REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING NO. 24 OF 2019

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

-VERSUS-

JOY KEMUMA LOYCE.....RESPONDENT

DECISION

Hearing: 11th December 2019

Panel:
Gichuru Kiplagat – Chairperson
Gabriel Ouko – Member
Peter Ochieng – Member

Appearances: Mr. Bildad Rogoncho, Counsel for the Applicant (ADAK);

The Athlete appeared in person

Sports Disputes Tribunal

1. The Parties

1.1 The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016 whose address of service is Anti-Doping of Kenya, Parklands Plaza, 2nd Floor, Muthithi Road/Chiromo Lane Junction, P.O. Box 66458-80100, Nairobi. It is represented in this matter by Mr. Bildad Rogoncho.

1.2 The Respondent is a female adult and an elite national level athlete from Kapsabet Kenya, aged 33 years and participates in cross-country ('**the Athlete**').

1.3 The Sports Disputes Tribunal (hereinafter 'the Tribunal') is an independent Sports Arbitration Institution created under the provisions of the Sports Act, 2013. Members of the Tribunal are appointed in terms of Section 6 of the said Act.

2. Background

2.1 The proceedings have been commenced by the Applicant filing a notice to charge the Athlete dated 11th September, 2019 signed by Mr. Bildad Rogoncho and addressed to the Chairman of the Tribunal and received on 11th September, 2019 at the Tribunal.

2.2 The Applicant brought charges against the Athlete vide a charge document dated 11th September, 2019. It stated that on 13th October, 2018 during the Ndalat Gaa Cross-country in Kenya, Doping Control Officers ('DCO') collected urine samples from the said Athlete. Assisted by the DCO, the Athlete was asked to split the sample into two separate bottles on each occasion which were the given reference numbers A4163796 (the A' sample) and B 4163796 (the B' samples) in accordance with the prescribed WADA procedures (see attached a Doping Control Form dated 13th October, 2018 'JKL1').

2.3 Both samples were transported to the WADA accredited Laboratory in Doha, Qatar ("**the laboratory**"). The laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Both analysis of the A Sample returned an Adverse Analytical Finding ("AAF") presence of a prohibited substance Erythropoietin (EPO) which is listed as

Sports Disputes Tribunal

peptide hormones, growth factors, related substances and mimetics/erythropoietin under S. 2 of WADA's 2018 Prohibited List.

2.4 The findings were communicated to the Athlete by Japeth K. Rugut EBS, the Applicant's Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 7th August, 2019. In the said communication the Athlete was offered an opportunity to provide an explanation for the same by 21st August, 2019 as confirmed by Notice of Charge dated 7th August, 2019 ('JKL3').

2.5 The same letter also informed the Athlete of her right to request for the analysis of B Sample and other avenues for sanction reduction including prompt admission and requesting for a hearing date and gave 21st August, 2019 for the same.

2.6 The Athlete responded vide email dated 19th August, 2019. She denied the charges and stated that ever since she started working with the athletics family she has never heard of or used any prohibited substances. She stated that she uses normal supplements such as Reflex, Isostar and Ferogblin. She further stated that she had been tested severally in the past years. This is confirmed by a copy of her email dated 9th August, 2019 attached as 'JKL4'.

2.7 The Athlete did not request a sample B analysis thus waiving her right to the same under IAAF rule 37.5 and confirmed that the results would be the same as those of sample A in any event.

2.8 The response and conduct of the Athlete was evaluated by Applicant and it was deemed to constitute an anti-doping rule violation and referred to the Tribunal for determination.

2.9 A charge document was prepared and filed by the Applicant and the Athlete presented a response thereto.

3. The Charge

3.1 The Charge against the Athlete is as set out in the Charge Document dated 7th August, 2019 and filed at the Tribunal on the same date.

Sports Disputes Tribunal

3.2 Subsequently, Applicant is preferring the following charged against the Athlete: -

(1) Presence of prohibited substance (EPO). Erythropoietin (EPO) is a Non-Specified substance listed as Peptide hormones, growth factors, related substances and mimetics/erythropoietin under S.2 of WADA's 2018 Prohibited List.

(2) The Athlete's AAF was not consistent with any applicable TUE recorded at the AAF for the substances in question and there is no apparent departure from the IAAF Anti-doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings.

(3) The Athlete did not request a sample B analysis thus waiving her right to the same under IAAF rule 37.5 and confirmed that the results would be the same with those of sample A in any event.

(4) The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an anti-doping rule violation.

(5) No plausible justification has been advanced for adverse analytical finding.

3.3 The Applicant contends that this Tribunal has jurisdiction to entertain this matter 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.

3.4 The Applicant therefore prays that:-

a) All competitive results obtained by the Athlete from and including 13th October, 2018 until the date of determination of the matter herein be disqualified, with all resulting consequences (including forfeiture of medals, points and prices) as per article 10.1 ADAK, ADR and WADC.

Sports Disputes Tribunal

b) The Athlete be sanctioned to a 4 year period of ineligibility as provided by ADAK Anti-doping Code, article 10 of ADAK and WADC rules.

c) Costs as per article 10.10 of WADC.

4. Preliminary Matters

4.1 The matter was first brought to the Tribunal vide a notice to charge addressed to the Chairman of the Tribunal on 11th September, 2019 by Mr. Bildad Rogoncho for the Applicant The notice also requested the Tribunal to constitute a hearing panel to whom the charge documents and other relevant materials where to be charged.

4.2 Upon reading the notice to the charge dated 21st August, 2019 filed at the Tribunal, the Tribunal directed and ordered the Applicant to serve the mention notice, notice of charge, notice of ADRV, the doping control form and all the relevant documents on the Athlete within fourteen (14) days of the date thereof. A panel was then constituted comprising of Mr. John Ohaga (Chairman), Njeri Onyango (Member) and Mr. Peter Ochieng (Member) and the matter was to be mentioned on 19th September, 2019 to confirm compliance and further direction. When the matter came up for mention on the said date, Counsel for the Applicant , Mr. Rogoncho was present and the Athlete was also present. The Athlete requested the court for a Pro-bono Lawyer and the Tribunal accepted to allocate one. The matter was to be mentioned on 16th October, 2019 to ascertain the allocation of lawyer for the Athlete.

4.3 On 16th October, 2019 the Applicant was represented by Mr. Bildad Rogoncho and the Athlete was presented by Mr. Chelagat who reported that the Athlete does not need a lawyer since she wants to represent herself. The Tribunal ordered Mr. Chelagat to further talk to the Athlete and report back to the Tribunal on 23rd October, 2019 at 2.30 pm.

4.4 On 23rd October, 2019 the Applicant was represented by Mr. Bildad Rogoncho and the Athlete by Mr. Chelagat who reported that he had not been successful in locating the Athlete. However, Mr. Rogoncho

Sports Disputes Tribunal

reported that he had received an email from the Athlete stating that she does not wish to contest the charge. The Counsel for the Athlete Mr. Chelagat, reported that he would still find time and speak to the Athlete. Mr. Rogoncho was in concurrence and the Tribunal ordered that the matter be mentioned on 14th November, 2019.

5. Hearing

5.1 The matter came up for hearing on 11 December, 2019 in Eldoret during the circuit court sessions. Mr. Rogoncho appeared for the Applicant and the Athlete represented herself. The Hearing Panel changed as Mr. John Ohaga and Ms. Njeri Onyango were both absent. They were replaced by Mr. Gichuru Kiplagat (Panel Chair) and Mr. Gabriel Ouko (Member) and Peter Ochieng was retained as a Member. The Athlete presented herself by viva voce evidence while Counsel for the Applicant submitted that he wishes to adopt and rely on the charge document dated 11th September, 2019, the annexures thereto as integral part of the submission, oral submissions and email communication availed to the Tribunal to prosecute the case.

5.2 The Athlete is formally charged with ADR violation being the presence of a prohibited substance Erythropoietin (EPO) contrary to provision of article 2.1 of ADAK – Antidoping Rules (hereinafter referred to as ADAK Rules) and rule 32.2 a and 32.2 b of the IAAF competition rules 2016-2017.

5.3 According to Mr. Rogoncho, the Athlete is a female national Athlete hence the IAAF competitive rules, IAAF antidoping regulations, the WADC and the ADAK ADR Rules apply to her.

5.4 The Applicant brought an ADR against the Athlete which arose during the Ndalat Gaa Cross-country in Kenya on 13th October 2018 where ADAK Doping Control Officer ('DCO') collected urine samples from the said Athlete. Assisted by the DCO, the Athlete was asked to split the sample into two separate bottles on each occasion which were the given reference numbers A4163796 (the A' sample) and B 4163796 (the B' samples) in accordance with the prescribed WADA procedures (see attached a Doping Control Form dated 13th October, 2018 JKL1).

Sports Disputes Tribunal

5.5 Both samples were transported to the laboratory which analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Both analysis of the A Sample returned an Adverse Analytical Finding ("AAF") presence of a prohibited substance Erythropoietin (EPO) which is listed as peptide hormones, growth factors, related substances and mimetics/erythropoietin under S. 2 of WADA's 2018 Prohibited List.

5.6 According to Mr. Rogoncho the findings were communicated to the Athlete by the Applicant through a Notice of Charge and mandatory Provisional Suspension dated 7th August, 2019. In the said communication the Athlete was offered an opportunity to provide an explanation for the same by 21st August, 2019 as confirmed by Notice of Charge dated 7th August, 2019, JKL3 that is also dully attached.

5.7 Counsel for the Applicant asserted that the Athlete responded vide email dated 9th August, 2019. She denied the charges and stated that ever since she started working with the athletics family she has never heard of or used any prohibited substances. She stated that she uses normal supplements such as Reflex, Isostar and Ferogblin. She further stated that she had been tested severally in the past years. This is confirmed by a copy of her email dated 9th August, 2019 JKL4 attached.

5.8 Mr. Rogoncho further states that the Athlete's AAF was not consistent with any applicable TUE recorded at the AAF for the substances in question and there is no apparent departure from the IAAF Anti-doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings.

5.9 Counsel for the Applicant , Mr. Rogoncho states that the Athlete did not request a sample B analysis thus waiving her right to the same under IAAF rule 37.5 and confirmed that the results would be the same with those of sample A in any event.

6.0 The Applicant submits that under article 3 the ADAK ADR and WADC the rules provide that the Applicant has the burden of proving the ADR to the comfortable satisfaction of the hearing panel.

Sport Disputes Tribunal

6.1 Counsel for ADAK further states that article 3.2 of the WADA code provides facts relating to the anti-doping rule violation which may be established by any reliable means including admissions and the methods of establishing facts and sets out prescriptions which include:-

a. Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid.

b. WADA accredited laboratories and laboratories approved by WADA are presumed to have conducted sample analysis and custodial procedures from laboratories in accordance with international standards for laboratories.

c. Departure from any other international standards or other antidoping rules or policies set forth in the code or those anti-doping rules which did not cause an adverse analytical finding or any anti-doping rule violation shall not invalidate such evidence or results.

d. The facts established by the decision of a court or a professional disciplinary tribunal of a competent jurisdiction which is not subject of any pending appeal shall be irrebuttable evidence against an Athlete or other persons establishes that the decision violated the principles of natural justice.

6.2 According to Counsel for the Applicant it is the role and responsibility of any Athlete under article 22.1 of the WADA code to:

Be knowledgeable and comply with anti-doping rules, be available for sample collection always, take responsibility in context of anti-doping for what they ingest and use, inform medical personnel of the obligation not to use prohibited substances and prohibited methods and to take responsibility to make sure that any medical treatment does not violate these anti-doping rules, to disclose to his/her international Federation and to the agency any decision by non-signatory findings that he/she committed an anti-doping rule violation within the previous ten years and to cooperate with the anti-doping organization investigating anti-doping rule violations.

Sports Disputes Tribunal

6.3 Counsel for the Applicant further stated that the Athlete is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows:-

"The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including;

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- *Character and education*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect of self and other participants*
- *Courage*
- *Community and solidarity*

6.4 Counsel for the Applicant in addition stated that the burden of proof expected to be discharged by the Anti-Doping Organization under Article 3 of the ADAK Rules and WADC was ably met by the prosecution.

6.5 He submitted that in her defence, the Athlete made a number of admissions and a few general denials. In her evidence in chief the Athlete made the following admission:; She admitted to the charges thereto, she admitted to buying the Erythropoietin in a Nairobi chemist, she admitted to having undergone several tests, she admitted to knowing the uses of Erythropoietin, she admitted to having heard about Erythropoietin from her fellow athletes, she admitted to her lack of interest whatsoever regarding the fight against doping as she has never attended any anti-doping workshop.

6.6 As a proof of anti-doping rule violation, Counsel for the Applicant submits that the Athlete is charged with the presence of prohibited substance Erythropoietin (EPO), a violation of Article 2.1 of the ADAK ADR. Erythropoietin is a Specified Substance and attracts a 4-year sanction.

Sports Disputes Tribunal

6.7 He further says that as 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.

6.8 Similarly, he opines that in terms of Article 10.2.1 the burden of proof shifts to the Athlete to demonstrate no fault, negligence or intention to entitle her to a reduction of sanction.

6.9 On intention, it is the Applicant's submission that in her evidence in chief, the Athlete admitted to knowingly injecting herself with the prohibited substance knowing that it poses an added advantage in competitions thus demonstrating her intention to cheat. She also demonstrated an evasive behavior in her testimony as she was economical with the truth thus her whole testimony comprised of lies. It is also the submission of the Applicant that from the explanation given by the Athlete, she failed to disclose to the Tribunal how she procured the prohibited substance, who introduced her to the prohibited substance and which specific chemist she bought the prohibited substance from.

6.9.1 Counsel for ADAK further says that the Athlete is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what she ingests and uses. The Athlete hence failed to discharge her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

6.9.2 The Applicant further submits that the Athlete has a personal duty to ensure that no prohibited substance enters her body as;

It is each Athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any 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 rules violation under Article 2.1

7.0 Mr. Rogoncho further states that the response and the conduct of the Athlete was evaluated by the Applicant and it was deemed to

Sports Disputes Tribunal

constitute an antidoping rule violation. Consequently, he referred the matter to the Tribunal for determination.

7.1 He therefore urges the Tribunal to find that an ADRV has been committed by the Athlete.

8. Discussion/Consideration

8.1 The Panel has carefully considered the matter before us, the evidence presented by the Applicant and the oral submissions of Counsel for the Applicant.

8.2 We have equally listened to the Athlete's oral submission and her admissions to the charges thereto

8.3 We have also listened to her admission as to lack of interest whatsoever regarding the fight against doping and her assertion that she has never attended any anti-doping workshops among other admissions and these are our observations.

8.4 Section 31 of the Anti-Doping Act 2016 states that "The Tribunal shall have jurisdiction to hear and determine all cases of Anti-Doping Rule violations on the part of the athletes and athlete support personnel and matters of compliance of Sports Organizations. (2) The Tribunal shall be guided by the code, the various international standards established under the code, the 2005 UNESCO Convention against Doping in sports, the sports act of 2013 and the agencies Anti-Doping Rules amongst other legal sources.

8.5 Consequently, our decision will be guided by the Anti-Doping Act 2016, the Sports Act 2013, the WADA Code 2015 and other legal sources.

8.6 It is evidently clear that the Athlete was served with the notice of ADRV and all other relevant document regarding this matter on 11th September, 2019.

8.7 It is also true that when the matter came up for hearing the Athlete represented herself.

Sports Disputes Tribunal

8.8 Under Article 3 the ADAK ADRV and the WADA Code the rules provide that the Applicant has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel. The Applicant has proven this to the panel.

8.9 In her defense in chief, the Athlete admitted virtually all the allegations as contained in the charge sheet.

8.0 Article 2.3 of WADC and Article 2.3 of ADAK Anti-Doping Rule define the following as constituting Anti-Doping Rule violation; evading sample collection or without compelling justification, refusing to submit sample collection after notification as authorized in applicable and Doping Rules.

9.0 The Panel finds that the Athlete, without any justification is in breach of article 2.3 of WADC and article 2.3 of ADAK Anti-Doping Rules. The panel notes that this being her first ADRV, she is subjected to the consequences specified in article 10.2 ADR for her first offenders, which is a period of ineligibility of up to four years.

9.1 The Panel also finds that the ADRV threshold has been met by the Applicant. The Athlete in her own evidence in chief admitted to the charge document and further admitted lack of interest in fighting against doping. It is the opinion of the panel that the Athlete has failed to give any convincing explanation for her failure to execute due diligent and care in observing that she does not ingest and use any prohibited substance that can result to ADRV. Thus, the Applicant comfortably proved to the satisfaction of the hearing panel.

10. **Decision**

10.1 The period of ineligibility (Non-participation in both local and international events) of the Athlete shall be for a period of four (4) years commencing on the date of the provisional suspension, which is 21st August, 2019.

Sports Disputes Tribunal

10.2 All competitive results obtained by Kemumo Joy Aloyce from and including 21st August, 2019 until the date of determination of the matter herein are disqualified with resulting consequences (including forfeiture of medals, points and prices) pursuant to article 9 and 10 of the WADA Code, RADO rules and ADAK ADR.

10.3 Each party to bear its own costs.

10.4 The right of appeal is provided for under article 13.2.1 of the WADA Code, rule 42 of the IAAF competitive rules and article 13 of the RADO rules.

Dated at **NAIROBI** this .....***19th*** .....day of .....***August***,.....2020

Gichuru Kiplagat, Panel Chair

Gabriel Ouko (Member)

Peter Ochieng (Member)

Sports Disputes Tribunal