REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ADAK APPEAL NO. 18 OF 2019

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

-VERSUS-

SHEETAL JAYENDRA KOTAK.....RESPONDENT

DECISION

Hearing: VIA Written Submissions

Appeal Panel: Mrs. Elynah Shiveka..... Panel Chair
Mr. Allan Owinyi.....Member
Mr. Peter Ochieng..... Member

Appearances: Mr. Bildad Rogoncho for Appellant

Mr. Faraji Chipinde for Respondent

1. The Parties

1.1. The Appellant, 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 as amended.

1.2. The Respondent is a female adult of presumed sound mind, a national level Athlete who practices the game of body building in Nairobi, Kenya.

2. Background/Facts of the Case

2.1. Ms. Sheetal Jayendra is a Kenyan Bodybuilding athlete.

2.2. On 17th January, 2018, during an out of competition testing in Nairobi, Kenya, the Athlete underwent a doping control process. **("The Doping Control Form"** Exhibit 1).

2.3. The analysis of the A sample revealed the presence of S1 – 1A Exogenous AAS/Methenolone and its metabolite 1-methylene-5a-androstan-3a-ol-17-one, S1.1B Endogenous AAS/Boldenone and its metabolite 5b-androst-1-ene-17b-01-3-one, S1.1B Endogenous AAS/19-Norandrosterone, S1.1B Endogenous AAS/19-Norandrosterone. ('**The Test Report** 'Exhibit 2).

2.4. All the foregoing are Non-specified substances and are at all times under S1.1A for first substance and S1.1B for the rest of the substances of the 2018 Prohibited List. (**"The 2018 Prohibited List"** Exhibit 3).

2.5. ADAK vide an Anti-Doping Rule Violation Notice dated 9th March 2018 notified the Athlete of the positive finding and provisionally suspended her. (**'The ADRV Notice"** Exhibit 4).

2.6. The Athlete via an email dated 12th March, 2018, accepted the charges, Confirmed the accuracy of the AAF and accepted the consequences laid out in paragraph 4.1 of the ADRV Notice. (**"The email dated 12th March 2018"** Exhibit 5).

2.7. In the same email alluded hereinabove, the athlete forwarded a letter dated 13th August 2017, from Doctor Shabbir Hussain, addressed to WHOM IT MAY CONCERN. The letter indicated that the athlete was under treatment with *ventipumin, nibal* and *carbimizole* amongst others, for being underweight with an acute iron deficiency and early onset of osteoporosis. The Doctor indicated that the athlete also suffers from asthma and hyperthyroidism. (**"The letter dated 13th August 2017 from Dr. Shabbir Hussain"** Exhibit 6).

2.8. Upon receipt of the aforementioned Response from the athlete, ADAK proceeded through its counsel by lodging the case at the Sports Disputes Tribunal and the matter was scheduled for directions on 25th April, 2018. ADAK's counsel proceeded to serve the athlete with a Mention Notice for the said 25th April 2018. The athlete responded vide a letter dated 12th April. 2018 and waived her right to be heard and further indicated that she had already accepted the charges including the consequences being the 4 years ban from active competition. She further asserted that she had no interest in pursuing the matter and was amenable to serving the ban. (**"The letter dated 12th April 2018"** Exhibit 7).

2.9. ADAK through its counsel, lodged a Charge Document dated 20th April 2018 and filed on 25th April 2018. ("**The Charge Document dated 20th April 2018**" Exhibit 8)

2.10. Since the athlete had waived her right to be heard, ADAK relied on the filed Charge Document and requested for a decision.

2.11. On 7th March 2019, the Sports Disputes Tribunal delivered the Decision and sanctioned the athlete to a **2 year period of ineligibility with effect from 17th January 2018.** ("**The Decision dated 7th March 2019**" Exhibit 9)

2.12. ADAK being dissatisfied with the Decision lodged a Notice to Appeal dated

13th March 2019. ("**The Notice of Appeal**" Exhibit 10).

3. Submissions in opposition to the Notice of Preliminary Objection dated 23rd October 2019

A. Jurisdiction of the Sports Disputes Tribunal (SDT) to hear and determine this Appeal

3.1. The SDT derives its jurisdiction to hear and determine this Appeal from the Sports Act, Section 58 (b) and Rule 13.2.2 of the Anti-Doping Rules 2016.

3.2. The SDT in determining this Appeal shall be guided by the Anti-Doping Act, Anti-Doping Rules 2016, and the WADA Code.

B. Whether the Appeal was filed out of time

3.3. Rule 13.7.2 of the Anti-Doping Rules, provides that the time for lodging an Appeal to the SDT shall be 21 days from the date of receipt of the Decision by the Appealing Party.

3.4. The appealed Decision herein was delivered on 7th March 2019.

3.5. The Appellant lodged a Notice of Appeal dated 13th March 2019 and filed on 14th March 2019.

3.6. This was well within the 21 days provided by Rule 13.7.2 of the ADR.

3.7. The Notice of Appeal was filed well within the timelines provided for lodging such an Appeal and as such the same was not filed out of time as alluded by the Respondent.

3.8. The Court of Appeal Rules 2010 recognize that once a Notice of Appeal has been lodged then the Appeal process is in motion. Thus, the appellate procedure commenced with the lodging the Appeal herein.

3.9. We invite the Panel Members to appreciate the wording of Rules 82 and 83 of the Court of Appeal Rules 2010. ("**The Court of Appeal Rules 2010**" Exhibit 11)

3.10. **Under Rule 13.2.2.2.1 of the ADR,** the SDT has powers to regulate its procedures.

3.11. According to the Appellant's counsel it is the SDT's practice that once a Notice to Charge and/or a Notice of Appeal is filed, the same is placed before the Chairperson to issue Directions, which are then served upon the Respondent together with a

Mention Date inviting the parties to appear before the SDT for further directions.

3.12. The Appellant has always complied with this practice and in so far as service of the Notice of Appeal is concerned, the SDT adopts its own procedures and ousts the Court of Appeal Rules 2010.

3.13. The SDT is a quasi-judicial body which is not bound by the Appellate Jurisdiction Act 15 of 1977 (as amended in 2010).

3.14. The Appellant filed the Notice of Appeal within 7 days of the delivery of the appealed Decision however the SDT's members' term of office lapsed and they did not sit until June 2019 when this matter came up for Mention on 27th June 2019.

3.15. On 27th June 2019, the Chairperson directed the Appellant to draft, file and serve the Respondent with the Appeal brief together with Directions which were promptly issued on 28th June 2019.

3.16. The Appellant complied and served the Respondent.

3.17. The foregoing buttresses the fact that this Appeal was timeously filed, and the Hearing Panel should proceed and entertain the same.

C. Prayer

3.18. The Appellant humbly urges the Hearing Panel to find that the Preliminary Objection lacks merit and thus dismiss it.

and dismiss the same with costs.

4. Grounds of appeal

4.1. According to the Appellant the Tribunal first instance Panel erred in sanctioning the athlete to a two years period of ineligibility.

4.2. The Panel erred in making a finding that the athlete had proved a lack of intention.

4.3. The Panel was wrong in making a finding that the athlete had established origin.

4.4. The Panel further erred in making a conclusion that the athlete's language conveyed ignorance and therefore a lack of intent.

5. Substantive submissions

A. Anti-Doping Rule Violation

5.1. Pursuant to art. 2.1 ADAK ADR, 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. The presence of a Prohibited Substance or its Metabolites or Markers constitutes an anti-doping rule violation ("**ADRV**").

5.2. The athlete underwent an out-of -Competition doping control on 17th /1/2020. The analysis of the sample revealed the presence of S1 AAS/Methenolone and its metabolite 1-methylene-5a-androstan-3a-ol-17-one, S1.1B Endogenous AAS/Boldenone and its metabolite 5b-androst-1-ene-17B-01-3-one, S1.1B Endogenous AAS/19-Norandrosterone, S1.1B Endogenous AAS/19-Norandrosterone.

5.3. All the foregoing are Non-Specified substances and are at all times under S1.1A for the first substance and S1.1B for the rest of the substances of the 2018 Prohibited List.

5.4. The Respondent athlete does not dispute the analytical results of her sample conducted by the Anti-Doping Laboratory in Qatar but rather admitted the AAF and the charges brought against her by ADAK.

5.5. In light of the above, the athlete has committed an Anti-Doping Rule Violation under Article 2.1 of the ADAK ADR and WADA Code.

B. Determining the sanction

5.6. According to Article 10.2.1.1 ADAK ADR the period of ineligibility shall be four years where the ADRV does not involve a Specified Substance, unless the athlete can establish that the ADRV was not intentional.

5.7. As the athlete bears the burden of establishing that the violation was not intentional (within the above meaning), a whole series of CAS cases have held that it

follows that he/she must necessarily establish how the substance entered his/her body (see, for

example, ***(i) CAS 2016/A/4377 WADA v. IWF & Alvarez, at para. 51; (ii) CAS 2016/A/4662 WADA v. Caribbean RADO & Greaves, at para. 36; (iii) CAS 2016/A/4563 WADA v. EgyNADO & ElSalam, at para. 50; (iv) CAS 2016/A/4626 WADA v. Indian NADA & Meghali; and (v) 2016/A/4845 Fabien Whitfield v. FIVB.***

See also UK National Anti-Doping Panel Decisions in; ***UKAD vs. Graham case SR00001202 59), UKAD vs. Williams (SR0000120251) and UKAD vs. Songhurst (SR0000120248)***

5.8 Notwithstanding the above, ADAK is aware of a very limited number of CAS awards which found that in *"extremely rare"* cases, an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance (CAS 2016/A/4534 Villanueva v. FINA; CAS 2016/A/4676 Ademi v. UEFA; CAS 2016/A/4919 WADA v. WSF & Iqbal). The Villanueva award refers to the "narrowest of corridors" in order to stress just how rare it will be for an athlete to be able to rebut intentionality without establishing the origin of the prohibited substance. The panel in the Iqbal case went so far as to hold that *"in all but the rarest cases the issue is academic"; CAS 2016/A/4919 WADA v. WSF &Iqbal, para. 66.*

5.9. ADAK accepts in principle that such exceptional cases may exist. However, ADAK agrees with the CAS case law cited above that the circumstances would have to be truly exceptional; in particular but without limitation, a lack of intention cannot be inferred from *e.g.* protestations of innocence (however credible) and/or the lack of a demonstrable sporting incentive to dope.

5.10. In this case and for the reasons set out below, the Athlete has not established the origin of S1-1A Exogenous AAS/Methenolone and its metabolite 1-methylene-5a-androstan- 3a-ol-17-one, S1.1B Endogenous AAS/Boldenone and its metabolite 5b-androst-1-ene- 17B-01-3-one, S1.1B Endogenous AAS/19-Norandrosterone, S1.1B Endogenous AAS/19-Norandrosterone in her system. ADAK submits that the academic debate (regarding whether there may be limited circumstances in which intention may be rebutted without origin being established) is moot as there are clearly no exceptional circumstances on the facts of this case.

5.11. The Panel in their reasoned Decision at para. 74, makes reference to ADAK ADR Art. 10.6.3, as being applicable in this case. Unfortunately, this article does not fall within the purview of the Tribunal and as such cannot purport to invoke and/or apply the same.

C. Establishment of the origin

I. Applicable jurisprudence

5.12. With respect to establishing the origin of the prohibited substance, it is not sufficient for an athlete merely to make protestations of innocence and to suggest that the prohibited substance must have entered his or her body inadvertently. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.

5.13. As set out by the panel in *CAS 2014/A/3820 WADA v. Damar Robinson & JADCO* case: *"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide* ***actual evidence*** *as opposed to mere speculation"*
(Emphasis added by the panel).

5.14. By way of further example, in the case *CAS 2016/A/4676 Ademi v. UEFA,* the athlete alleged that the positive finding for stanozolol came from a use of a supplement called *"Megamin".* He went to great lengths to try and establish the origin:

(i) He requested to have the product tested by the WADA-accredited laboratory of Seibersdorf. However, this request was refused by the results management authority.

(ii) He, therefore, had it analyzed by a non-accredited laboratory in Croatia, which found that the product contained stanozolol.

(iii) The product was then sent to another laboratory in the Netherlands *(a "National and EU Reference Laboratory in food safety research"),* which detected suspect peaks for stanozolol, but eventually did not confirm its presence in the product.

(iv) The product was also sent to the Cologne WADA-accredited laboratory, directly from the Dutch laboratory. The Cologne laboratory found stanozolol in most of the capsules.

5.15. Despite all the efforts made by the athlete in that case and the fact that certain laboratories (including the WADA-accredited laboratory of Cologne) had found that the pills did contain stanozolol, the panel found that the athlete had failed to establish the origin. *CAS 2016/A/4676 Ademi v. UEFA, para. 73, is instructive.*

5.16. It is not sufficient for an athlete to simply find a potential source. An athlete must also demonstrate that the source could have caused the actual AAF. In the case *CAS 2010/A/2277 La Barbera v. IWAS, the panel considered that "Mr. La Barbera did not*

supply any actual evidence of the specific circumstances in which the unintentional ingestion of the Prohibited Substance would have occurred. Mr. La Barbera does in particular neither bring any scientific evidence that would explain how the Prohibited Substance could still be found in his system one week after the end of the dogs' treatment, nor whether such a potential ingestion through his biting his nails could result in the level of substance found in his body. As a result, the Panel finds that Mr. La Barbera's explanations lack corroborating evidence and prove unsatisfactory, thereby failing the balance of probability test." See CAS 2010/A/2277 La Barbera v. IWAS, para. 4.27.

II. The Athlete's explanation

5.17. In the present case, the Athlete explained and even produced a Doctor's letter addressed to "WHOM IT MAY CONCERN" [Exhibit 5 and 6], indicating that she was under medication with ventipumin, Nibal and carbimizole amongst others, for being underweight with an acute iron deficiency and early onset of osteoporosis. The Doctor indicated that the athlete also suffers from asthma and hyperthyroidism. (Note the letter was dated 13th August, 2017)

5.18. The athlete had even gone further to confirm that she had accepted the charges and that she was ready to serve the 4 years ban.

5.19. On scrutiny, none of the medication alluded to by the athlete, actually contained the banned substance found in her system. The athlete failed to **establish origin, a fact which was acknowledged by the Panel at para. 37 of the Decision. [Exhibit 9]**

5.20. In view of the CAS case law regarding the strict nature of the duty establish the origin of the prohibited substance in their system, it is clear that the Athlete has manifestly not satisfied her burden.

5.21. As the Athlete has failed to establish the origin of the prohibited substance, the provision on Contaminated Products and more generally all provisions requiring a finding of No Significant Fault or Negligence are not applicable either (see Definition of No Significant Fault or Negligence).

5.22. The fact that the athlete herein initiated the testing process does not in itself clear her of any intent to cheat. After all, the Panel's conclusion that her conduct meant that she lacked intent, is a matter of conjecture, speculation and assumption of which the

contrary could also be true and correct. What if she wanted to be tested in order to confirm whether she can proceed to compete, undergo the Doping Control Process and get away with it? In a nutshell, such a summation is better abandoned in the arena of argumentative engagement, since to permit and/or entertain the same would undermine the strict liability principle which obtains herein.

5.23. Nothing in the Doping Control Form and the Supplementary Report Form [Exhibits and 11 respectively] reveals the origin of the prohibited substance found in the athlete's system.

5.24. Therefore, and in view of the foregoing, the Athlete has failed to meet her burden to demonstrate that the violation was not intentional.

D. Indirect Intention

5.25. Even in the unlikely event that the Panel were to accept the Athlete's explanation of origin, ADAK submits that the anti-doping rule violation must nonetheless be considered intentional.

5.26. Indeed, art. 10.2.3 ADAK ADR sets out that the term "intentional" is meant to *"identify those players who cheat and, therefore, requires a player or other person engaged in conduct which he 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".* (Emphasis added)

5.27. In this context, ADAK submits that the Athlete's conduct would fall at least within the ambit of the second limb of art. 10.2.3 ADAK ADR **("Indirect Intention").** Indirect Intention is subject to two requirements:

> (i) the Athlete knew that there was a significant risk that her conduct might constitute or result in an anti-doping rule violation; and
>
> (ii) she manifestly disregarded that risk.

5.28. In CAS 2016/A/4609 WADA v. Indian NADO & Pereira, the sole arbitrator held the following in respect of Indirect Intention:

"63. Even before the introduction of the legal concept of "intent" in the 2015 edition of the World Anti-Doping Code, CAS panels already elaborated on the concept of 'indirect intention' or 'dolus eventualis' *and* sees *no reason to deviate therefrom:*

'[...] the term "intent" should be interpreted in a broad sense. Intent is established - of course - if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behavior as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behavior is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If - figuratively speaking - an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent.' (CAS 2012/A/2822, para. 8.14)

'[...] the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per "dolus eventualis," the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance within the meaning of Art. 10.4 IWF ADP.' (CAS 2011/A/2677, para. 64)"

5.29. In CAS 2017/A/5178 Tomasz Zielinski v. IWF, para. 84, the athlete claimed, among other arguments, that the source of nandrolone detected in his sample might be the unlabeled ampoules of B_{12} vitamin allegedly supplied by the federation and injected to the athlete by a doctor. In this regard, the panel concluded that *"if the ampoules were the source of the AAF, they must be qualified as highly suspicious and that an athlete applying a minimal duty of* care *would never have applied or* used *them. Thus, if one were to follow the [athlete's] submission his behavior would have to be qualified as intentional within the meaning of Art. 10.2.1.1 In conjunction with Art.10.2.3 of the IWF ADP".*

5.30. ADAK recalls that the burden of proof with respect to the question of intention lies with the Athlete. She therefore has the duty of establishing on a balance of probability

that she did not know that her conduct might result in an anti-doping rule violation and did not manifestly disregard that risk.

5.31. As mentioned above, the athlete admitted to the charges and accepted the four years ban.

5.32. ADAK strongly disagrees with the finding of the Sports Disputes Tribunal of Kenya for the following reasons:

i. The athlete admitted the ADRV, [Exhibit 5]
ii. The athlete accepted the sanction of four years of ineligibility, [Exhibit 5]
iii. The athlete failed to establish origin. None of the medication alluded to by the athlete, actually contained the banned substance found in her system, [Exhibit 6]
iv. The athlete did not demonstrate a lack of intention. As the sole arbitrator recalled in the case of CAS 2016/A/4609 WADA v. Indian NADO & Pereira, para. 68, citing previous CAS case law, *"there is an inherent significant risk that medications may contain prohibited substances*

5.33. The Athlete must satisfy the Panel that she did not perceive the significant risk that she might be committing an anti-doping rule violation when she accepted to be under medication without ascertaining whether the inherent ingredients contained prohibited substances or at the very least seek a TUE. Any athlete in the circumstances described above would have perceived the obvious risk.

5.34. The athlete cannot and should not be allowed to hide behind the veil of ignorance. As clearly indicated in the Decision at para. 60 that, the moment the athlete chose to participate in the sport of body building, she automatically signed herself up for due obligation to the code and became bound under WADC's Article 21 *'to be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code.* [Exhibit 9]

5.35. In these circumstances, the Athlete cannot be held to have satisfied her burden of proof to rebut the presumption of intentionality. Therefore, the anti-doping rule violation must be deemed intentional and the Athlete sanctioned with a **four-year period of ineligibility.**

E. Discussion by the Hearing Panel

5.36. The Respondent did not contest the occurrence of the ADRV as confirmed by the Hearing Panel in paragraph 30 of the Decision.

5.37. The Hearing panel proceeded to usurp the role of Defence Counsel and commenced on analyzing the principle of Intention even though the Respondent had accepted the consequences of her ADRV.

5.38. The Hearing Panel did not have to delve into the issue of Intention since the athlete had already admitted the ADRV.

5.39. The foregoing notwithstanding, the Respondent did not establish Origin, a fact which was acknowledged by the Hearing Panel as stated in paragraph 37 of the Decision.

5.40. The Respondent is a professional athlete who ought to have appreciated her role and responsibility under the ADR, owing to the fact she is the one who invited the ADAK Doping Control Officer to take her sample for analysis.

5.41. The alleged ignorance and lack of intent alluded to by the Hearing Panel under paragraph 36 of the Decision does not apply at all.

5.42. The fact that she initiated the testing does not absolve her of the intention to dope.

5.43. The Hearing Panel's conclusion that the intent, is a matter of conjecture, speculation, and assumptions, of which the contrary could also be true.

5.44. The Appellant could also conclude that the Respondent invited ADAK to take her through the Doping Control Process so that she could confirm whether if she proceeded to compete, she could beat the system.

5.45. In a nutshell, such a summation is better left in the arena of academic debate, since to allow and entertain the same would undermine the strict liability principle, the Appellant asserts.

5.46. The Respondent did not even declare the alleged medication in her Doping Control Form.

5.47. The Hearing Panel assumed that she must have listed the same in the

supplementary form. An assumption we have dispelled by availing the said supplementary form.

5.48. The athlete's sample was collected on 17th January 2018, whereas the doctor's report she produced was for August 2017. She failed to produce a current medical report and the conclusion thereof was that she did not intend to have her period of ineligibility reduced.

5.49. The Hearing Panel relied so much on the evidence of the missing Supplementary form that they ended up misinforming themselves.

5.50. Such reliance on the missing supplementary form led to the arrival of the Decision under appeal.

5.51. It is our conclusion that the athlete did not file any credible response/evidence to warrant a reduction of her period of ineligibility.

F. Conclusion

5.52. In view of the above, the Athlete has breached art. 2.1 ADAK ADR and WAD Code.

5.53. As she has not discharged her burden of establishing the origin and her lack of intention and as, even on her alleged facts, she would have indirect intent, she shall be sanctioned with a period of ineligibility of four years.

I. Request for relief

5.54. ADAK respectfully requests the Appellate Panel to rule as follows:

(1) That the Appeal herein is admissible.

(2) The Decision dated 7th March 2019 rendered by the Sports Disputes Tribunal of Kenya in the matter of *ADAK v Sheetal Jayendra Kotak* (Anti-Doping case no. 7/2018) is set aside.

(3) Sheetal Jayendra Kotak has committed an Anti-Doping Rule Violation.

(4) Sheetal Jayendra Kotak is sanctioned with a four-year period of ineligibility starting on the date on which the Appeal Panel Decision is delivered. Any period of provisional suspension or ineligibility effectively served by Sheetal Jayendra Kotak before the delivery of the Appeal Decision be credited against the total period of ineligibility to be served.

(5) All competitive results obtained by Sheetal Jayendra Kotak from and

including 17th January 2018 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

(6) Costs of the Appeal be borne by the Respondent pursuant to ADAK ADR Art. 10.10.1.

6. Submissions in opposition of the Appeal dated 28th August 2019 and in support of the notice of Preliminary Objection dated the 23rd of October, 2019

6.1. The Respondent's counsel in his introductory remarks notes that a decision rendered on 7th March, 2018, the Sports Disputes Tribunal sitting to resolve this dispute at first instance imposed a two year ban on the Respondent citing a commission of an ADRV. The counsel further notes that as at the 20th of January, 2020, the Respondent athlete had served her ban period and continues to show a sign of good faith by not engaging in any bodybuilding events in any capacity from January to date.

I. Principles of jurisdiction of a Tribunal to determine a dispute

6.2. The counsel started by laying a basis for their arguments by citing various cases challenging the jurisdiction of this Tribunal to handle, hear and determine this appeal as per section 58 of the sports Act of 2013, section 32 of the Anti-Doping Act No.5 of 2016 and Rule 13.2.3 of the ADAK ADR. As stated by the Court of Appeal in the case of **'Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1;**

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it

holds the opinion that it is without jurisdiction." (Pg.11 of our list and

bundle of authorities)

6.3. The counsel is also guided by the decision in Jackson Gilo v Computer Pride Limited [2013] eKLR where quoting the Court of Appeal decision in the case of Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) Ea 696, the court appreciated at paragraph 2;

"....a'preliminary objection' consists of a point of law which has been pleaded, or

which arises by clear implication out of pleadings, and which if argued as a

preliminary point may dispose of the suit. Examples are an objection to the

jurisdiction of a court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. Sir Charles Newbold, President stated in the same judgment as follows;-

A preliminary objection is in the nature of what used to be demurrer. It raises a

pure point of law which is argued on the assumption that all the facts pleaded by

the other side are correct. It cannot be raised if any fact has to be ascertained or if

what is sought is the exercise of judicial discretion."(See pg 32 of Respondent's list

and bundle of authorities).

II. The Appeal was filed out of time

6.4. The Respondent's Counsel challenges the jurisdiction of this Tribunal to hear

and determine this Appeal by virtue of the fact that the Appeal was filed out of time. The Tribunal sits in its Appellate capacity under the purview of section 58 of the Sports Act, Section 32 of the Anti-Doping Act No. 5 of 2016

and Rule 13.2.3 of the ADAK ADR. The Respondent submits that this being an appeal, the Tribunal should be guided by the Court of Appeal Rules and the Appellate jurisdiction Act.

6.5. The Respondent submits that Parliament – as the legislative arm of government drafted section 32 (6) of the ***Anti-Doping Act No. 5 of 2016*** to provide for the process and timelines within an appeal on a doping violation would be brought before an appellate body.

6.6. The Respondent avers that other than contravening section ***31 (6) of Anti-Doping Act No. 5 of 2016*** to file the appeal within 30 days of the decision rendered, the Appellant further contravened the Provisions of ***Rule 13.7.2 of the Anti-Doping Agency of Kenya,*** Anti-Doping Rules which mirrors the Provisions under ***Rule 13.7.2 of the WADA Code.***

6.7. Section 31 (2) and 31 (6) of the Anti-Doping Act No. 5 of 2016 sets the timeline for filing an appeal before the Tribunal is 30 working days from the date of the decision by the Tribunal. Section 31 (6) states that;

In all disputes, there shall be a right of appeal within thirty working days from the date of communication of the Tribunal's decision by the accuse, the Agency, the national anti-doping organization of the person's country of residence..."

6.8. ADAK ADR 2016 thus provide as follows;

Rule 13.7.2; *"The time to file an appeal to the National Anti-Doping Appeal Panel shall be twenty-one days from the date of receipt of the decision by the appealing party...."*

6.9. The Respondent posits that under both provisions the term "shall" has

been to connote that these provisions must be read as having mandatory import and therefore these provisions must be complied with. The Respondent is hereby guided by the decision in ***Republic v Council of legal Education & another Ex parte Sabiha Kassamia & another [2018] eKLR*** by Honourable Justice Mativo J.M where at paragraph 20 he held that;

> *"The word* "shall" ***when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in ordinary meaning is a word of command which is normally given a compulsory meaning as intended to denote obligation. The Longman Dictionary of English Language states that "shall" is used to express a command or exhortation or what is legally mandatory," (refer to pg. 34 of the Respondent's list and bundle of authorities)***

6.10. The Respondent opines that whereas the trial Tribunal rendered its decision on the **7th of March, 2019** the Appellant waited until the **28th August 2019** to file an appeal. The Respondent notes that even though the appellant had filed a Notice of Appeal on **14th of March 2019**, a cumulative 162 days had passed from the date of the trial decision.

6.11. The Respondent therefore prays that this Tribunal adopts the decision of Court of Appeal sitting in Meru in ***Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR*** and held at paragraph 12 that;

"whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite that this court has jurisdiction to entertain appeals filed within the requisite time and / or appeals filed out of time with leave of the court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court..." (See pg 45 of Respondent's list and bundle of authorities).

6.12. The Respondent takes cognizance of the fact that a Notice of Appeal was lodged timeously on the 14th of March, 2019. We highlight that the mere filing of a Notice of Appeal does not in itself institute an appeal. The Respondent avers that it is in fact an import of Rule 82

(1) Of the Court of Appeal Rules that a party who has lodged a Notice of Appeal but who does not institute or file a record of appeal as required by the rules is deemed to have withdrawn the notice of appeal at the expiry of 60 days from when the notice of appeal was lodged.

6.13. The Respondent's counsel submits that Notice was not served until the 22nd of July 2019 when their client found out via email that the Appeal was coming up for mention on the **24th of July 2019.**

6.14. The Respondent argues that the failure to serve the Notice offends the mandatory Appellate provisions of Rule 77 (1) of Court of Appeal Rules which are procedural Rules that this Tribunal sitting in its

Appellate capacity should be guided by. The Respondent relies on the decision in ***Daniel Nkirimpa Monirel vs Sayialel Ole Koilel & 4 others [2016] eKLR*** paragraph 13 states;

"The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of Appeal in which the said notice is tucked away somewhere in the record. That occasion's prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process"

(See pg 50 of Respondent's list and bundle of authorities)

6.15. The Respondent asserts that to buttress the importance of service of the Notice Appeal, they wish to bring before this Tribunal yet another

violation of the provision of **Rule 13.2.2.3.3** and **Article 14.3.2** of the ADAK ADR rule provides that;

"The decision may be appealed as provided in Article 13.2.3. ***If no appeal is brought against the decision, then (a) if the decision is that an anti-doping rule violation was committed, the decision shall be publicly disclosed as provided in Article 14.3.2;***

6.16. The Respondent states that the connotation and their interpretation of this provision is that unless a case on appeal has been decided and heard to finality then such decision should not be publicized. Whereas the Agency has expressed their intention to file an appeal by filing the Notice of Appeal, they went ahead and publicized the decision of the Tribunal in clear violation of **Rule 13.2.2.3.3.** Having not served the Respondent with the Notice, the publication was an express demonstration to the Respondent that according to **Rule 13.2.2.3.3** of their rules, the matter had come to a close.

6.17. The Respondent submits that at the even at the time of filing the appeal, the appellant had the option of seeking leave before this Tribunal for the appeal to be admitted out of time to rectify this defect which the appellant failed to do.

III. Determination of the sanction

6.18. The Respondent avers that the appellant violated its own Dispute

Resolution Procedure and instead prematurely prosecuted this case. The Respondent asserts that evidently, the appellant herein was aware of the decision by the athlete not to actively participate in the trial process from her initial response. The Respondent submits that her initial response was intended to ensure that she cooperated with the Agency and avoid participation in any trial proceedings.

6.19. The Respondent postulates that the purpose of Rule 7.10.1 as read with Rule 7.10.3 of the ADAK ADR, empowers the appellant to determine the sanction to an athlete upon admission to a doping violation. The Appellant conveniently failed to issue a decision imposing a sanction of their choice and a justification of the decision thereof as required by Rule 7.10.3 and instead elected to extensively prosecute this case before the Tribunal with little to no involvement by the respondent.

6.20. The responsibility of safekeeping of documents relating to Doping is bestowed upon the Agency by as per Article 7 of the WADA code. The Doping control officer who handled the Respondent's testing indeed directed attention to a supplementary report form. Going by the Tribunal's narration of facts and the documentation presented to us at the time of appeal, this material piece of evidence. It is suspect that even at the behest of the Tribunal; the Agency could not produce the said documentation. This in turn compromised the Respondent's case

and violated the provisions of Article 7 of WADA Code to *wit:*

"Results management and hearings shall be the responsibility of and shall be governed by the procedural rules of the Anti-Doping Organization that initiated and directed sample collection"

6.21. The Respondent submits that at this point there can only be speculation on the contents of the missing supplementary form and the impact this loss of a material piece of evidence may have had on the Respondent's case had she defended it. Following the gravity of and nature of the sanction and the Tribunal's threshold of proof in doping cases, we hereby rely on the decision in Republic v George Onyango Anyang & another [2016] eKLR where the court held (at paragraph 19) that:

"...the prosecution is required to avail to court all relevant evidence to enable court make an informed decision based on evidence available" (see page 57 of the Respondent's list and bundle of authorities)

IV. Indirect Intent

6.22. The Respondent's conduct before, during and even after the testing process does not in fact communicate any intention to cheat or deliberately violate the ADAK ADR. It is clear from the circumstances leading to her testing and the proceedings of the trial Tribunal that the

Respondent did not fathom that there was a risk that of being charged with an ADRV; and neither can the circumstances suggest that she manifestly disregarded that risk.

6.23. The Respondent further submits that as per the initial response to the Tribunal, the Respondent had informed the owner of her training facility to call the offices of the Agency to report for testing. They wish to rely on the following decision CAS 2012/A/2822 para. 8.14 to define intent;

"the term 'intent' should be interpreted in a broad sense. Intent is established - of course – if the athlete ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a 'minefield' ignoring all stop signs along his way, he may well have the primary intention of getting through the 'minefield' unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result(i.e. adverse analytical finding) may materialize and therefore acts with (indirect)"

(CAS 2012/A/2822, para.8.14)*(See page 82 of the Respondent's list and bundle of authorities).*

6.24. The Respondent posits that she consistently maintained her innocence and even with the absence of counsel, insisted on cooperating with the Agency to come to a speedy close of this matter, her behaviour therefore can in no way be construed to have communicated intent to commit an ADRV.

6.25. Further the Respondent produced a letter from Dr. Shabbir to explain the origin of the substances she had been accused of ingesting. The Respondent presented before this Tribunal an inconclusive list of the medication administered. They wish to rely on the case of ***CAS 2019/A/6110 Liam Cameron v. UK Anti-Doping Limited (UKAD)*** citing UKAD v Buttifant (NADP/508/2016) paragraphs 28 and 29 of which prove that:

> *"There may be wholly exceptional cases in which the precise cause of the violation is not established but* ***there is objective evidence which allows the Tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation.*** *In such a case*

the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise." (See page 112 of the Respondent's list and bundle of Authorities).

Reliefs Sought

6.26. The Appellant seeks among other reliefs that the decision of the 7th March, 2019 be set aside and a fresh ban of a period of four years be imposed on the Athlete. It is the Respondent submission that the Tribunal sitting in its trial capacity substantively and conclusively dealt with this matter. It is even more suspect that the appeal was filed just 5 months to the completion of the athlete's two year ban.

6.27. The Respondent submits that the intention of the prompt admission of the ADRV was to bring this case to a close. In her letter to the Tribunal the athlete indicated that she was ready to serve the entire term of the ban. This was information that was first available to the Appellant noting that the Respondent was in communication with the Tribunal through the Appellant. The Respondent submits that this is a remedy that the Appellant should have sought from the trial court or have imposed in their capacity derived under Article 7.10.3 at the onset of these proceedings.

6.28. The Respondent reiterates the decision of the Trial Tribunal on the reduction of the ban based on prompt admission under Article 10.6.3 to wit:

Prompt Admission of an Anti-Doping Rule Violation after being confronted with a violation sanctionable under Article 10.2.1 or Article 10.3.1. An athlete or other person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing sample collection or tempering with sample collection), by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping Organization, and also upon the approval and at the discretion of both WADA and the Anti-Doping Organization with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of fault.

6.29. The Respondent therefore wish to rely on the decision of Arbitration ***CAS 2017/A/5282 World Anti-Doping Agency (WADA) v. International Ice Hockey Federation (IIHF) &F*** in which, citing (CAS 2016/A/4534, para. 48), it was decided that: *(See pages 160 of the Respondent's list and bundle of authorities).*

To trigger the possibility of a reduction from what would otherwise be a four-year sanction, a player must have admitted the asserted anti-doping rule violation promptly after being confronted with it.....the key word in the Article is 'may' not 'must' – and depends upon the

severity of the violation and the player's degree of fault (CAS 2016/A/4534, para.48)

6.30. As at the 20th of January, 2020, the Respondent athlete had served her period and continues to show a sign of good faith by not engaging in any bodybuilding events in any capacity from January to date.

6.31. In the circumstances, the Counsel for the Respondent prays that the Appeal herein be dismissed, the Respondent be released and at the same time be declared free to participate in bodybuilding contests from now on and the Appellant to bear the costs to the Respondents.

7. Discussion

7.1. We have carefully considered the Appeal before us and the submissions and arguments of both parties and these are our observations;

7.2. Section 31 of the Anti-Doping Act states that;

"(1) The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of 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, and the Agency's

Anti-Doping Rules, amongst other legal sources."

7.3. Consequently, our decision on the Appeal before us will be guided by the Anti-Doping Act 2016, the WADA Code, and other legal sources.

7.4. The Respondent based his submissions and arguments in support of a preliminary objection by opposing this Appeal.

7.5. The Respondent challenged the jurisdiction of this Tribunal to handle, hear and determine this appeal premised on **Section 58 of the Sports Act**, **Section 32 of the Anti-Doping Act No. 5 of 2016**, and **Rule 13.2.3 of ADAK ADR.**

7.6. The Sports Disputes Tribunal derives its jurisdiction to hear and determine this Appeal from the Sports Act, Section 58 (b) and Rule 13.2.2 of the Anti-Doping Rules 2016.

8. Decision

8.1. In light of the above discussed, the Tribunal has relied on Anti-Doping Act 2016, WADA Code and the Sports Act 2013 to hear and determine this Appeal.

8.2. The Tribunal has heard the arguments from both the Appellant and the Respondent and considered the Respondent's admission and all the facts involved, the intention and the origin of the prohibited substances. Collectively, the Appeal panel of the Tribunal has decided as hereunder:

(1) That the Appeal herein is admissible;

(2) The Decision dated 7th March 2019 rendered by the Sports Disputes Tribunal of Kenya first instance panel in the matter of *ADAK v Sheetal Jayendra Kotak* (Anti-Doping case no. 7/2018) is set aside;

(3) Sheetal Jayendra Kotak committed an Anti-Doping Rule Violation;

(4) The applicable sanction is set at Article 10.2.1 of the WADA Code;

(5) Sheetal Jayendra Kotak is sanctioned with a four-year period of ineligibility starting from the date of sample collection which was on 17th January, 2018 up to 17th January, 2022;

(6) All competitive results obtained by Sheetal Jayendra Kotak from and including 17th January 2018 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes);

(7) Each party shall bear its own costs;

(8) The right of appeal is provided for under Article 13 of the WADA Code and Article 13 of ADAK rules.

Dated and delivered at Nairobi this _3rd day of ___*November*____, 2020.

Signed:
Mrs. Elynah Sifuna-Shiveka

_____
Deputy Chairperson, Sports Disputes Tribunal

Signed:
Mr. Allan Mola Owinyi

_____
Member, Sports Disputes Tribunal

Signed:
Mr. Peter Ochieng

_____
Member, Sports Disputes Tribunal