REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 07 OF 2019

IN THE MATTER BETWEEN

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

-versus-

GABRIEL MUKUNDI NJOKI..... ATHLETE

DECISION

Hearing : 8th August, 2019

Panel :
Mrs. Njeri Onyango - Panel Chair
Ms. Mary N Kimani - Member
Mr. Peter Ochieng - Member

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

Mr. Denis C. Mungai of Messrs Mohammed Muigai Advocates, MM Chambers, K-Rep Centre, 4th Floor, Wood Avenue, Kilimani, P.O. Box 61323-00200, Nairobi, Advocate for the Athlete

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 male adult of presumed sound mind, an Elite and International Level Athlete, (ID No. 28076582 D.O.B 28.08.1990) of P.O. Box 8685-00300, Nairobi (hereinafter **'the Athlete'**).

II. Factual Background

3. The Athlete is a self-managed National Level Athlete Body Builder hence the KBBF Competition Rules, KBBF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
4. On 3rd November, 2018, ADAK Doping Control Officers in an In - competition testing during the Mr. /Ms. Kenya Bodybuilding Competition in Nairobi county 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 4362648 (the **"A Sample"**) and B 4362648 and (the **"B Sample"**) in accordance with the prescribed WADA procedures.
5. Both samples were sent to a WADA accredited Laboratory in Doha, Qatar. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance Stanozolol, (see test reports in page 8-10 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 11th December, 2018 imposed. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 27th December, 2018 and the option for Sample B analysis (see page 14-15 of the Charge Document).
8. The Athlete responded to the Notice from ADAK in a letter dated 22 January 2019, see copy of letter and attachments in page 16-20 & 23 of the Charge Document. He also attached hospital documents (in page 21-22 of the Charge Document).
9. 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 23rd January 2019 was filed by ADAK on similar date and on the very same day 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 15 days from date of directions.
   (ii) The Panel constituted to hear this matter shall be as follows; Mrs. Elynah Sifuna-Shiveka Panel Chair, Gilbert MT Ottieno, Member and Mrs. J Njeri Onyango, Member
   (iii) The matter to be mentioned on 14th February 2019 to confirm compliance and for further directions.
10. The Charge Document was filed at the Tribunal on 13th February 2019.

11. At the mention on 14th February 2019 Counsel for the Applicant, Mr. Rogoncho confirmed that the Agency had just served the Athlete with the Charge Document. In response the Athlete who appeared in person requested for time to study the matter; he also requested for a pro-bono lawyer. The Tribunal ordered that the Athlete be furnished with contact of a lawyer by SDT Secretariat and another mention was fixed for 25th February 2019 for further directions.
12. On 27th February 2019 when the matter came up for mention only Mr. Rogoncho Counsel for the Applicant made an appearance. He told the Tribunal that the Athlete who had sought for legal representation was not before the Tribunal since he (Athlete) expected his advocate to appear on his behalf but that was not possible as the nominated advocate was on duty outside Nairobi. Consequently the matter was set for mention on 14/3/2019.
13. The Athlete and Mr. Rogoncho for the Applicant appeared before the Tribunal on 14th March 2019. It was confirmed that the Athlete would be represented by Mr. Mungai of Mohammed Muigai LLP. The matter would be mentioned on 28th March 2019 in order to allow Mr. Mungai to take instructions from his client.
14. A Notice of Appointment of Advocates was filed at the Tribunal on 28th March 2019 by Mohammed Muigai LLP on behalf of the Athlete and at mention on the same date Mr. Mungai came on record officially to represent the Athlete as pro-bono lawyer; he requested for time to respond to the Charge and matter was set for mention on 25/4/2019.
15. The matter was mentioned again on 27th June 2019 with appearances from both Counsels for the Applicant and Athlete, Mr. Rogoncho and Mr. Dennis C. Mungai respectively. Counsel for the Athlete requested for leave

to file the Statement of Response within 7 days and with no objection from Applicant's Counsel the matter would next be mentioned on 18th July 2019.

16. On 18th July 2019 a Response to Charge was filed at the Tribunal by the Athlete's Counsel and at mention on same day during which the Applicant was represented by Mr. Rogoncho while Mr. Angwenyi held brief for Mr. Mungai, a hearing date of 8th August 2019 was set for the matter.
17. On 8th August 2019 with a revised panel consisting of Mrs. Njeri Onyango, Panel Chair, Mr. Peter Ochieng, Member and Ms. Kimani Nyokabi, Member, the matter proceeded for hearing. The Applicant was represented by Mr. Rogoncho while Mr. Mungai acted on behalf of the Athlete who was also present in person. At the end of the hearing the Tribunal ordered that Mr. Mungai file and serve written submissions within 21days and Mr. Rogoncho was granted 2 weeks to respond. A further mention was set for 11/9/2019 to confirm filing of submissions.
18. The Respondent's Submissions were filed at the Tribunal on 12th September 2019 and at mention on same date with respective Counsels for the Applicant and Athlete Mr. Rogoncho and Mr. Mungai Counsels present, it was confirmed by Mr. Mungai that his submissions had indeed been filed whereas Mr. Rogoncho requested his 2 weeks to file its written submissions. The Tribunal ordered highlighting of submissions shall be on 2nd October 2019.
19. The Submissions by ADAK were filed at the Tribunal on 2nd October 2019 and at mention on even date with both Counsels present, both advocates concurred that they did not consider that there was anything useful to add to their respective submissions and both asked for a date for the decision which was set to be rendered on 7th November 2019.

III. The Hearing

20. At the hearing ADAK was represented by Mr. Bildad Rogoncho, Advocate while the Athlete, represented by Mr. Mungai was present.

21. ADAK has preferred the following charge against the Athlete: -

    Presence of a prohibited substance *Stanozolol* 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

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

A. Applicant's Submissions

23. Mr. Rogoncho, Counsel for the Applicant, informed the Panel that the Agency wished to adopt and own the Charge Document dated 13th February 2019 and the annexures thereto as an integral part of its submissions.

24. He submitted that the Athlete is a National Level Athlete and therefore the results management authority vested in ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in Anti-Doping Act No. 5 of 2015 to constitute a hearing panel which the Athlete was comfortable with.

25. The Applicant stated that the Athlete denied the ADRV charges and he (Athlete) said he had been in competitive bodybuilding for three years and had never used any performance enhancing substances or methods; rather the Athlete stated that on 1st July 2018 he was involved in a motorcycle accident, suffered injuries on his left knee and referred himself to the nearest hospital where the doctor diagnosed the injuries including

angioedema and prescribed medications to him. *"He further alluded that on receipt of the ADRV Notice from ADAK, he queried the findings of the AAF with his doctor and confirmed that, Neurabol, one of the medications prescribed to him may have contained the prohibited substance. He further provided medical documents in support of his defense."*

26. The Applicant legal position was that it was its task to prove the ADRV to the comfortable satisfaction of the hearing panel and further it relied on Art. 3.2 Namely: *"that facts relating to ADRV may be established by* ***any reliable means*** *including* ***admissions*** *and the methods of establishing facts"*; it set out the presumptions which included *"(a) Analytical methods... (b) WADA accredited labs...* ***are presumed to have conducted sample analysis*** *and custodial procedures in accordance with IS for laboratories..."*

27. The Applicant also spelled out the roles and responsibilities as laid down in ADR/ WADC Art. 22.1 (a) – (f) and the Athlete's duty *"as embodied in the preface to the Anti-Doping Rules"*.

28. It was the Applicant's position that it had ably discharged its burden of proof under Art. 3 of ADAK Rules and WADC; that *"in his defense the Respondent made a number of admissions and a few general denials. In his* ***evidence in chief*** *the respondent made the following admissions*

    (a) He admitted to have participated in 12 local competitions and 1 international competition.

    (b) He admitted to not confirming and crosschecking the ingredients of the medication before ingesting them.

    (c) He admitted to not informing the doctor that he was an athlete before he received treatment.

    (d) He admitted to being aware of prohibited substances such as steroids.

(e) He admitted to never taking time to do any research on the fight against doping."

29. Counsel for the Applicant urged the Tribunal to find that an ADRV had been committed by the Athlete stating, *"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."*

30. The Applicant having charged the Athlete with presence of Prohibited Substance, a violation of Art. 2.1 of ADAK ADR stated Stanozolol is a Non-Specified Substance and constituted a 4-year sanction. Pointing the Panel to Art. 10.2.1, the Applicant averred that the burden of proof shifted to the athlete *"to demonstrate* ***no fault, negligence or intention*** *to entitle him to a reduction of sanction."*

31. Specific pronouncements made by the Applicant in regards to the issues of intention, origin, Fault/Negligence, knowledge and sanction shall be examined in detail herein during the discussion.

B. Athlete's Submissions

32. The Athlete's Counsel Mr. Muigai submitted amongst others that the Athlete through a letter dated 22nd January 2019 denied committing an ADRV and that:

"(a) The Respondent has participated in thirteen (13) competitions; twelve (12) local and one (1) international;

(b) That before the 3rd of November 2018 sample collection, he had never been tested locally or internationally;

(c) He was tested in November and subsequently attended the Dubai Classic in December 2018;

(d) He has never attended or aware of any anti-doping awareness conducted by the Kenya Body-Building Federation or Anti-Doping Agency in bodybuilding;

(e) That he had not heard of Anti-Doping Agency before January 2018;

(f) He had an accident and took himself to hospital. He did not mention to the doctor who treated him that he competes in body-building;

(g) He was prescribed 500mg Naproxen and Neurabol 2mg to manage inflammation and analgesia;

(h) He found out that Neurabol contains Stanozolol after he was informed of the ADRV;

(i) That he would not have taken the medication if he had known it contained Stanozolol;

(j) The Anti-Doping Agency did not advise him of the provision of applying for a retroactive Therapeutic Use Exemption (TUE)

(k) The Anti-Doping Agency authenticated his medical report and prescription"

33. Counsel flagged out Comment to Art. 2.1.1, *"states that; Anti-Doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various Court of Arbitration for Sports 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 the Court of Arbitration for Sports."*

34. Quoting definitions of No significant fault or Negligence as given by ADR, the Athlete's Counsel sought to rely on CAS 2013/A/3327 Marin Cilic v. ITF & CAS 2013/A/3335 ITF v. Marin Cilic.

35. Counsel for the Athlete extensively dealt with the issue of TUE referring to both Art. 4 of the ADR and Art. 5 of the International Standard for TUE and sums up in No. 28 *"It is our humble submission that the Respondent*

satisfies the conditions for grant of a retroactive TUE or in the very least the chance to submit an application for a retroactive TUE."

36. In No. 22 of the Athlete's submissions, Counsel touched on matter of intention, *"Consequently, it has been established that presence of the prohibited substance in the Respondent's urine sample was a result of the medication prescribed following the accident. There was no intention to enhance his performance or gain an undue advantage over his fellow athletes."* During the hearing the Athlete direct prayer to the hearing panel was *"he be treated fairly as he did not commit it intentionally."*

37. In No. 31 the Athlete's Counsel submitted, *"Evidence presented by the Respondent to the Agency was produced that prove that the treatment was legitimate. Consequently, evidentiary burden has arisen on the party alleging the infraction to rebut the effect of that evidence. The Agency did not call any witness to rebut that evidence."*

V. Jurisdiction

38. 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

39. 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

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

41. The Tribunal will address the issues as follows:

a. ***Admissibility of Prayer for Retroactive TUE by Athlete.***

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

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

d. ***Reduction based on No Fault;***

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

A. Admissibility of Prayer for a Retroactive TUE

42. Right from the outset the Athlete argued that a retroactive TUE was appropriate for his case. In his explanation letter to ADAK he stated, *"I am hoping you issue one retrospectively due to the medical evidence provided and within WADA's provisions for special conditions; as this information was unavailable to me prior to the competition."*

43. Perusing through the documents submitted by the Athlete, this Panels finds no evidence of a retroactive TUE application (or filing of any other type of TUE) submitted by the Athlete to ADAK and denied and/or ignored by the Agency. It was necessary for the Athlete to go beyond *'hope'* that ADAK would *'issue one retrospectively'* and proceed to actively apply for one by serving his appropriate medical documentation as spelt out in ADAK ADR Rule 4.4.

44. In the glaring absence of the appropriate TUE request procedurally filed by the Athlete and including any evidence to show that ADAK denied the TUE, this Panel is curtailed from further entertaining an award of a retroactive TUE as prayed by the Athlete in his submissions. This is because ADAK's ADR Rule 4.4.6.1 clearly spells out at what point the TUEs can be addressed to the Tribunal. We dare mention that the opportunity to submit an application for a retroactive TUE was always open to the Athlete in so long as he conformed to the criteria set in the ISTUE Article 4; it would have been prudent for him to file his request in the manner prescribed by ADAK ADR and also upheld by the ISTUE in Article 6, (attaching relevant medical information to support his application) and leave the chips fall where they may.

45. The Panel also observes that in CAS/2008/A/1452 Kazuki Ganaha v. Japan Professional Football League relied upon by the Athlete, the panel

therein was seized of a matter where a TUE had been applied for, by/on behalf of the said athlete, and same **was considered** by respective ADO which then **made a decision**, not only to deny the TUE Application but also to bring an ADRV against the athlete, following which it pronounced a sanction. It is therefore the view of this Panel that, the Ganaha case, in effect was an appeal as allowable under the ADAK ADR/WADC, unlike in the present case where no TUE appeal properly lies before it as per ADAK ADR Rule 4.4.6.1.

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

46. 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.***

47. 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 Athlete admitted to use of prohibited substance, see No.4((g)-h) of his submissions;

    (ii) The laboratory analysis of the A Sample provided by the Athlete on 3rd November 2018 resulted in the AAF; for

presence in the Athlete's body of Stanozolol, a non-specified substance prohibited in-and out-of-competition under the 2018 Prohibited List;

(iii) The Athlete after Notification as under WADC's Article 7.3 (c) did not request for a test of his B Sample, and failing such request the B Samples analysis were deemed waived thereby confirming the A Samples results as under WADC's Article 2.1.2.

48. Therefore on issue of establishment of ADRV, suffice it to conclude that as submitted by the Applicant, *"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."*

49. Therefore, the Athlete bound by the principle of 'Strict Liability" and with no TUE (including a retroactive or advance TUE) to justify the presence of prohibited substance in his body was in commission of an ADRV

C. Was the Athlete's ADRV intentional?

50. The Applicant 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)

51. 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.***

52. 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. [...]***

53. 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, [...].*

54. The Applicant in its submissions stated in Nos. 26 *"For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability,* ***she/he did not know that his conduct constituted an ADRV*** *or that there was no significant risk of an ADRV. According to established case-law of* ***CAS 2014/A/3820, par. 77*** *the proof by a balance of probability requires that* ***one explanation is more probable than the other possible explanation.*** *For that purpose, an athlete must provide actual evidence as opposed to mere speculation.[3]"* And in No.27, *"To prove lack of intention, the athlete must clearly demonstrate that the substance "was not intended to enhance" his performance. It does not suffice to say that one did not know that the supplements contained a banned substance.* ***In Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)*** *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.[4]", the Applicant reiterated.

55. In response, the Athlete not only denied having any intention to enhance his performance but also produced evidence of treatment/prescriptions from Mater Misericordiae Hospital (see page 21-22 in the Charge Document) whose authenticity was not contested by the Applicant who, in its submission at No.29 went on to acknowledge that *"From the explanation given by the athlete, he confirmed the presence of the prohibited substance in his sample through ingestion of* ***Neurabol****, that was prescribed to him as stated."*, and No.30, *"In that regard, we do submit that the origin of the prohibited substance has been established."* The Athlete's explanation hence went beyond a probable 'possible explanation' and was what the Panel would term as corroborative evidence of at least the origin of the prohibited substance.
56. The Athlete was then required to 'demonstrate that the substance was not intended to enhance' his performance without falling back on the plea of ignorance of the Anti-Doping Program. In his submissions the Athlete stated that what had made him refer himself to hospital rather out of the blues was an accident, again another uncontested point. The Athlete did not engage the services of a doctor/expert to support his claim that the dosage prescribed to him did not *"contain sufficient dosages to give me unfair advantage in training"* and it therefore could not amount to deliberate performance enhance but indeed it related strictly to the treatment of a medical condition by remedial medications. That notwithstanding, the facts adduced relating to the accident and hospital visit were undisputed by the Applicant and hence this Panel will examine **Kurt Foggo** further to see what that panel said concerning the timing of ingestion of a prohibited substance in relation to intention to enhance performance;
57. **CAS A2/2011 Kurt Foggo v. NRL**, *'14. The next issue is the issue of intent, the determination of which depends upon the proper construction of the phrase in Rule 154 (WADC 10.4): "that such specified substance was not intended to enhance the Athlete's sport performance". We are of the view that the task of the Panel is to give effect to the natural and ordinary meaning of these words having regard to the context of the rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product which contained the specified substance was not intended to enhance his sport performance.* ***The time at which the absence of intent is to be shown is the time of ingestion of the***

substance. *The athlete must negate an intention at that time to enhance his or her performance in the relevant sport, in this case rugby league, by the taking of the substance. The rule focuses on the nexus or link between the taking of the substance and the performance as a player of the sport. Whether or not the link will be established will depend on the particular circumstances of the case. (Rule 154 (WADC 10.4) would not be satisfied if an athlete believes that the ingestion of the substance will enhance his or her sport performance although the athlete does not know that the substance contains a banned ingredient.)'*

58. The Athlete's claim to having been seeking medical intervention for inflammation and analgesia remained consistent throughout his pleadings and also during the hearing. The Athlete, to his credit, provided various exhibits to anchor his claim; at page 22 of the Charge Document was a copy of a confirmatory letter from the hospital that treated him signed off by the Medical Officer, a Dr. Wanjala while in page 20 the Athlete attached a copy of his Instragam screenshot/notification to his friends of the said motor bike accident with its chain of 63 Comments, all such being collaborative evidence that could be verified or authenticated.
59. In these circumstances the Panel is persuaded by the Athlete's attestations that his ADRV was as a result medication prescribed following the accident and not an orchestrated attempt on his part to enhance his performance or gain an undue advantage over his fellow athletes.
60. In his arguments the Applicant pointed out that the Athlete did not declare the prohibited substance in his DCF; the Athlete on the other hand stated at the hearing that he had stopped taking the medication sometime in October 2018 which was also when he stopped his follow-up visits to the hospital. The Athlete testified that he filled his DCF following directions stipulated therein. Being the first time he was engaging in a doping test he may have not been the wiser to know to fill in medications he had stopped taking a while ago, that is, beyond the time span specified in the DCF. Consequently, we do find that the Athlete's ADRV was not intentional.

D. Reduction Based on No Fault or Negligence/No Significant Fault or Negligence/Knowledge

61. We shall begin in reverse order of aforementioned subtitle (with Knowledge): The Athlete stated that he had engaged in a couple of other sports, namely boxing (since he was 12 years) and rugby (when he joined

high school) before finally concentrating on bodybuilding for the last three years. Further he said he had received no anti-doping training either from his NF or IF. Interestingly, despite the Athlete saying he had participated in 13 bodybuilding competitions (12 local and 1 international), the test that occasioned the ADRV was his very first ever (at the relatively ripe age of 28 years). The Applicant submitting on the issue of knowledge said in its No. 37, *"Further, the Applicant contends, that the Athlete has had an active career in Bodybuilding athletics, and it is therefore curious that he had no exposure to the crusade against doping in sports."*

62. One way for the an athlete to get exposed might have been through Doping Control or perhaps through education via various digital mediums; and this Panel's attention is drawn to the submission by the Athlete in page 17 of the Charge Document (page 2 of Athlete's explanation letter at ii.); *"I believe it is unfair for ADAK to expect athletes, many of whom are laymen to be knowledgeable of very complex area like medication (and obtaining exemptions), when its website is not functioning, and information is not readily available to the public."* The Athlete's attachment at page 23 of the Charge Document does seem to echo the Athlete's frustration when trying to gain the urgently required knowledge to help himself when faced by the AAF. In view of the grave repercussions of ADRVs on athletes' lives, it would be recommended that basic principles for information and education as alluded to in WADC's Articles 18.1 & 18.2 be fairly accessible (very early in progression of sports careers) to all athletes who either desire and/or need them. There is a proverb (from the national language) that loosely translated reads, "Something that you do not have knowledge of is like a very dark night", much like a person waking up at that darkest hour of a moonless night devoid of stars and groping around without any form of illumination to assist maneuverability. To shine a flashlight via adequate awareness/education becomes a critical component in prevention programs for doping-free sport, see WADC's Article 18.1: *"The basic principle for information and education programs for doping-free sport is to preserve the spirit of sports, as described in the Introduction to the Code, from being undermined by doping. The primary goal of such programs is prevention. The objective shall be to prevent the intentional or unintentional Use by Athletes of Prohibited Substances and Prohibited Methods [...]."*

63. On the matter of Fault/Negligence the Applicant asserted that the Athlete failed to discharge his responsibilities under Rules 22.1 and 22 of ADAK ADR quoting **PERIERA-CAS 2016.A 14609**: *"'Given that athletes are under a constant duty to personally manage and make certain that any medication administered is permitted under the anti-doping rules, an athlete cannot simply rely on a doctor's advice it follows that e.g. The prescription of a particular medicinal product by an athlete's doctor does not excuse the athlete from investigating to his or her fullest extent that the medication does not contain prohibited substances.' From the foregoing, the onus is on the Respondent to ensure that he does not ingest medication in a careless manner. Based on his vast experience, he ought to have taken measures to ensure that whatever he ingests does not contain any prohibited substance."* While we wholly agree with the Applicant when it deems the Athlete as being vastly experienced, we wonder whether that experience was only generally in the techniques of his sports as, judging from evidence available, he does not seem to have been subjected to any doping test prior to this first one that also resulted in an AAF. Also no evidence of certification in any doping awareness was adduced neither other proof to indicate his attendance of doping program(s).
64. The Athlete's other prayer was that he be found with No Fault should the Panel rule that he had committed an ADRV. We find that WADC's Articles 10.4 and 10.5.2 are applicable and comment to thereto especially relevant: *"[Comment to Article 10.4 and Article 10.5.2 apply only to imposition of sanction; they are not applicable to determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: [a] a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest {Article 2.1.1} and have been warned against the possibility of supplement contaminated; [b] the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete {Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance} and [c] sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates {Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink}.*

However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence]." Did the Athlete in his pleading demonstrate that his particular circumstances were exceptional or did he prove he took all due/utmost care?

65. In page 17 of the Charge Document (page 2 of the Athlete's Explanation Letter at iii.), the Athlete acknowledged having heard of one ADAK awareness being announced in February 2018, in his own words, *"I can only recall one ADAK awareness session announced – February 2018, I could not attend due to working commitments following my recent return to Kenya from Qatar. I and other athletes were not apprised of what was discussed at the ADAK awareness sessions. No minutes were published by ADAK or KBBF, no notices or clear directions were given. We were just told to "keep it clean" [...]."*
66. Very crucially this Panel notes that the Athlete admits being too busy to attend that 'one' session yet, by the end of that same year, that missed opportunity came home to roost. The sport of bodybuilding the Athlete confessed was also his livelihood. We venture that, had he treated attendance to that one Doping awareness session with the same import he told the Panel he gave all other aspects of his day to day sport training, he might have bent backward to make time to honor it and probably could have taken home information that may have extricated him from the bind he now finds himself in; for example on suffering the accident and having rushed to hospital first he may have known to explain to the doctor attending to him of his obligation not to use Prohibited Substances – which as the Applicant notes he did not do – so that the doctor might have prescribed him alternative medication not on the Prohibited List, or advised that of necessity the drugs on that list must be used, leading the Athlete to seek ADAK's intervention whether for a TUE, advance or retroactive as circumstances dictated.
67. The mundane reason (which does not reflect an exceptional situation as such) given by the Athlete for not attending that single call by ADAK to grace the awareness session weakens his otherwise vigorous attempt to depict the limited doping education granted. Just as he adhered to his training programs with utmost discipline, had the Athlete treated the call to attend what would have been his very first doping awareness session as an essential cog thereto and factored it into his busy schedule, he might have gained an inroad to information which might have culminated in a

far more different scenario than the present one – after all, as stated in the Introduction to the Code, "*anti-doping rules, like competition rules, are sports rules governing the conditions under which sport is played. Athletes or other Persons accept these rules as a condition of participation and shall be bound by these rules*", therefore they should have equal footing as all other sports technical rules athletes bear allegiance to. The Athlete is schooled to a relatively appreciable level and at the hearing he confirmed that he had successfully attended an online course with International Science Institution for certification in Fitness. With a smart phone at hand and triggered by what basics that might have been imparted at that February 2018 session, he may well have been able to undertake research into the essentials of doping prior to his in-competition test and thereby kept his allegiance to the Doping Program as required in ADAK ADR Rule 22.1.

68. 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.*

69. Also see **Foggo** para. 22, "*The evidence shows that athletes were encouraged to take pre workout substances for gym training sessions, a practice which the Club condoned. It also shows that the appellant, a young professional player, was given very limited formal drug education by the Club. Nonetheless, the Panel is conscious of the provisions of Rules 32, 37, 45 and 233 of the Policy which provide, in effect, that the athlete is under a personal duty to ensure that there is no violation, and that ignorance is no excuse. In our opinion it cannot be too strongly emphasised that there is imposed a continuing personal duty to ensure that ingestion of a product will not be in violation of the Code. To guard against unwitting or unintended consumption of a prohibited or specified substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis while ever the athlete uses the product. There is a salutary lesson in this respect to be learned from the circumstances of CAS OG 06/001, where the athlete tested positive to a banned substance at the World Cup in November 2005. The athlete freely admitted that he had been taking the banned substance since 1999 for medical reasons and that he had checked the prohibited list on the USADA*

website every year for the 5 years from 1999 to 2004. In each such year the substance was not on the banned list but he failed to check in 2005 when it was. The Panel in that case found that the athlete had not exercised "the utmost caution" in 2005."

70. When concluding his letter the Athlete also submitted that *"[…] I therefore risk public humiliation in the event ADAK deems I am responsible for committing an ADRV […]."* This Panel adopts the principle espoused in **CAS 2017/A/5015 FIS v. Therese Johaug & NIF** para.224, *"Nonetheless none of these reasons* (stress or stigma) *are relevant considerations with respect to Johaug's sanction. The sanction must be commensurate with Ms. Johaug's degree of fault and the factors Ms. Johaug has pled do not warrant a reduction beyond the prescribed minimum. In defining fault, the WADA Code at Appendix 1 states: "[…] the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibilty, or the fact the Athlete only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."*
71. Consequent to the aforementioned, the Panel finds the Athlete does not satisfy the Code's "the utmost caution" requirement to qualify for a finding of No Fault.
72. The Athlete in his pleadings stated that, *"For many of us ordinary people, KBBF is our primary source for information and direction."*, and that is as it should be; WADC's Article 20.3.12 is instructive of what needs to be done in joint effort between ADAK and KBBF, therefore, it is recommended that NFs become comprehensively compliant with the Code and fulfill their side of the contract by giving timely and dependable anti-doping education and not the kind of haphazard/kneejerk or reactive interventions the Athlete largely seemed to have received in the run-up to notification of his AAF.

E. Sanctions

73. 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.

74. 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. ...

75. 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.

76. It is also noted by the Panel that this was the Athlete's first ADRV.

VIII. DECISION

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

(i) The applicable period of ineligibility shall be two (2) years;

(ii) The period of ineligibility shall be from 27th December 2018 when the Athlete was provisionally suspended;

(iii) All Competitive results obtained by the Respondent Athlete from and including 3rd November 2018 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.

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

Dated at Nairobi this 5th day of _____ *December*, _____2019

Mrs. J Njeri Onyango, Panel Chairperson

Ms. Mary N. Kimani, Member

Mr. Peter Ochieng, Member