

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 22 OF 2019

IN THE MATTER BETWEEN

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

-VERSUS-

IRINE JEPTOO..... RESPONDENT

DECISION

HEARING: 29<sup>th</sup> January, 2020

<b>PANEL</b>	:	1. John Ohaga	Chairperson
		2. Njeri Onyango	Member
		3. Mary Kimani	Member

### **APPEARANCES**

Mr. Bildad Rogoncho for Applicant.

No appearance for the Respondent.

### **ABBREVIATIONS AND DEFINITIONS**

The following abbreviation used herein have the indicated

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

## **1. THE PARTIES**

- 1.1 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) (hereinafter the Applicant)
- 1.2 The Respondent is a female adult of presumed sound mind, an Elite International Level Athlete (hereinafter 'the Respondent').

## **2. JURISDICTION**

- 2.1 The Sports Disputes Tribunal has Jurisdiction under Sections 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.

## **3. APPLICABLE LAWS**

- 3.1 The Respondent is an International Athlete, the WADC, the IAAF Competition Rules, IAAF Anti-Doping Regulations and the ADAK ADR Rules 2016 do apply to her.

## **4. BACKGROUND**

4.1 The facts as set out in the charge document show that on 21<sup>st</sup> April, 2019 during the KL, Tower International Towerthon Challenge in Kuala Lumpur, Malaysia, the Respondent participated in the 10 & 20 Km race despite being aware of serving a provisional suspension with effect from 22<sup>nd</sup> September 2017 and that she subsequently had been placed on a two-year period of ineligibility imposed on her by this Tribunal on 28<sup>th</sup> March 2019, for a previous Anti-Doping rule violation, being Presence of Prohibited Substance, Prednisolone in her Urine sample collected by CHINADA Doping Control Offices on 19<sup>th</sup> March, 2017 during Yuanan Marathon 2017 race held in China.

4.2 Under the current charge, ADAK's position is that the Respondent was informed of her participation in an athletic competition contrary to Article 10.12 of ADAK Anti-Doping Rules (ADR) and World Anti-Doping Code (WADC) vide a letter dated 21<sup>st</sup> May 2019 wherein, the Respondent was required to provide an adequate explanation for the violation by 4<sup>th</sup> June, 2019. (Page 18 of the Charge Document).

4.3 The Respondent responded to the Notice of Rule Violation vide a letter dated 21<sup>st</sup> May 2019 (Page 18 of the Charge Document).

21/5/2019 To ADAK

Dear Sir,

“ .....

Sijawahi tumia dawa mbaya” (I have never used any prohibited substance)

4.4 The Respondent did a further Response through a letter dated 24/05/2019 (Page 19 of the Charge Document).

24/05/2019

Hello Sir,

I was suspended in 2017 in March 19<sup>th</sup> after I participated in Yuanan Marathon. According to my understanding, I thought the suspension started from the date of the race until this year march 19<sup>th</sup> 2019.

I was really innocent about the date and the month of which the ban should end as no one ever explained to me concerning the issue.

Kindly requesting ADAK not to penalize me because I was really innocent. Thank you

## Regards

Irene.

- 4.5 On 8<sup>th</sup> July, 2019 the ADAK filed a Notice of Charge against the Respondent, the same was reviewed by the Chairperson of the SDT who constituted the Panel to hear this matter as follows:
- a. John M Ohaga
  - b. Mrs. J Njeri Onyango
  - c. Ms. Mary Kimani
- 4.6 Mr. Bildad Rogoncho, for the Appellant, indicated that the Charge document was served upon the Respondent vide her WhatsApp telephone number 0792-435-305 on 30<sup>th</sup> September 201 by Mr. Mwakio. However, the Respondent failed to respond.
- 4.7 On 4<sup>th</sup> October, the Respondent was served with a mention Notice for 16<sup>th</sup> October, 2019 by Mr. Mwakio vide her aforesated WhatsApp telephone number and she still failed to respond.
- 4.8 On 18<sup>th</sup> October, 2019 Mr. Mwakio served the Respondent with a mention notice for 28<sup>th</sup> November, 2019 vide WhatsApp and she still failed to respond.
- 4.9 On 19<sup>th</sup> December, 2019 Mr. Rogoncho served the Respondent with a hearing notice for 29<sup>th</sup> January, 2020 vide WhatsApp and she still failed to respond.

4.10 ADAK had filed the formal charge with all the supporting documents. The documents filed were:

**List of Documents**

1. Investigations Report dated 16<sup>th</sup> May 2019
2. ADRV Notice dated 21<sup>st</sup> May 2019
3. Letter dated 21<sup>st</sup> May 2019
4. Letter dated 24<sup>th</sup> May 2019
5. World Anti-Doping Code
6. IAAF Rules
7. ADAK Anti -Doping Rules

**5. HEARING**

5.1 The matter came up for hearing on 29<sup>th</sup> January, 2020. The Applicant was represented by Mr. Rogoncho. There was no appearance from the Respondent in person or through an Advocate. The panel having perused the Affidavit of service filed by the Applicant was satisfied that the Respondent had been properly notified of the matter and the hearing date, she was duly served. The Panel therefore elected to proceed with the hearing.

- 5.2 During the said hearing ADAK presented Mr. Dennis Kiprop Keitany as their only witness. Mr. Keitany is a compliance officer at the Anti -Doping Agency of Kenya (ADAK).
- 5.3 The witness testified before this Panel that ADAK Director for Standards and Compliance notified him that the Respondent who was serving a two-year ban had been identified receiving a cheque from racing organizers for finishing in third Place.
- 5.4 The witness further testified that the director forwarded to him "screenshots of the conversation between herself and the executive member of Athletics Kenya, one Mr. Barnaba Korir regarding the matter. That when he referred to the images sent by Mr. Korir, he noted that a Mr. Aman Yusof, had posted on his facebook page a picture of an athlete receiving a cheque, as well as results indicating the Respondent finished in third place in the KL Tower International Towerthon Challenge 2019.
- 5.5 The witness further stated that when he referred to this Tribunal's decision Anti- Doping No. 27 of 2017, he noted that the Respondent had been declared ineligible to participate in any athletic competition/event for a period of 2 years from 22<sup>nd</sup>



September, 2017. That he also checked out the website indicated in the posted photos at [www.results.sportshive.com](http://www.results.sportshive.com) and confirmed that the Respondent was position 3 in the women's category and position 36 overall.

- 5.6 The Witness stated that he confirmed the Respondent's identity from her known WhatsApp number, her Passport number A2412291 and her traveler history report from the Department of Immigration.
- 5.7 The Respondent was served with the charge document, mention notices and the hearing notice vide her WhatsApp telephone number 0792-435-305. The panel takes note that the above telephone number is registered as an address of service by the Respondent and was previously used to effect service and facilitate communication in Anti-Doping No. 27 of 2017 against the Respondent. Further, this Panel notes that the Respondent engaged in communication with ADAK's Counsel, Mr. Rogoncho in communication relating to this matter on 25<sup>th</sup> May 2019 through the same number. Upon service of the proceedings herein the Respondent through the same telephone number, the message was

successfully delivered as indicated in the attached exhibit of 25<sup>th</sup> May of 2019. In view of this, the Panel took the position that the Respondent was notified of the charge filed and these proceedings, and on account of her silence, she is taken to have waived her right to a hearing. The panel therefore proceeded to decide the matter based on the documents availed and attached to the charge document and the Witness' testimony.

5.8 None of the parties filed any submissions, we will therefore proceed to review the matter and render a decision.

## 6. DECISION

6.1 The Panel needs to consider whether the evidence tendered by ADAK and the testimony of Denis Kiprop Keitany can serve as grounds for the Respondent to be sanctioned to a new period of ineligibility as provided by the ADAK Anti-Doping Code, Article 10 of ADAK and WADC Rules.

6.2 Furthermore, the Panel needs to consider whether there was a violation of the Prohibition during the period of ineligibility.

6.3 *With reference to the grounds for additional period of ineligibility:*

### 6.3.1 WADC Article 10.12.1

**“No Athlete or other *Person* who has been declared *Ineligible* May, during the period of *Ineligibility*, participate in any capacity in a *Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory*, *Signatory’s* member organization, or a club or other member organization of a *Signatory’s* member organization, or in *Competitions* authorized or organized by any professional league or any international - or national - level Event organization or any elite or national - level sporting activity funded by a governmental agency.**

**An *Athlete* or other *Person* subject to a period of *Ineligibility* longer than four years may, after completing four years of the period of *Ineligibility*, participate as an *Athlete* in local sport events not sanctioned or otherwise under the *jurisdiction* of a *Code Signatory* or member of a *Code Signatory*, but only so long as the local sport event is not at a level that could otherwise qualify such *Athlete* or other *Person* directly or indirectly to**

compete in [or accumulate points toward] a national championship or *International Event*, and does not involve the *Athlete* or other *Person* working in any capacity with *Minors.....*”

6.4 ADAK has presented tangible evidence implicating the Respondent

- i) Exhibit 1 is a copy of a picture showing the Respondent receiving a cheque prize after she finished in third place in the KL Tower International Towerthon Challenge 2019.
- ii) Exhibit 2 is a copy of KL Tower International Towerthon Challenge 2019 participants list indicating Irine Jeptoo Kipchumba, the Respondent Bib Number C2265 as position 3 in the women’s category and position 36 overall.
- iii) Exhibit 3 is a copy of an image of the Respondent’s WhatsApp number +254-792-

435-305 profile picture similar to that of an athlete receiving a cheque prize in exhibit 1.

- iv) Exhibit 4 is a Doping control form dated 11/03/2017.
- v) Exhibit 5 is a letter from the department of Immigration attached with the Respondent's copies of the passport, identity card and traveler history as captured by personal Identification Secure Comparison and Evaluation System (PISCES).
- vi) Exhibit 6 is the Investigation Report dated 16<sup>th</sup> May 2019.

6.5 The Respondent did not dispute her participation in KL Tower International Towerthon Challenge 2019. She instead admitted in her letter of 21<sup>st</sup> May 2019, to have participated in two other competitions, being Eldoret City Marathon and Kass FM Marathon.

6.6 The Panel notes that the Respondent failed to file any response to the charges or even appear before the tribunal either in person or

by way of legal representation though duly notified about the proceedings.

6.7 Therefore, having regard to the aforementioned the Panel concurs with the inference made and evidence tendered by ADAK that above a mere balance of probability and to the comfortable satisfaction of this Panel, that the Respondent was;

- i) Very much aware of her ineligibility during the KL Tower International Towerthon Challenge 2019.
- ii) That her ineligibility period ran from 22<sup>nd</sup> September 2017 to 22<sup>nd</sup> September 2019.

6.8 In *Robert Kajuga and Africa Zone v RADO APPEAL CASE NO. 1/2016*, the Appeal Panel held that when considering the degree of fault on the part of the Athlete the following factors are relevant; the athlete's experience; whether the athlete is a minor; the degree of risk that should have been perceived by the Athlete; the level of care and investigation exercised by the Athlete to what should have been perceived level of risk; whether the Athlete suffers from any impairment; any other relevant factors and specific

circumstances that can explain the Athlete departure from the expected standard of behavior.

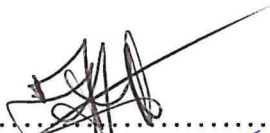
6.9 The Respondent is a 29-year old elite Athlete, who had participated in SDT, Anti-doping No. 27 of 2017 as a Respondent for presence of a Prohibited Substance. There are 2 responses to ADAK from the athlete after receiving the Notice of rule violation in May 2019. The responses clearly show that the athlete admits having participated in the stated Marathon race as per the charge document. She however tries to explain in her letter, that she miscalculated the effective dates of the sanction and wrongly believed that the period of ineligibility ended in on 19<sup>th</sup> March,2019. There is no effort to contact ADAK or AK to confirm this belief, and there is really no basis for her to hold such a belief.

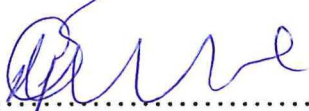
6.10 Therefore, when assessing the degree of fault on the part of the Athlete, there is a possibility for sanction of additional period of ineligibility.in this instance, we find that the athlete bears a high degree of fault for her failure to act in a prudent manner to confirm her alleged belief.


- 6.11 ADAK has successfully charged and proved the violation of the Prohibition of Participation During Ineligibility as sanctioned by this Tribunal in SDT, Anti-doping no. 27 of 2017.
- 6.12 Based on the foregoing, the sanction applicable on the Respondent in terms Article 10.12.3 of shall be a period of TWO (2 years) with effect from 22<sup>nd</sup> September, 2019.
- 6.13 All results obtained by the Respondent from and including 21<sup>st</sup> April, 2019 inclusive of any points and prizes are disqualified.
- 6.14 Each party shall bear its own costs of these proceedings.
- 6.15 The right to appeal is provided for under Article 13.2.1 of the WADC and Article 13 of the ADAK rules.

DATED at NAIROBI this 05 day of 03 2020

Signed

JOHN OHAGA *for*  .....

MRS. NJERI ONYANGO  .....

MS. MARY KIMANI  .....