

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 8 OF 2019

ANTI- DOPING AGENCY OF KENYA APPLICANT

-VERSUS-

EMMY CHEPKIRUI RESPONDENT

DECISION

Hearing : On 8th August, 2019.

Panel :

- | | |
|---------------------------|-------------------|
| 1. Mrs. J Njeri Onyango | Panel Chairperson |
| 2. Mr. E Gichuru Kiplagat | Member |
| 3. Mr. Gabriel Ouko | Member |

Appearances:

Applicant:

Mr. Bildad Rogoncho Advocate Representing ADAK

Respondent:

No appearance for the Respondent

Abbreviations and Definitions

The following abbreviations used herein have the indicated

- a. AAF - Adverse Analytical Finding
- b. ADAK - Anti-Doping Agency of Kenya
- c. ADR - Anti-doping Rule
- d. ADRV - Anti Doping Rule Violation
- e. AK - Athletics Kenya
- f. IAAF - International Association of Athletics Federation
- g. SD T - Sports Dispute Tribunal
- h. WADA - World Anti-Doping Agency

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

The Parties

1. 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 (as amended).
2. The Respondent is an adult female of presumed sound mind and an international level Athlete.

Jurisdiction

3. The Sports Disputes Tribunal has jurisdiction under Section 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.

Applicable Laws

4. The Respondent is a female athlete; therefore, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADC and the ADAK ADR apply.

Background

5. On 4th of November 2018 ADAK Doping Control officers in an in-competition testing during the Baringo half Marathon in Baringo County, Kenya, collected two urine Samples from the Respondent.
6. Both Samples were given reference Numbers *A 4362650* and *B 4362650* and handled in accordance with the prescribed WADA procedures. They were

transported to the WADA accredited laboratory in DOHA, Qatar (The Laboratory). The analysis of the 'A' sample carried out in accordance with WADA's International standard for Laboratories (ISL) Analysis of the sample 'A' returned an Adverse Analytical Finding (AAF) for presence of a prohibited substance **NORANDROSTERONE** which is listed as an endogenous AAS under S. 1. 1B of the 2018 WADA prohibited list.

7. The ADAK had no record of any Therapeutic Use Exemption (TUE) for the Respondent to justify the presence of Norandrosterone in her system.
8. The findings were communicated to the Respondent athlete by a Letter from ADAK CEO Mr. Japheter K. Rugut by a Notice of Charge and provisional suspension dated 11th December 2018. The Athlete was well notified of the process of Result Management. She was given an opportunity to provide an explanation for the same by 27th December 2018.
9. The Respondent did give a response through her letter to ADAK dated 15th January (an e-mail). She confirmed receipt of the Charge Notice that she had read and understood the Charges. She however denied the Charges and disclosed that she had been on medication for Malaria, typhoid and a leg fracture injury. She attached thereto medical records and prescription documents to support her assertion.
10. ADAK was dissatisfied with the Response and explanation given. ADAK had no record of a TUE in respect of the Respondent to justify the presence of a 19-Norandrosterone in her system. Accordingly, ADAK determined that there was a violation of Article 2.1 ADR, "*Presence of a prohibited substance or its metabolites or markers in an athlete's sample.*"
11. The Respondent, it is stated, did not request for testing of the 'B' sample in terms of the Notice of ADRV above stated. ADAK therefore filed the current Charge; the Notice of Charge was filed on 30/1/2019.
12. On 20/2/2019, the SDT Chairperson received the Notice of Charge and issued the following directions:
 - 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. Gabriel Ouko
 - c. Mrs. J Njeri Onyango
- iii) The matter shall be mentioned on **Thursday 21st March 2019** to confirm compliance and for further directions.

13. The matter came up for further directions on 21st March 2019. ADAK had by 8th March 2019 filed the Substantive Charge with relevant supporting documents as follows;

1. Doping Control Form dated 4th November 2018
2. Test report dated 5th December 2018
3. ADRV Notice dated 11th December 2018
4. Copy of email dated 15th January and medical records and prescription documents respectively.
5. World Anti-Doping Code
6. IAAF Rules
7. ADAK Anti-Doping Rules

14. At the mention on 21st March 2019 Mr. Rogoncho appeared for ADAK. The Athlete/Respondent had been served and was present (I.D. NO. 27527870). Her date of birth is indicated as 18/9/1988. She indicated that she did not require Legal representation and that she would represent herself in the matter.

15. On that day, no substantive orders were issued in view of the fact that the term of the Tribunal members was due to lapse at the end of March 2019. A mention date was issued for 14th April 2019, to establish the position by them.

16. Meantime, the Respondent supplied the SDT with copies of documents she intended to rely upon. These were;

- a. A treatment chit from Olenguruone sub-County Hospital dated 10/8/2019.
- b. Treatment (General Outpatient Record) from Olenguruone District Hospital for 25/8/2018 to 5/10/2018.
- c. A Lab request form for Keringet Nursing Home Ltd with Lab report results of 27/12/2018.
- d. A copy of her National Identification Card.
- e. X-ray (pelvis) receipt from Molo Sub-County Hospital.

- f. N.H.I.F outpatient claim from (outpatient No. 08991/19) N.H.I.F No.2103718 of 25/2/2019
- g. Outpatient attendance sheet from Molo Sub-County Hospital for the period 25/2/2019 to 25/2/2018.
- h. Copy of I.D Card of Ngetich Kibet Johnson

17. The matter was next mentioned on 27th June 2019 after the Term of the members was extended by the Judicial Service Commission.

18. The Respondent did not attend. The matter was fixed for hearing on 8th August 2019. ADAK was directed to serve a hearing Notice on the Respondent.

Hearing and Submissions

19. At the hearing on 8th August 2019, the Respondent attended in person. ADAK was represented by Mr. Rogoncho. Mr. Rogoncho stated that he would fully rely on the Charge document and the documents filed therewith and would not call any witnesses.

20. The Respondent opted to give sworn oral testimony. Her testimony is as follows;

“My name is Chepkirui Emmy. I am from Keringet Nakuru, a place called Temebo, Bararget. I am an athlete. I am married. My husband is Kibet Ng’etich. He also has a doping matter here at the Tribunal for an ADRV. I have one child a boy aged 6 years old. I have 4th form Education. I completed 4th form in 2008. I obtained a D+.

I started running in 2003 at Kericho. I attended a training Camp of Dickson Kimeto. I do 1,500 and 5,000. I started when I was 13. In 2004, I went to Brussels Belgium for competition. I have competed in many races locally I have won a few. In 2018 I ran in Italy. I have competed in many other International races. (Brussels, Italy, Fukuoka). I have been tested at least twice before, in 2015 in USA and Italy 2018. I have therefore been tested 3 times. I represented Kenya in 2016 in Fukuoka Japan, 2008 Youth Cross Country and African Youth Championships 2010 Ongadugu.

I stayed out for a while on Maternity leave. On 4/11/2018 I ran the Baringo ½ Marathon 10 KM run. I was 10th.

I had ankle pains on the left leg. This started before I went to Italy in August 2018. It became serious. Previously from about 2014 I used to receive relief

from physiotherapy. But in 2018 it was severe. I went for treatment at Olenguruone on 25/8/2018 evening. I was X-rayed as I was in pain. I was given an injection and tablets. I have my X-ray and treatment chit from that health facility. (See page 15 of Charge document) I also have other documents which show treatment at Olenguruone and other health facilities as of 10/8/2019. I was under medication for a suspected leg fracture, typhoid and Malaria. I took the medications before the race. I did not notify the hospital that I was an athlete. I was not asked. I did not take prohibited substances, I did not know that the medication had any prohibited substances. I have not received training on anti-doping.

ADAK's Submissions

21. ADAK filed written submissions. It is ADAK's position that under Article 3.2 facts relating to Anti-Doping rule violation may be established by reliable means, one of which is the Analytical Methods or decision Limits. In this instance, an analytical method has established presence of a prohibited substance. The Athlete did not challenge the process and outcome and did not request for testing of the 'B' Sample. ADAK thus poses that it has met its burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

22. ADAK also submits that under Article 22.1 the athlete has a duty to;

- a. To be knowledgeable of and comply with 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.

23. ADAK faults the Athlete for what it terms lack of interest regarding the fight against doping for failure to attend anti-doping workshop, yet she has variously been tested since she started running in 2003.

24. ADAK submits that Rule 40.3 of the IAAF Rules, 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 an anti-doping rule violation and manifestly disregarded that risk”

25. ADAK places reliance on CAS 2014/ A/3820, par 77 – and submits that to prove lack of intention, the athlete must clearly demonstrate that the substance was not intended to enhance her performance. ADAK also relies on the case of **Kurt Foggo -vs- National Rugby League (NRL) CAS A2/2011**, where the Panel observed that;

“The athlete must demonstrate that the substance was not intended to enhance the athlete’s performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent.”

It is ADAK’s position therefore that CAS Jurisprudence is that the athlete bears the burden of establishing that violation was not intentional. And that in this instance the Respondent has failed to prove 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 the local and international events. That the Respondent also demonstrated deceit as she misled the Tribunal to believe that she did not know where the substance came from. *“She also demonstrated an evasive behavior in her testimony as she was economical with the truth thus her whole testimony were lies”*

26. ADAK further submitted that the Respondent further submitted that the Respondent failed to disclose the origin of the prohibited substance and thus origin of the offending substance has not been established.
27. On fault and negligence, ADAK submits that the Respondent is charged with the Responsibility to be knowledgeable and to comply with Anti-doping rules and take responsibility in anti-doping context for what they ingest and use. In this case the Respondent failed to do so thus breached rules 22.1.1 and 22.1.3 of ADAK ADR.

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.

28. ADAK relies on the decisions of CAS 2012/A/2804-DIMITAR KUTROVSKY - vs- ITF and PEREIRA CAS 2016/ A/14609.
29. On Sanctions, ADAK proposes a period of ineligibility of 4 years on the basis that no plausible explanation has been given for the presence of a Prohibited Substance in the Respondent's system.

Analysis and Decision

30. A review of the Doping Control Form completed by the Respondent at the time of Sample collection dated 04/11/2018 shows that the Respondent did disclose that she was on treatment for what she listed as Typhoid Treatment.
31. Upon notification of the AAF by the letter of 11th December 2018, the Respondent responded by her e-mail of 15/1/2019 – she states

*"I have read and understood and here is my explanation. I was under medication for Malaria, Typhoid and leg fracture. Attached are copies of doctor's report and treatment.
Thanks in Advance"*

32. She stated that she had no intention of using any Prohibited Substance as she had performed well all along without them. That all she was doing was to seek treatment at recognized Public Health facilities. She therefore asked the Panel to find that she had no intention or fault in the resulting AAF, though she said she was shocked at the outcome. She stated that she could not afford the cost for testing the B sample hence she did not request for it.
33. The Panel in making its determination will consider
- a) Whether the ADRV has been proved to the Required Standard of proof
 - b) Whether or not there was intention to violate the applicable anti-doping regulations

- c) What degree of fault and/ or negligence to be assigned to the athlete's conduct;
- d) What period of ineligibility to be imposed

34. The Panel is of the view that the fact of the AAF as per the Laboratory results is not disputed, as far as the 'A' Sample results go and that there was no request for 'B' Sample analysis.
35. The Panel also notes that there was no applicable TUE at the time of Sample Collection. Further, it is noted that ADAK did not question or doubt the authenticity of the Respondent's medical records. Those records had been in the possession of ADAK since January 2019 when the Respondent sent them to ADAK upon receiving the ADRV Notice.
36. This Panel from the foregoing therefore finds that the fact of the AAF has not been contested, there being no contest, this Panel finds that the Charge in regard to presence of a Prohibited Substance "Norandrosterone" in the Athlete's Sample has been proved to the required standard under both the ADAK ADR and WADC article 3.2.

"The facts relating to the anti-doping rule violation may be established by any reliable Means including admissions and methods of establishing facts and set out the presumptions which include, results obtained by

- a) Analytical methods or decision limits*
- b) WADA accredited Laboratories approved by WADA...."*

37. Based on the above, this panel finds that in this instance there is an AAF from a WADA accredited laboratory which has not been challenged. There is also admission by the Respondent to receiving medication for a suspected Leg fracture, Typhoid and Malaria which is suspected to be the source of the AAF. ADAK has also stated and it's on record that it has not received substantial assistance from the Respondent in pursuing the source of the AAF.
38. The provisions of Article 10.2.3 of the WADC and ADAK rules provide that in order for a violation under the code to be deemed "intentional" the athlete should have known that the conduct constitutes an anti-doping rule violation and that there was a significant risk that the conduct could constitute or result an anti-doping rule violation and that he or she manifestly disregarded that risk.

39. It is this panel's position that a failure to explain on a balance of probability as required by Article 3.1 of the WADC the origin of the prohibited substance would mean that the athlete cannot prove lack of intent. In the words of Arbitrator Yves Frontier at page 77.

77. " it appears to me that logically I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says contained clenbuterol; with respect to the contrary view I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body"

40. This panel is also of the view that apart from proving lack of intention, the Respondent must show as well that the substance was not intended to enhance her performance. In the CAS decision of **CAS A2/2011 KURT FOGGO VS NATIONAL RUGBY LEAGUE (NRL)** the panel was of the view that:

"The athlete must demonstrate the substance was not intended to enhance the athlete's performance. The mere fact that the athlete did not know the substance contained a prohibited ingredient does not establish absence of intent..."

41. In the present case the Respondent gave a sworn oral testimony at the hearing on 8th August 2019 which we have fully set out above. It is notable that the Respondent has in the panel's view made efforts to establish origin of the substance stated in the AAF. She has shown that she, prior to the sample collection visited and received treatment at a public health institution namely, Olenguruone Sub-County Hospital from August, 2018 to October 2018 prior to her participation in the Baringo Half Marathon on 4/11/2019. The treatment notes do indicate that she was first diagnosed with a suspected case of ankle joint injury dislocation and sub-luxation. The treatment plan stated was to X-ray the joint. The notes further state that an X-ray revealed a fracture of the Malolae. The doctor thus prescribed medication as follows:

- a. Fracture reduction and plaster cast
- b. 1m Duprofos iv
- c. 1m Tramadol
- d. Tablets Myaob for 5 days
- e. Tabs Cox.B 50mg for 7 days
- f. Tab Neurocare for 7 days

42. On 20th September, 2018, the medical chit shows that the Respondent visited the same medical facility for review and removal of the POP cast. An Xray review is indicated to have shown proof being of union though the patient still complained of some pain and Numbness. She was put on further medication being, Neurocare tablets for 7 days as well as Dinac 100mg tabs for 7 days.
43. The next visit was on 3rd October 2018, this time she had hip joint pains. The old injury was seen to have healed. For the Hi, physiotherapy was advised. The attendance records for Physiotherapy seem to be from Molo Sub County Hospital but are for the period of February 2019. the panel has no record of the same for the period from October 2018. the other lab test request is also for 27th December, 2018 and the further pelvis X-ray receipt is for 2nd February 2019, which does not cover the period before the date of Sample collection.
44. There is a further Medical attendance sheet of 3rd October, 2019 from the Olenguruone Sub County Hospital, which we note is also attached to the Bundle of ADAK's documents. The same shows that the Respondent had attended at that institution and had received medical attention for complaints of Vomiting, Headaches and general body pains. She was described to be feeble and sick looking. She was investigated and said to have Typhoid fever. She was given medications for that, those were
- a) Cofiaxon 1gm(start)
 - b) Tabs Cefixalo 400mg for 30days
 - c) Tabs Tramadol 100mg
45. At the time of sample collection, the Respondent only indicated on the Doping Control form that she was on medication for Typhoid which was the last treatment she had received. She did not mention the previous treatment and Medications for the ankle injury
46. The Respondent in her testimony contended that the Prohibited Substance must have entered her body as a result of the treatment and medications she had received for Leg Fracture, suspected Typhoid and Malaria. She has contended that she had no medical knowledge to determine that part of her prescribed treatment constituted a Prohibited Substance. She has provided medical reports detailing the above treatment within the times she was subjected to sample collection. She conceded that she failed to notify the medical personnel at the point of treatment, that she was an athlete

47. Based on the foregoing, it is the duty of the Claimant ADAK to prove intentional use of the offending substance, that has not been shown to the panel's comfortable satisfaction. The panel having considered the circumstances as set out in the sworn testimony, is of the view that the athlete did not intend to cheat or to unduly enhance her performance. However, the Panel finds that the Respondent did not exercise due caution and inform the Doctor that she was a participating athlete therefore banned or estopped from using certain medical substances. The onus and responsibility of disclosing participating status rests with the athlete pursuant Article 22.1 on additional Roles and Responsibilities of Athletes and other Persons. Specifically, Article 22.1.4 states thus:

22.1.4 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.

Based on the foregoing this Panel is of the view that the Respondent failed to discharge this obligation.

48. The rule is that the Respondent is under strict liability and is responsible to ensure that no Prohibited Substance enters her body. It is her duty in this case to establish circumstances for consideration in reduction of the period of ineligibility from the prescribed period under the Code. The standard of proof is to the comfortable satisfaction of the panel and calls for the Respondent to demonstrate that she made an effort to ensure that what she received, consumed or entered her body was safe and not offending the anti-doping rules.

49. However, this Panel notes that the Respondent may have not undergone any or any proper training on doping and her standard of education may not support full appreciation of the permissible conduct of an athlete as prescribed by the anti-doping rules.

50. In **CAS 2018/A/4643 Maria Sharapova -vs- International Tennis Federation**, the panel therein set out factors for consideration in assessment of degree of fault on the part of the athlete as follows;

- i) Professional Experience
- ii) Age
- iii) Perceived and actual degree of risk
- iv) Any impairment
- v) Disclosure of Medication on the Doping Control form
- vi) Admission of the ADRV in a timely manner
- vii) Any other relevant factors and specific circumstances that can explain the Athlete's conduct.

51. Article 2 of the WADC states that:

"Athletes or other persons shall be responsible for knowing what constitutes ADRV and the substances and methods which have been included on the Prohibited list"

52. Additionally, Article 2.1 WADC states that;

"It is each athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their sample. Accordingly, it is not necessary that intent, fault, negligence or knowing on the athlete's part be demonstrated in order to establish an ADRV under this Article.

53. Article 10.2 of the WADA Code provides:

"The participant can establish how a Specified Substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such Specified Substance was not intended to enhance the Player's sport performance or to mask the use of a performance enhancing substance, the period of ineligibility established shall be replaced (assuming it is the participant's first anti-doping) offence with, at a minimum, a reprimand and non-period of ineligibility and at maximum, a period of two years. To qualify for any elimination or reduction, the participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Tribunal, the absence of intent to enhance sport performance or mask the use of a performance-enhancing substance. Where the

conditions set out are satisfied, the participant's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."

54. In this instance and bearing in mind the Respondent's level of education and previous exposure and testing experience, we find that the, Respondent should bear normal fault having failed in conducting any of the basic objective elements of fault such as:

- a. Informing the medical personnel of her status or career. Or making basic inquiry of the effects of the medication
- b. Failing to familiarize herself with the Anti-doping rules.

55. This panel finds that:

- a. The ADRV has been admitted
- b. The admission was timeously given
- c. The Respondent did not intend to cheat
- d. The Respondent was at fault and negligent in her conduct leading to obtaining the medication which resulted in the AAF
- e. The origin of the offending substance has been established

56. The Panel notes that the Respondent has no known previous charge (s) or ADRV.

57. Under Article. 10.1.2 of ADAK ADR, the period of 4 years may be avoided or reduced by establishing that the violation was not intentional in which case a reduction of up to two years may apply.

58. Any period of ineligibility may be completely eliminated under article 10.4 if it can be established that there was "*no significant fault or negligence*"

59. The period of ineligibility can be reduced to maximum of 2 years if the ADRV is promptly admitted (Article 10.6.3) but contingent upon:

- i. The athlete's degree of fault; and
- ii. Assessment of the seriousness of the ADRV, contrary to article 10.2 ADR


60. 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 Respondent may benefit from prompt admission.

Sanction

61. Having reviewed the circumstances of this matter, the panel imposes the following sanctions:

- a. The period of ineligibility for the Respondent shall be for two (2) years from 11th December, 2018 the date of the provisional suspension pursuant to Article 10.2.2 of the WADC;
- b. The disqualification of the Baringo Half Marathon results of 4/11/2018 and any subsequent event pursuant to Article 9 and 10 of the WADA code;
- c. Each party shall bear its own costs.
- d. Parties have a right of Appeal pursuant to Articles 13 of the WADC and ADAK ADR.
- e. Any other prayers and motions are dismissed.

Dated at Nairobi this 4th day of December, 2019



J Njeri Onyango, Panel Chairperson

PP 

E Gichuru Kiplagat, Member



Gabriel Ouko, Member