.6.3 of the WADC, that reads 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 an Anti-Doping Organization, and also upon approval and at the discretion of both WADA and the Anti-Doping Organization with results management responsibility 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.

63. While the Athlete adhered to the 27th February 2019 deadline imposed by the Applicant by responding in her letter dated 20/02/2019 and admitting use of "*decadura bolin*" evidence confirming if indeed the AAF arose from the said supplement was still outstanding.

VIII. SANCTIONS

64. With respect to the appropriate period of ineligibility, Article 10.2 of the ADAK ADR provides that:

> *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.*

65. It is noted that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete can establish that the ADRV was not intentional.

66. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

> *If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such*

period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. ...

67. In regard to Disqualification, Article 10.8 of the ADAK ADR reads as follows:

> *Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*
>
> *In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes.*

68. It was noted by the Panel that this was the Athlete's first ADRV.

IX. DECISION

69. Consequent to the discussions on merits of this case:

(i) The applicable period of Ineligibility of four years is hereby upheld;

(ii) The period of Ineligibility shall be from 27th February 2019 when the Athlete was Provisionally Suspended;

(iii) All Competitive results obtained by the Respondent Athlete from and including 11th January 2019 are disqualified including prizes, medals and points;

(iv) Each party shall bear its own costs;

(v) The right of appeal is provided for under Article 13 of WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of ADAK Rules.

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

Dated at Nairobi this 17TH **day of** OCTOBER **,** _____**2019**

Mrs. Elynah Shiveka, Panel Chairperson

Ms. Mary Kimani, Member

Mr. GMT Ottieno, Member