

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 31 OF 2017

IN THE MATTER BETWEEN

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

AND

SELY JEPKURUI KORIR.....RESPONDENT

DECISION

Hearing : 16th November 2017

Panel : John M Ohaga - Chair
E Gichuru Kiplagat - Member
Gabriel Ouko - Member
Mary N Kimani - Member

Appearances: Ms. Damaris Ogama from ADAK for the Applicant;
Ms Selly Jepkurui Korir appearing in person.

Parties

- I. The Applicant is the Anti-Doping Agency of Kenya (hereinafter 'ADAK') a State Corporation established under Section 5 of the **Anti-Doping Act, No. 5 of 2016**.
- II. The Respondent is a female adult of presumed sound mind, a National Level Athlete whose address of service is through her advocates office.

The Charge

1. The Anti - Doping Agency of Kenya is therefore preferring the following charge against the Athlete: -

Presence of a prohibited substance oxycodone 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.

Jurisdiction

2. 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.

Hearing

3. At the hearing ADAK was represented by Ms. Damaris Ogama Advocate while the respondent appeared in person

Background

4. On 15th November 2017 the Applicant filed a charge document charging the Respondent for violation of Article 4.2 of the World Anti-Doping Code and Class S7 of the WADA prohibited list.
5. On 21st May 2017 the Respondent's urine sample number A6266883 (the A sample) and B6266883 (the B sample) was taken by CHINADA Doping control officers during the Jintan Maoshan International Half Marathon.
6. The samples were then transported to the WADA accredited laboratory in Seibersdorf, Austria where the A sample was analysed according to WADA's International Standards for Laboratories.

7. The analysis returned Adverse Analytical Findings presence of a prohibited substance, *oxycodone*, a prohibited substance as provided for by Class S7 of the 2017 WADA Prohibited List.
8. The findings were communicated to the Athlete by Japther K. Rugut, the ADAK Chief Executive Office through a notice of charge and provisional suspension dated 15th September, 2017.
9. The Respondent was offered an opportunity to provide an explanation to the AAF by September 22, 2017.

The Applicant's arguments

10. The Applicant through its counsel Mr. Erick Omariba called one witness. The witness identified himself as Dr Julis Ogeto a qualified medical doctor holding the following qualifications, Bachelor of Medicine and Surgery (UoN), Diploma Sports Medicine (Lagos) and a Post Graduate Diploma in Tropical Medicine (Tokyo).
11. The witness stated that the prohibited substance traced in the Athlete's sample namely *Oxycodone* is a Trade name while Oxycodone is the chemical name of the substance. It is a strong painkiller, an opiate which is listed in the WADA List of Prohibited Substances.
12. The witness testified that *Oxycodone* is a drug which acts centrally in the brain and suppresses any kind of pain in the body. This drug is usually used in patients with prolonged severe pain e.g. the excruciating pain experienced by some cancer patients and is used in place of common painkillers like Panadol which do not act centrally.
13. The witness testified that the vigorous exercise usually undertaken by Athletes can cause pain and when the drug is used it can mask this pain. The drug is not encouraged because prolonged use has many side effects some of which can be severe. If the drug is used continuously i.e. over 18 days and then withdrawn, the user may experience restlessness, light headedness, sweating, heavy tremors, palpitations of the heart, dryness in the mouth etc. and it is also very addictive.
14. The witness informed the tribunal that when the Athlete herein collapsed and was taken to hospital the drug may have been administered if the Athlete was in a severe condition but there were alternatives that could have been administered. The reason for this is because first she was an

Athlete and secondly China is an advanced society where pharmaceutical manufacturing thrives hence availability of modern medicine is presumed.

15. The witness proffered that the Athlete could have requested and applied for a retrospective Therapeutic Use Exception (TUE) once the drug was administered following the incident of collapse and subsequent deliberate or inadvertent administration of WADA prohibited medication.
16. The witness contended that the Athlete could have used Tramadol as an alternative since it is in the same class as *Oxycodone* and it achieves the same results without the side effects.
17. The witness averred that because the drug suppresses pain, one does not feel like they have done any work at all and they feel rejuvenated and can run tirelessly even if it was eight days after ingestion of the drug.
18. The witness observed that the Athlete's agent should not have allowed the Athlete to run in this particular race because there was no adequate recovery of the injured muscles in those eight preceding days.
19. The witness also noted that the Athlete was not put on the drug for eighteen continuous days and so may not have experienced some of the most severe effects of this substance.
20. Mr Omariba, counsel for the Applicant, submitted that the Athlete took part in two races in China, the first on 13th April 2017 where she collapsed and was attended to by race attendant during which time the prohibited substance was administered. The second race was conducted on 21st April 2017 where upon her successful completion of the race, a prohibited substance was detected in her sample.
21. The counsel for the applicant, submitted that the agency was not sure whether the place where the Athlete took part in the first race on 14th April 2017 was in rural China.
22. The Applicant submitted that no plausible explanation had been advanced for the adverse analytical finding (AAF).
23. The Applicant argued that the Respondent had a personal duty to ensure whatever enters her body is not a prohibited substance.

24. The Applicant also contended that there was fault and negligence of the Respondent by ingesting a prescription that she did not know the contents.

The Respondent's arguments

25. The Respondent in her response to the charge, dated 15th September 2017 and 18th September 2018 stated that she participated in the DALIAN Marathon on 13th May 2017.

26. She informed the Tribunal that during the race on the 27th Kilometre, she collapsed and was taken to the Dalian Friendship Hospital while still unconscious.

27. The Respondent was given two medicines for her treatment which was Universal Dinac 100 Retard and *Oxycodone* and Acetaminophen tablets whose writings were in the Chinese language.

28. She also stated that the doctor instructed her to take 1 tablet of oxycodone per day and 1 tablet per day for Universal Dinac 100 Retard which relieved her of her complication.

29. The Respondent argued that when her sample was being taken, she failed to disclose on the Doping Control Form, the medicine she was taking. This is because her tablets were in the hotel and written in Chinese.

30. The Respondent also averred that she was able to write on the doping control form the medication that was written in English which was the Universal Dinac 100 Retard.

31. The Respondent submitted that the non-disclosure was occasioned by the lack of co-operation of the doping control officers and the language barrier.

32. She argued that she was not conversant with the Chinese language and was therefore unable to know what medication was given to her because of the Chinese writings on the package.

Decision

33. **Article 2 of the ADAK Rules 2016** stipulates definition of doping and anti-doping rule violations. It provides 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; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

34. Under these Rules, an anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS. Further, it is understood that The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analysed even if the Athlete does not request the analysis of the B Sample.

35. We find **Article 10.2 of the ADAK Rules** relevant in determining the sentence to be imposed. It stipulates the sanction of Ineligibility where there is Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method. It provides as follows:

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substance or Prohibited Method

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

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

10.2.3 *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.*

36. Article 3.1 of the World Anti-Doping Code provides that;

"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. Where the Code places 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."

I. Duty of disclosure

37. In CAS 95/142 L. / Fédération Internationale de Natation Amateur (FINA), award of 14 February 1996 the Panel held that;

"the failure to mention salbutamol in the "medication taken recently"-section of the doping test form may create the assumption that there was a doping offence (No. 42). In addition, a competitor must be well aware that such a failure may involve him into a formal doping procedure with all its deplorable side-effects. It is therefore very difficult to understand why L. as a competitor of the highest level failed to comply with one of his most important professional duties and was not able to present any excuses for his negligence other than fatigue and forgetfulness."

38. In this case, it was not upon the CHINADA officials to find out the medication taken by the Athlete. It was indeed the Athlete's duty to put down on the Doping Control Form the medication taken recently.
39. Even though the medication was in another language, the Athlete ought to have even mentioned that there was a second medication she was taking that was unknown to her.
40. The law puts a duty of disclosure of any medication taken recently on an Athlete, whether known or unknown. Each Athlete ought to be aware of this fact.
41. It is also imperative to note that the failure to disclose that there was a second medication that she was taking, puts a presumption of intention to withhold the use of a prohibited substance.

II. Responsibility for what is ingested

42. **Article 2.1.1 of the World Anti-Doping Code** provides that;

"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."

43. In the case of **CAS 2008/A/1577 United States Anti-Doping Agency (USADA) v. Barney Reed** the Panel held that;

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. In the case at hand, it was the personal duty of Mr. Reed to ensure that Cannabinoids would not be present in his urine while participating in competition. It is not necessary for USADA to demonstrate that intent, fault, negligence or knowing use of Mr. Reed was present in order to establish a doping violation under Article 2.1."

44. In the case of CAS 2008/A/1488 P. v. International Tennis Federation (ITF), award of 22 August 2008 the Panel held that;

"Secondly, it is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention" as submitted by the Appellant. P.'s fault cannot be considered insignificant given that she did not conduct a thorough investigation into the composition of the drug and did not take even the most elementary of steps and advise her medical professional that she cannot ingest any Prohibited Substances. 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."

45. In the same case, the Panel added that;

"As such a result is undesirable, the Panel must concur with the Tribunal's finding that "the player clearly failed to comply with the duty of utmost caution, or to exercise any reasonable level of care to comply with the anti-doping programme". In its Decision, the Tribunal listed the following reasons as the basis for declining to reduce the mandatory period of ineligibility: "She did not give any consideration to whether the prescription medicine might contain a prohibited substance, by checking the constituents of Ameride against the prohibited list, which is available on the internet. She did not make any enquiry of her medical practitioner, nor ask her to check the position by reference to the ITF wallet card. She could not reasonably expect her medical practitioner who is not a specialist in sports medicine, to warn her that Ameride contained prohibited substances. She failed to take advantage of the telephone advice line offered by the ITF. She did not make any enquiry of her national federation or her national anti-doping organisation"

46. The Athlete is required to be aware of what enters their body at all times and also to be wary of what is administered to them for medical purposes.

47. The Tribunal takes into consideration that an Athlete in some exceptional circumstances may not be aware of what enters their body. However, we note that this case does not form part of such circumstances.

III. Responsibility to inform the Medical Practitioner

48. **Article 21.1 of the World Anti-Doping Code** provides that the Athlete is responsible for what they ingest and is also responsible to inform medical personnel of their obligation not to use prohibited substances and to make sure any treatment received does not violate anti-doping policies and rules.

49. The Athlete failed to bring to the attention of the medical practitioner who attended to her that she was an Athlete and hence subject to the World Anti-Doping Code and also the WADA prohibited list of substances.

50. We do recognise that she had collapsed during a race and taken to the hospital, however, the Athlete ought to have disclosed the same to the doctor while she was being given her prescription.

IV. No fault of negligence

51. In CAS 2006/A/1067 International Rugby Board (IRB) v. Jason Keyter, award of 13 October 2006 the Panel held that;

“It is in this regard that the prior tribunals failed. The Definitions of No Fault or Negligence and No Significant Fault or Negligence must be applied. Accordingly, to establish exceptional circumstances the Respondent must prove: (a) how the prohibited substance came to be present in his body, and (b) that he did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the prohibited substance. The proof of (a) and (b) would establish No Fault or Negligence. No Significant Fault or Negligence requires a Panel, in addition to taking into account the factors relevant to a finding of No Fault or Negligence, to take into account the totality of the circumstances and, having done so, to conclude that the Athlete’s fault or negligence was not significant in relationship to the anti-doping rule violation. The Respondent is required to establish that the fault or negligence was not significant on the “balance of probability”.

52. In the case of CAS 2012/A/2701 World Anti-Doping Agency (WADA) v. International Waterski and Wakeboard Federation (IWWF) & Aaron Rathy, award of 21 November 2012: the Panel made the following statement (par. 5.5.16 and 5.5.17):

“Generally speaking, if an Athlete ingests a product failing to inquire or ascertain whether the product contains a prohibited substance, such Athlete’s conduct constitutes a significant fault or negligence, which excludes any reduction of the applicable period of ineligibility.”

53. The Respondent failed to inquire on the contents or even the name of the medication given to her. This lack of concern for what she was prescribed for, clearly shows that she failed to exercise her duty of care and took the medication negligently.
54. Against this background, the Tribunal is cognizant of the submissions by both parties as well as the documentation filed by either to support their case.
55. The question before this Tribunal is whether the Athlete exercised utmost caution with the prescription given to her.
56. The Respondent admitted that she was a national level Athlete who had partaken in many events for sports. She also stated that she had collapsed during a race.
57. In such a case the Tribunal puts the Athlete in a high regard and also expects the Athlete to be cognizant of any regulations put in place that governs their sport and conduct.
58. The Tribunal also notes that in any race conducted internationally, all Athletes are subjected to an anti-doping procedure that requires them to give samples for testing and also disclosure of any medication that they may have taken 7 days prior.
59. The Tribunal recognizes that the medication given to the Athlete may have been written in the Chinese language and the Athlete may have not been able to decipher what the medication could have been. However, every Athlete is responsible for anything that enters his/her body and it does not suffice to claim language barrier to committing an anti-doping offence. The question that begs is why the Athlete did not inquire as to what medicine was given to her.
60. The law is very clear that an Athlete is responsible for what they ingest. It also imposes a duty on them to disclose, to any medical practitioner, that they are an Athlete.

61. Failure to exercise such due diligence leads to negligence on the part of the Athlete for ingesting medication whose contents she was not aware of.

62. The Tribunal therefore finds that even though the medication was in another language the Athlete did not take any steps to find out what the contents were and hence, led her to commit an ADRV.

Conclusion

63. In these circumstances, the following orders commend themselves to the Tribunal:

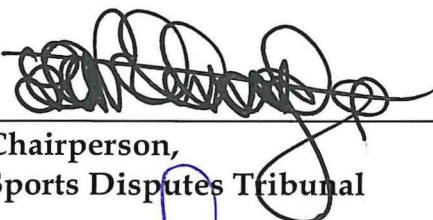
- a. The period of ineligibility (non-participation in both local and international events) for the Athlete shall be for 2 years from 15th September 2018 pursuant to Article 10.2.2 and 10.11.2 of the ADAK Rules and the WADA Code;
- b. Each party to bear it's on costs;
- c. Orders accordingly.

64. The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of RADO rules.

Dated at Nairobi this 23rd day of October, 2019

Signed:

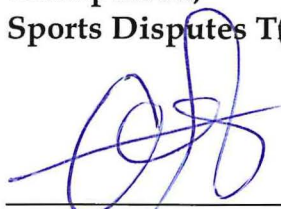
John M Ohaga, C.Arb



**Chairperson,
Sports Disputes Tribunal**



**E Gichuru Kiplagat
Member**



**Gabriel Ouko
Member**



**Mary N Kimani
Member**