

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 1 OF 2019

IN THE MATTER BETWEEN

ANTI-DOPING AGENCY OF KENYA (ADAK).....APPLICANT

-versus-

RHOLEX JELIMO KOGO.....RESPONDENT

DECISION

Mention: 4th December, 2019

Panel: John M Ohaga - Chairperson
Njeri Onyango - Member
Mary N Kimani - Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant
Mr. Gichangi Ndirangu, Advocate for the Respondent.

ABBREVIATIONS AND DEFINITIONS

The following abbreviations used here have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR- Anti- Doping Rule

ADRV-Anti- Doping Rule Violation

AK-Athletics Kenya

IAAF-International Association of Athletics Federation

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

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

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No. 5 of 2016. It is the body charged with managing Anti-Doping activities in the country including results management.
2. The Respondent Rhonex Jelimo Kogo is a female adult of presumed sound mind, an International Level Athlete to whom the Anti-Doping Act No. 5 of 2016 and ADAK ADR apply.

Jurisdiction of the Tribunal

3. The Tribunal has jurisdiction under Section 58 (b) and (c) of the Sports Act No. 25 of 2013 which provides that the Sports Tribunal shall determine other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear and appeals from the decision of the Registrar.
4. The parties admitted the jurisdiction of this Tribunal to determine the case.

Procedural History

5. ADAK filed a Notice of Charge dated 7th January 2019 at the Sports Disputes Tribunal (SDT) on 15th January 2019, with a request to the SDT to constitute a hearing panel.

6. The Tribunal issued directions which required the Applicant to serve the Mention Notice, Notice to Charge, Notice of ADRV, Doping Control Form and all relevant documents on the Respondent within 15 days of the date hereof.
7. The matter was set for mention to confirm compliance on 7th February 2019 and a panel comprising Mr. John Ohaga, CI Arb, Mrs. Njeri Onyango and Ms Mary N Kimani was constituted to hear the matter.
8. The Applicant filed the Charge Document dated 22nd February 2019 at the SDT on 5th March 2019.
9. The Respondent filed a Memorandum of Appearance and Statement of Defence, both dated 16th August 2019, on the same day.
10. The matter came up for mention to confirm compliance on 21st August 2019 and was listed for hearing on 25th September 2019 but the hearing was then adjourned to 2nd October 2019.
11. The Applicant was granted 15 days to file submissions and the Respondent was given 14 days to respond and the matter was set for mention to confirm compliance on 7th November 2019.
12. The Applicant filed their submissions dated 15th October 2019 on 16th October 2019.
13. The matter was mentioned on 13th November 2019 and the Respondent reported that they had not filed their submissions and requested for 2 weeks to comply. The matter was scheduled for a mention to confirm compliance on 27th November 2019.
14. The Respondent filed their submissions dated 4th December 2019 on the same date. The decision was set to be given on 23rd January 2020.

Facts and Background

15. The Appellant vide the Charge Document dated 22nd February 2019 brought a charge before the SDT against the Respondent where the Appellant pointed out that the Respondent's "A sample" returned an AAF presence of a prohibited substance Prednisolone and Prednisone.

16. The Appellant prayed that all competitive results obtained by the Respondent from 28th October 2018 until date of determination be disqualified with all resulting consequences.
17. The Appellant also prayed that the Respondent be sanctioned to a four year period of ineligibility as provided by the ADAK Anti-Doping Code, Article 10 of ADAK and WADC Rules and also prayed for costs.

Hearing and Parties Evidence

ADAK's Case

18. Mr. Rogoncho appearing for the Applicant did not call any witness and fully relied on the Charge Document and annexed documents as filed.
19. Mr. Rogoncho pointed out that the Athlete's 'A' sample analysis returned an AAF or the presence of a prohibited substance Prednisolone and Prednisone.
20. Prednisolone and Prednisone are prohibited substances under Section 9 of the 2018 WADA Prohibited List. They are listed as Glucocorticoids under the list.
21. It was ADAK's position that the Respondent had no applicable TUE nor any reason to have the stated substance in her sample.

Respondent's Case

22. Mr. Gichangi Ndirangu of C.G Ndirangu & Co. Advocates was acting for the Respondent and they did not call any witnesses and fully relied on the Statement of Defence and submissions to present their case.
23. The Respondent via a Statement of Defence presented her case where she admitted to having the prohibited substances in her urine sample.
24. The Respondent then explained that she consumed the prohibited substances through some drugs prescribed to her by a doctor 11 days before the 42 Kilometers Standard Chartered Marathon race where she finished at position 4.

25. The Respondent avers in the Defence that she visited ADAK offices and was asked to write a letter explaining how the medication entered her body and she proceeded to write the letter. She was later informed that the letter was ineligible, and she proceeded to write another letter.

Parties Submissions

ADAK's Submissions

26. ADAK filed its written submissions on 16th October 2019. It was noted that IAAF Competition Rules, IAAF Anti- Doping Regulations together with WADC and ADAK ADR apply to the Respondent.
27. ADAK submitted that the athlete's two urine samples were collected in an in-competition testing during the 2018 Standard Chartered Marathon in Kenya by ADAK Doping Control Officers and the samples were split and given references numbers A 4364051 and B 4364051 as prescribed.
28. Both samples were transported to the WADA accredited Laboratory in Doha, Qatar. Both analysis of the A sample returned an Adverse Analytical Finding (AAF) presence of a prohibited substance Prednisolone and Prednisone.
29. ADAK submits that the AAF was communicated to the Respondent by Japhter K. Rugut EBS, the ADAK CEO through a Notice of Charge and a mandatory Provisional Suspension dated 11th December 2018. The athlete was offered an opportunity to provide an explanation for the same by 27th December 2018.
30. The Respondent vide a letter dated 24th January 2019 denied ever using the prohibited substance. She stated that she had on various occasions visited Kapkimibir Dispensary and Kapsabet District Hospital for treatment of her prolonged chest problem.
31. ADAK submits that the response and conduct of the Respondent were evaluated by ADAK and it was deemed to constitute an anti-doping rule violation and referred to the Sports Dispute Tribunal for determination.
32. ADAK also submitted that the athlete had responsibilities under article 22.1 of ADAK ADR as follows:

- a) To be **knowledgeable** of and comply with the anti-doping rules.
- b) To be **available** for sample collection
- c) To **take responsibility**, in the context of anti-doping, for what they ingest and use.
- d) To **inform** medical personnel of their obligation not to use prohibited substances and prohibited methods and to take responsibility to make sure that any medical treatment received does not violate these anti-doping rules.
- e) To **disclose** to his or her international federation and to the agency any decision by a non-signatory finding that he or she committed an anti-Doping rule violation within the previous 10 years.
- f) To **cooperate** with Anti-doping organizations investigating anti-doping rule violations.

33. Commenting on the Respondent's evidence, ADAK submits;

- a) She admitted ingesting the prohibited substance which she indicated in the Doping Control Form
- b) She admitted to not confirming and cross-checking the ingredients of the medication before ingesting them.
- c) She admitted to not informing the doctor that she was an athlete before she received treatment.
- d) She admitted to never taking time to do any research on the fight against doping.

34. ADAK therefore submitted that having met its obligations and proved the presence of a prohibited substance, the burden of proof shifted to the athlete similarly to article 10.2.1 to demonstrate no fault, negligence or intention to entitle them to a reduction of sanction.

35. ADAK'S position is that for an ADRV to be committed non-intentionally, the athlete must show on a balancing probability that, they did not know that their conduct constituted an ADRV, or that there was no significant risk of an ADRV. Relying on CAS 2014/A/3820, par 77 ADAK submitted the proof on a balance of probability requires that "one explanation is more probable than the other possible explanation". The athlete must provide actual evidence as opposed to mere speculation.

36. ADAK relied on the following past decisions:

- i. *CAS 2014/A/3820- Par. 77*

“Proof by a balance of probability requires that one explanation is more probable than the other possible explanation” The athlete must provide actual evidence as opposed to mere speculation.

- ii. **CAS A2/2011 Kurt Foggo -vs- International Rugby League (WLR).**
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.
- iii. **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26**
“The athlete’s fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any prohibited substance”
- iv. **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.”

37. ADAK therefore submits that the Respondent herein has not met any of the basic conditions so as to benefit from a reduction of the sanction.

Respondent’s Submissions

38. It is admitted that the Respondent is an international athlete. It is submitted that she suffers from chest pains which date back before she started professional athletics. It is admitted that she experienced further chest pains 11 days before the Stanchart Marathon and proceeded to Kapsabet County Referral Hospital and was given medicine and prescription to manage the condition.

39. The Respondent does not object to the presence of the prohibited substance in her urine sample A. The Respondent admits that she did not engage in conduct that she knew constituted an anti-doping rule violation, she was only taking the medication to cure the chest pains. The Respondent therefore admits that the doping act was not intentional.

40. The counsel for the Respondent submits that the substance in question is a prohibited substance and further submits that it is the responsibility of ADAK "to prove that the athlete used the substance intentionally".
41. It is submitted she did not put herself at the risk of violating anti-doping rules. It is further submitted that she was only taking her medicine to cure her pains and did not consume the prohibited substance in order to enhance her performance.
42. The Respondent's counsel relied on *Arbitration CAS A2/2011 - Kurt Foggo vs National Rugby League (NRL)*
43. It is submitted that the Respondent is a Standard seven dropout without any meaningful background on anti-doping rules violation and she is also very remorseful for violating, albeit unintentionally, the anti-doping rules in her testimony and also relies on her letter to the Applicant on 7th January 2019.
44. The Respondent's counsel submits that the Honourable Tribunal should invoke the provisions of Article 10.5 of the WADA Code, 2015 on reduction of the period of ineligibility based on no significant fault or negligence and Article 10.5.1 on reduction of sanctions for specified substances or contaminated products for violation of Article 2.1, 2.2 or 2.6 of the WADA code, 2015.
45. The Respondent's counsel relies on Sub Article 10.5.1.1 of the WADA Code, 2015 on specified substances provides that:
- "where the anti-doping rule violation involves a specified substance, and the athlete or other person can establish no significant fault or negligence, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years of ineligibility, depending on the athlete's or other person's degree of fault".**
46. The Respondent's counsel therefore submits that the athlete should be punished to a period of ineligibility of eleven months starting from 27th December 2018 when she was provisionally suspended and be deemed as having fully served the period of ineligibility.

DECISION

47. The Panel has reviewed the foregoing evidence and submissions of the parties and take note of all the circumstances surrounding the charge.
48. The Panel particularly notes that the Respondent has not mounted any challenge on the process of sample collection. A challenge has also not been raised on the presence of a banned substance in the athlete's blood.
49. ADAK relies on the findings of the laboratory and of course the provisions of Section 9 of the 2018 WADA prohibited list and Article 2.1 of ADAK Anti-Doping Rules to put their case forward against the Respondent.
50. The ADRV having been established, the burden shifts to the Respondent to answer to the ADRV and to establish circumstances to help the panel see whether the Respondent can benefit from the requirements set in the WADC reduction of the applicable sanctions.
51. It is therefore important to look at the available explanations or responses given by the Respondent both to ADAK and in these proceedings. Having looked at the Respondent's Statement of Defence, the Respondent avers that she was only consuming the medicine prescribed to her to cure her chest pains. She has specified these medicines in the Doping Control Form.
52. Prednisolone and Prednisone are listed as stimulants and are prohibited substances under the WADA Prohibited List of 2018.

RESPONDENT'S RESPONSIBILITIES

53. Paramount to the findings of the Tribunal are the provisions of Article 2.1.1 and 22 of the WADC and ADK Rules which are premised on the fact that it is the athlete's personal duty to ensure that no prohibited substance enters his/her body. The athlete is essentially deemed to be personally liable for any prohibited substance or its metabolites or markers found to be present in their samples. This position is emphasized in numerous decisions of CAS such as *CAS 2012/A/2804-DIMITAR KUTROUSKY vs. ITF page 26*.

"The athlete's duty is measured against the fundamental duty that he or she owes under the programme and WADC to do everything in his or her power to avoid ingesting any prohibited substance."

54. We have already held that the ADVR has been proved by the ADAK to our satisfaction in the prescribed manner.
55. The circumstances as submitted by ADAK, without more point to the conclusion that the Respondent ingested the prohibited substance with intend to dope or in reckless abandon of the duty owed to the programme, it would therefore follow that in the absence of explanation by the Respondent, the standard of proof is in that instance greater than a mere balance of probability but less than proof beyond reasonable doubt.
56. 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.
57. In this case it is notable that the athlete never made any effort to inform the medical personnel of her duty not to use prohibited substances and prohibited methods and to take responsibility to make sure that any medical treatment received does not violate the Anti-doping rules.
58. In her response, she has nowhere in her pleadings stated that she informed the doctor treating her that she is an athlete and she is obligated not to use the prohibited substances.
59. In her submissions, the Respondent claims that the presence of prohibited substances was not intentional since she was not aware of the presence of prohibited substances in the medicine, she was taking to cure her chest pains. The panel holds that ignorance is not a defence and relies on the CAS decision in *CAS A2/2011/KURT FOGGO-vs- NATIONAL RUGBY LEAGUE*.

“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 intention.”

60. The Panel, however, takes note of the fact that the medication was disclosed in the Doping Control Form. This points to a lack of intent on the Athlete's part. ADAK has not demonstrated any circumstances to displace the Athlete's reliance on Article 10.5.1.1 of the Wada Code in view of the nature of the substances.

61. It is the panel's view from the circumstances narrated by the athlete that while she failed to exercise the minimum duty of care, she has also explained how and why the substances were ingested.

SANCTION

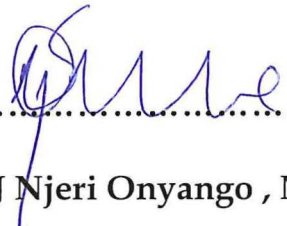
62. From the foregoing, the Panel is of the view that the following orders are appropriate in the present circumstances:

- a) The Athlete shall serve a period of two (2) years from the date of provisional suspension pursuant to Article 10.1 ADAK ADR.
- b) That all competitive results obtained by the Respondent from and including 28th October 2018 until the date of provisional suspension are disqualified with all resulting consequences including forfeiture of medals, points and prizes (Article 10 ADAK ADR)
- c) Each party shall bear its own costs of these proceedings.
- d) Parties shall have the right to appeal pursuant to Article 13 of the WADA code and part IV of the Anti-doping Act No. 5 of 2018 (as amended)

Dated at Nairobi this 27th day of February, 2020


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John M. Ohaga, C.Arb
Panel Chairperson


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Ms. Mary N. Kimani, Member


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Mrs. J Njeri Onyango, Member