

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. 26 OF 2019

IN THE MATTER BETWEEN

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

-VERSUS-

PAUL KARIUKI MWANGI..... RESPONDENT

DECISION

HEARING : 30<sup>th</sup> January, 2020

PANEL

- |                          |        |
|--------------------------|--------|
| 1. Njeri Onyango. MCIarb | Member |
| 2. E Gichuru Kiplagat    | Member |
| 3. Mary Kimani           | Member |

APPEARANCES

Mr. Bildad Rogoncho Advocate for Applicant

Mr. Franklin Cheluget Advocate 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 – Athletes Kenya

S.D.T- Sports Dispute Tribunal

WA – World Athletics

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 male 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 a male Athlete hence the WA Competition Rules, WA Anti-Doping Regulations, the WADC and the ADAK ADR apply to him.

## 4. BACKGROUND

4.1. The facts as set out in the Charge document show that on 12<sup>th</sup> May 2019, during the Bucharest Half-Marathon in Bucharest, Romania, ANAD-Romania Doping Control Officers collected a urine sample from the Respondent. Assisted by the DCO, the Respondent split the Sample into two separate bottles, which were given reference numbers A 4310954 (the “A Sample”) and B 4310954 (the “B Sample”) in accordance with the prescribed WADA procedures.

4.2. Both Samples were remitted to the Anti-Doping WADA accredited laboratory in DOHA (‘the Laboratory’). The Laboratory then analyzed the A Samples in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Both analyses of the “A” Sample returned an Adverse Analytical Finding (“AAF”) for the presence of

*Methylprednisolone* which is a specified prohibited substance, listed as a glucocorticoid under S9 of WADA 2019 Prohibited list.

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

4.4. The findings were communicated to the Respondent athlete by a Letter from ADAK CEO Mr. Japheter K. Rugut through a Notice of Charge and Mandatory Provisional Suspension dated 7<sup>th</sup> August, 2019. In the said communication the Athlete was offered an opportunity to provide an explanation for the analytical findings by 21<sup>st</sup> August, 2019.

4.5. The Respondent gave a response through his letter to ADAK dated 7<sup>th</sup> August, 2019 as follows:

*“Wednesday 7<sup>th</sup> August 2019.*

***Ref: ADAK/LEG/3/003/19***

*To: CEO ADAK*

*I am writing to you concerning the 12<sup>th</sup> May 2019 Anti-doping result in Bucharest Half Marathon.*

*The results from the Anti-doping laboratory shows that I used Methylprednisolone. I had skin rashes for a long time. But on date 5<sup>th</sup> March 2019, I decided to visit my personal doctor who confirmed that I was allergic after several tests. My doctor recommended some medications which are:*

- 1. Hydrocortisone cream*
- 2. Oatmeal Soap*
- 3. Depo Medrol injection*

*I didn't know that the medication prescribed by my doctor will affect my career. Until now am still under this medication because the Allergy has not healed completely. This career is my only source of income that helps me take care of my family and my younger siblings that are in school. This career has helped me so much that I wouldn't like to ruin it in any way. So, I didn't know the medication will bring this effect.*

*I hope when making decision you will consider my case. Thanks in advance.*

*Yours Sincerely,*

***Signed***

*Paul Kariuki Mwangi.*

4.6. ADAK was dissatisfied with the Response and explanation given. ADAK further held that the Respondent was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at the WA for the substances in question and there is no apparent departure from the WA Anti-Doping regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings. Accordingly, ADAK determined that there was

4.7. VIOLATION OF ARTICLE 2.1 ADR, *Presence of a prohibited substance or its metabolites or markers in an athlete's sample.* "

4.7. The Respondent did not request for testing of the 'B' sample. ADAK, therefore, filed the current Charge; the Notice to Charge was filed on 19<sup>th</sup> September, 2020.

4.8. On 21<sup>st</sup> August, 2019 ADAK filed the Notice to Charge with the SDT and upon receipt the Chairperson issued the following directions on 22<sup>nd</sup> August, 2019:

- i) The Applicant shall serve the Mention Notice, the Notice to Charge, the Notice of ADRV, the Doping Control Form, and all relevant documents on the Respondent by Wednesday, 11<sup>th</sup> September, 2019.
- ii) The Panel Constituted to hear this matter shall be as follows:
  - a. Njeri Onyango;
  - b. E Gichuru Kiplagat;
  - c. Mary N Kimani
- iii) The matter shall be mentioned on **Thursday, 19<sup>th</sup> September, 2019** to confirm compliance and for further directions.

4.9. When the matter came up for mention on 19<sup>th</sup> September, 2019. Mr. Rogoncho was present for ADAK and the Respondent was present in person. The Respondent requested the SDT to appoint a legal counsel to represent him in the proceedings. The matter was set for mention on 16<sup>th</sup> October, 2020.

4.10. At the mention on 16<sup>th</sup> October, 20219, Mr. Mwakio holding brief for Mr. Rogoncho was present for the ADAK. Mr. Cheluget officially came on record for the Respondent. Mr. Cheluget informed this panel that he tried to call the Respondent but was not able to reach him on phone and his calls went unanswered. This Panel also confirmed that ADAK had filed and served the Substantive Charge with relevant supporting documents as follows;

1. Doping Control Form dated 12<sup>th</sup> May, 2019
2. Test report dated 14<sup>th</sup> June, 2019
3. ADRV Notice dated 7<sup>th</sup> August, 2019
4. Letter dated 7<sup>th</sup> August, 2019
5. Prescription form dated 5<sup>th</sup> March, 2019
6. IAAF Rules
7. World Anti - Doping Code
8. ADAK Anti - Doping Rules

4.11. At the mention on 23<sup>rd</sup> October, 2019, Mr. Mwakio holding brief for Mr. Rogoncho appeared for ADAK. Mr. Cheluget was present for the Athlete/Respondent. Mr. Cheluget informed the Panel that the Respondent had written to ADAK informing it that he had quit sports and he proceeded to request for more time to contact the Respondent for more

...directions on the same. The matter was set for Mention for directions on 14<sup>th</sup> November, 2019.

4.12. When the matter came up for mention on 14<sup>th</sup> November, 2019, Mr. Mwakio holding brief for Mr. Rogoncho was present for ADAK and Mr. Njoroge holding brief for Mr Cheluget was present for the Respondent. Mr. Njoroge informed this Panel that the Respondent had accepted to be represented by a Counsel. He requested for 21 days to file the Statement of Defence. The matter was set for Mention on 11<sup>th</sup> December, 2019.

4.13. During the Mention on 11<sup>th</sup> December, 2019 Mr. Mwakio holding brief for Mr. Rogoncho was present for ADAK. There was no appearance for the Respondent. However, Mr. Cheluget had filed and served the Statement of Defence. The matter was set for hearing on 30<sup>th</sup> January, 2020.-

## 5. HEARING AND SUBMISSIONS

5.1. At the hearing on 30<sup>th</sup> January, 2020 ADAK was represented by Mr. Rogoncho. Mr. Cheluget was present for the Respondent. Mr. Cheluget informed this Panel that the Respondent was presently out of the Country in South Sudan where he worked for gain. Mr. Rogoncho also added that the Respondent had informed him that he will be available towards the end of March, 2020. The matter was set for Mention on 25<sup>th</sup> March, 2020 to establish the status of the Respondent.

5.2. This Panel did not sit on 25<sup>th</sup> March, 2020 as scheduled due to the Covid-19 Pandemic.

5.3. The matter was mentioned on 17<sup>th</sup> June, 2020. During the mention, Mr. Mwakio holding brief for Mr. Rogoncho was present for ADAK and Mr. Cheluget for the Respondent. Mr. Cheluget informed this Panel that he is in touch with the Respondent and he had indicated to him that he may be able to proceed virtually with proceedings. He requested for a further mention to prepare his responses. On his Part, Mr. Mwakio confirmed that he had no objection to Mr. Cheluget's request. The matter was set for mention on 24<sup>th</sup> June, 2020.

5.4. On 24<sup>th</sup> June, 2020 both Mr. Rogoncho and Mr. Cheluget were present for ADAK and the Respondent respectively. Mr. Cheluget informed this panel that the Respondent would not be able to follow the proceedings virtually because he is only available on weekends. He proceeded to propose that the matter be disposed of by way of written submissions. Mr. Rogoncho confirmed that he was amenable to proceed by way of written submissions. Mr. Cheluget was advised to file his written submissions within 21 days from the date thereof and ADAK to file and serve the same within 21 days thereafter. The matter was set for mention on 13<sup>th</sup> August, 2020.

5.5. At the mention on 13<sup>th</sup> August, 2020, Mr. Rogoncho was present for ADAK while Mr. Cheluget was for the Respondent. Mr. Cheluget confirmed that he had filed his written submissions and served the same upon Mr. Rogoncho via email. Mr. Rogoncho sought 14 more days to put in his written submissions. The matter was set for mention on 26<sup>th</sup> August, 2020 to confirm compliance

5.6. The matter was mentioned on 27<sup>th</sup> August, 2020 via Microsoft Teams. Mr. Rogoncho was present for ADAK and Mr. Cheluget for the Respondent was also present. Mr. Cheluget requested for leave to file Supplementary Submissions. The matter was set for mention on 3<sup>rd</sup> September, 2020.

5.7. At the Mention 3<sup>rd</sup> September, 2020. Mr. Rogoncho was present for ADAK. There was no appearance for the Respondent. The Respondent was granted Leave to file Supplementary Submissions within 14 days from the date thereof. The matter was set for mention on 23<sup>rd</sup> September, 2020.

5.8. At the mention of 23<sup>rd</sup> September, 2020. Mr. Rogoncho and Mr. Chuleget were present for both ADAK and the Respondent respectively. Both Counsels confirmed filing their written submissions. The matter was set for decision on 29<sup>th</sup> October, 2020.

## 6. ADAK SUBMISSIONS

6.1. ADAK filed written submissions on 24<sup>th</sup> August 2020. It is ADAK's position that under Article 3.2 that facts relating to Anti-Doping rule violation may be established by **reliable means**, including **admissions** and the methods of establishing facts and sets out the presumptions. Which include;

1. **Analytical methods or decision limits....**
2. WADA accredited Laboratories and other Laboratories approved by WADA are **presumed to have conducted Sample analysis** and custodial procedures in accordance with the international standards for laboratories procedures in accordance with the international standards for laboratories.
3. Departures from any other International Standards or other anti-doping rule or policy outlined in the code or these Anti-Doping **Rules which did not cause an Adverse Analytical Finding** or other Anti-Doping rule violation shall **not invalidate** such evidence or results.
4. The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of the pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.
5. The hearing panel in a hearing...

6.2. ADAK submitted that in this instance, an analytical method has established the presence of a prohibited substance. The Athlete did not challenge the process and outcome and did not

request for testing of the B Sample. ADAK thus poses that it has met its burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

6.3.ADAK also submitted that under Article 22.1 the athlete has a duty to;

- a. To be knowledgeable of and comply with anti-doping rules,
- b. To be available for sample collection always,
- 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.

6.4.ADAK held the position that the Respondent made several admissions and a few general denials. It submits that the Respondent made the following admissions and denials

- a) He admitted to not crosschecking the ingredients of the medication prescribed to him.
- b) He admitted to not notifying the Doctor that he was an athlete and should not be prescribed medication containing prohibited substances.
- c) The Respondent admitted to being aware of sample collections rules.
- d) The Respondent denied that he negligently or intentionally consumed any prohibited substance with the intentions of enhancing his performance.

6.5.ADAK further submitted that the Respondent had confirmed the presence of the prohibited substance in his sample through the injection of *Depo Medrol Injection* which is the origin of the prohibited substance and thus origin of the offending substance has been established.

6.6.ADAK placed reliance on CAS 2014/A/3820, par 77 – and submitted that to prove a lack of intention, the athlete must clearly demonstrate that the substance was not intended to enhance her performance. ADAK also relies on the case of **Kurt Foggo –vs- National Rugby League (NRL) CAS A2/2011**, where the Panel observed that;

*"The athlete must demonstrate that the substance was not intended to enhance the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish the absence of intent."*

It is ADAK's position therefore that CAS Jurisprudence is that the athlete bears the burden of establishing that violation was not intentional. And that in this instance the Respondent

has failed to prove a lack of intention to cheat based on his inability to prove his knowledge on the overall fight against doping as premised by his participation in local events.

6.7. On fault and negligence, ADAK submitted that the Respondent is charged with the responsibility to be knowledgeable and to comply with Anti-doping rules and take responsibility in the anti-doping context for what they ingest and use. In this case, the Respondent failed to do so thus breached rules 22.1.1 and 22.1.3 of ADAK ADR.

2.1.2

*"Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A sample where the Athlete waives analysis of the B sample and the B sample is not analyzed, or where the Athlete's B sample is analyzed and the analysis of the Athlete's B sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A sample; or where the Athlete's B sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*

6.8. ADAK relied on the decisions of CAS 2012/A/2804-DIMIYA KUTROVSKY v. ITF – Page 26 where the Panel observed that;

*'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.'*

6.9. On the issue of knowledge, ADAK submitted that the Respondent was an Athlete competing at National and International levels, who also knows that he is subject to doping controls as a consequence of his participation in National and/or International Competitions cannot simply assume as a general rule that the products/medicines he ingests are free of Prohibited/specified substances.

6.10. ADAK argued that ignorance is no excuse and that it is prudent for an athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses any product. Further, that the Respondent has had an active career in Athletics, and it is therefore curious that he has had no exposure to the crusade against doping in Sports.

6.11. On Sanctions, ADAK proposed a period of ineligibility of 4 years on the basis that no plausible explanation has been given for the presence of a Prohibited Substance in the Respondent's system

## 7. RESPONDENT'S SUBMISSIONS

7.1. The Respondent filed his submissions with the SDT on 12<sup>th</sup> August, 2020.

7.2. The Respondent's submissions were as follows;

*a. That the anti-doping violation was not intentional*

- b. *That there should be an elimination of the Period of Ineligibility since there is No Fault or Negligence on the Part of Paul; and*
- c. *In the alternative to (b) above, there shall be a reduction of the Period of Ineligibility based on No Significant Fault or Negligence on the part of Paul.*

**a. Violation Not Intentional**

7.3. On this Limb, the Respondent's Counsel argued that the ADRV was not intentional as the use of prohibited substance was used out of Competition. Further, that the Respondent used the Prohibited substance on the 5<sup>th</sup> of March, 2019 when he got prescribed by his doctor several medications to treat several allergies, he had a month earlier before the competition took place.

7.4. Mr. Cheluget argued that ADAK has not proved to the required standards that the use of the prohibited substance was intentional.

**b. No fault or Negligence**

7.5. On this limb, Mr. Cheluget submitted that the Prohibited substances entered the Respondent's body as a result of using a prescription he got from a doctor. The prescription was meant to cure severe rashes which were associated with severe itching. The Counsel further submitted that the use of the Prescription aforesaid was out of dire medical need and not for out of passion for lavish spending and luxurious life.

7.6. In his submissions, Mr. Cheluget borrowed a leaf from the Court of Arbitration for Sports (CAS) Jurisprudence particularly, the legal opinion requested by WADA, former President of the European Court of Human Rights Jean-Paul Costa where the importance of **equal treatment of athletes and sanction harmonization** was emphasized. He advanced this argument by submitting that Athletes are still only humans, and like every human, have a right to seek medical redress that they can afford.

7.7. The Counsel placed reliance on the case of **CAS 2006/A/1025 Mariano Puerta v ITF** where the panel considered and underlined the importance of the principle of *proportionality in the meting out of punishment*.

7.8. In the submissions, Mr. Cheluget admits that there was certainly a mistake on the part of the Respondent but not so gross a violation that the punishment should be so punitive as to outweigh the offense, and perhaps 'send a message'.

**No Significant fault or negligence**

7.9. On this limb, Mr. Cheluget urged this Panel to find that the Respondent's fault or negligence was not significant if in the unlikely event it finds that there was fault on his part.

7.10. In the submissions, Mr. Cheluget submits that the Respondent had never in his life committed a sporting violation and he therefore deserved at the very least to be shown by this Panel. Further, that should the Panel mind to mete out punishment for the Respondent, the period of ineligibility should be of not more than *twelve months* beginning on the date of his suspension which was 21<sup>st</sup> of August 2020.

7.11. In response to ADAK's submissions filed on 24<sup>th</sup> August 2020, the Mr. Chetuget filed Respondent's Supplementary Submissions on 23<sup>rd</sup> September, 2020 in which he focused on ADAK'S Submissions on Intention and Fault/Negligence.

## 8. DECISION

8.1. A review of the Doping Control Form completed by the Respondent at the time of Sample collection dated 12/05/2019 shows that the Respondent declared power run, muscle fuel, red bull and diclofenac as medication and supplements that he was taking at that time.

8.2. Upon notification of the AAF by the letter of 7<sup>th</sup> August, 2019, the Respondent responded by his letter of 7<sup>th</sup> August 2020 as follows.

**REF: ADAK/LEG/3/003/19**

**To: CEO ADAK**

*I am writing to you concerning the 12<sup>th</sup> May 2019 Anti-doping result in the Bucarest half Marathon.*

*The results from the Anti-doping laboratory shows that I used Methylprednisolone. I had skin rashes for a long time. But on date 5<sup>th</sup> March 2019, I decided to visit my personal doctor who confirmed that I was allergic after several tests. My doctor recommended some medications which are:*

- 1. Hydrocortisone cream*
- 2. Oatmeal soap*
- 3. Depo Medrol injection*

*I didn't know that the medications prescribed by my doctor will affect my career. Until now am still under this medication because the Allergy has not healed completely. This career is my only source of income that helps me take care of my family and my younger siblings that are in school. This career has helped me so much that I wouldn't like to ruin it in any way. So, I didn't know the medication will bring this effect.*

*I hope when making decision you will consider my case. Thanks in advance.*

*Yours sincerely,*

**Signed**

*Paul Kariuki Mwangi.*

The respondent attached a prescription form dated 5<sup>th</sup> March 2019.

8.3. Subsequently, the Respondent filed a statement of Defense with the SDT on 11<sup>th</sup> December, 2019. In his statement of defense, the Respondent reiterated the contents of his aforementioned letter of 5<sup>th</sup> March, 2019 to ADAK as follows:

- i. He has been suffering from skin rashes for some time now, and severally sought treatment**

- ii. On 5<sup>th</sup> March 2019 which was 2 months and 6 days before the race the Defendant experienced a severe itch due to the rashes on his skin
- iii. The Respondent immediately rushed to Muraya Medical Centre along Gilgil -Nyahururu road in Gilgil.
- iv. At the Hospital, the doctor gave a prescription of three drugs to manage the skin rashes and proceeded to take the medication. The 3 drugs were;
  - a) Hydrocortisone
  - b) Oatmeal soap; and
  - c) Depo Medrol injection

8.4. The Respondent waived his right to a full hearing and the matter proceeded by way of written submissions.

8.5. In his submissions, the Respondent confirmed the source of the AAF in his sample as *Methylprednisolone* from the injection he received to treat his allergic reaction. He stated that he had received the injection 1 month before the competition. However, this panel notes that the Respondent had not disclosed the injection in the Doping Control Form.

## 9. ANALYSIS AND DECISION

9.1. The Panel in making its determination will consider

- ii. Whether the ADRV has been proved to the Required Standard of proof
- iii. Whether or not there was an intention to violate the applicable anti-doping regulations
- iv. What degree of fault and/ or negligence to be assigned to the athlete's conduct.
- v. What period of ineligibility to be imposed

9.2. The Panel is of the view that the fact of the AAF as per the Laboratory results is not disputed, as far as the 'A' Sample results go and that there was no request for 'B' sample analysis.

9.3. The Panel also notes that there was no applicable TUE at the time of Sample Collection. Further, it is noted that ADAK did not question or doubt the authenticity of the Respondent's medical records. Those records had been in the possession of ADAK since January 2020 when the Respondent sent them to ADAK upon receiving the ADRV Notice.

9.4. This Panel from the foregoing therefore finds that the fact of the AAF has not been contested, there being no contest, this Panel finds that the Charge regarding the presence of a Prohibited Substance "*Methylprednisolone*" in the Athlete's Sample has been proved to the required standard under both the ADAK ADR and WADC article 3.2.

*"The facts relating to the anti-doping rule violation may be established by any reliable Means including admissions and methods of establishing facts and set out the presumptions which include, results obtained by*

a) *Analytical methods or decision limits*

b) *WADA accredited Laboratories approved by WADA....*”

9.5. Based on the above, this Panel finds that in this instance that there is an AAF from a WADA accredited laboratory which has not been challenged. There is also an admission by the Respondent to receiving medication for a severe skin rash which his personal doctor confirmed to be an allergic reaction suspected to be the source of the AAF. ADAK has also stated and it is on record that it has received substantial assistance from the Respondent in pursuing the source of the AAF.

9.6. Additionally, Article 2.1 WADC states that;

**"It is each athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their sample. Accordingly, it is not necessary that intent, fault, negligence or knowing on the athlete's part be demonstrated in order to establish an ADRV under this Article.**

9.7. 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 in an anti-doping rule violation and that he or she manifestly disregarded that risk.

9.8. It is this panel's position that a failure to explain to a reasonable satisfaction the origin of the prohibited substance would mean that the athlete cannot prove lack of intent. In the words of Arbitrator Yves Frontier on page 77.

**77. " it appears to me that logically I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says contained clenbuterol; with respect to the contrary view I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body"**

9.9. This panel is also of the view that apart from proving lack of intention, the Respondent must show as well that the substance was not intended to enhance his performance in the CAS decision of **CAS A2/2011 KURT FOGGO VS NATIONAL RUGBY LEAGUE (NRL)** the panel was of the view that:

***"The athlete must demonstrate the substance was not intended to enhance the athlete's performance. The mere fact that the athlete did not know the substance contained a prohibited ingredient does not establish absence of intent..."***

9.10. Rule 40.3 of the IAAF Rules, the term '*intentional*' is meant to

**"Identify those athletes who cheat. The term, therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk"**

9.11. In the present case, the Respondent gave an explanation through his letter of 7<sup>th</sup> August 2019, the statement of defense filed with the SDT on 24<sup>th</sup> August, 2019 and Submissions filed on 12<sup>th</sup> August, 2020 and supplementary submissions on 23<sup>rd</sup> September 2019 with the SDT. It is notable that the Respondent has in the panel's view made efforts to establish the origin of the substance stated in the AAF. According to his letter of 7<sup>th</sup> August, 2019 (page 15), the Respondent visited his personal doctor on 5<sup>th</sup> March 2019 with a severe skin rash a condition his doctor confirmed to be an allergic reaction before he participated in the Bucharest Half - Marathon in Bucharest on 12<sup>th</sup> May 2019 whereupon the prohibited substance was inadvertently introduced into his body. ADAK found of the Tribunal that the Respondent has provided substantial assistance and that it is satisfied with the same. ADAK for that reason made submissions on the matter and submitted that the Respondent disclosed satisfactorily the origin of the prohibited substance.

9.12. The Respondent contended that the Prohibited Substance was injected into his body as part of an ongoing treatment for an allergic reaction. He did not however inform the Doctor of his status as an athlete neither did he countercheck the medication he received whether it contained any substance in the Prohibited List. He has provided medical reports detailing the above treatment within the times he was tested for the Prohibited Substance. This Panel notes that ADAK has not countered these assertions.

9.13. Based on the foregoing, the panel having considered the circumstances as set out in the in the Respondent's defense is of the view that the athlete did not intend to cheat or to unduly enhance his performance. The onus and responsibility of disclosing participating status rests with the athlete pursuant to Article 22.1 on additional the Roles and Responsibilities of Athletes and other Persons. Specifically, Article 22.1.4 states thus:

**22.1.4 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.**

Based on the foregoing this Panel is of the view that the Respondent discharged his responsibility.

9.14. The rule is that the Respondent is under strict liability and is responsible to ensure that no Prohibited Substance enters his body. It is his duty, in this case, to establish circumstances for consideration in the reduction of the period of ineligibility from the prescribed period under the Code. The standard of proof is to the comfortable satisfaction of the panel and calls for the

Respondent to demonstrate that he made an effort to ensure that what he received, consumed, or entered his body was safe and not offending the anti-doping rules.

9.15. However, this Panel notes that the Respondent may have not undergone proper training and his standard of education may not support the full appreciation of the permissible conduct of an athlete as prescribed by the anti-doping rules.

9.16. In **CAS 2018/A/4643 Maria Sharapova –vs- International Tennis Federation**, the panel therein set out factors for consideration in the assessment of the degree of fault on the part of the athlete as follows;

- i) Professional Experience
- ii) Age
- iii) Perceived and actual degree of risk
- iv) Any impairment
- v) Disclosure of Medication on the Doping Control form
- vi) Admission of the ADRV in a timely manner
- vii) Any other relevant factors and specific circumstances that can explain the Athlete's conduct.

9.17. Article 2 of the WADC states that'

**"Athletes or other persons shall be responsible for knowing what constitutes ADRV and the substances and methods which have been included on the Prohibited list"**

9.18. Article 10.2 of the WADA Code,

**"The participant can establish how a Specified Substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Tribunal, that such Specified Substance was not intended to enhance the Player's sports performance or to mask the use of a performance-enhancing substance, the period of ineligibility established shall be replaced (assuming it is the participant's first anti-doping) offence with, at a minimum, a reprimand, and non-period of ineligibility and at maximum, a period of two years. To qualify for any elimination or reduction, the participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Tribunal, the absence of intent to enhance sports performance or mask the use of a performance-enhancing substance. Where the conditions set out are satisfied, the participant's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."**

In this instance, we find that the Respondent should bear normal fault having failed to demonstrate that he conducted himself in such a manner as to satisfy this panel that he made any inquiries relevant to avoid breach and to meet any of the basic objective elements of fault such as:

- a. Failing to inform the attending doctor of his 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.
- b. Failing to take responsibility, in the context of anti-doping, for what he ingested and used.
- c. Failing to familiarize himself with the Anti-doping rules.

9.20. This Panel notes that the Respondent failed to make any effort to appear in person before it to explain the Charges leveled against him by ADAK. This denied this Panel an opportunity to hear him, get to know him and even gauge his personal understanding of the issues involved, to get to know his educational level and gauge his knowledge in matters doping. This would have allowed the panel a better chance to determine better whether a lower degree of fault could be allowed.

9.21. This panel finds that:

- a. The ADRV has been admitted
- b. The admission was timeously given
- c. The Respondent did not intend to cheat
- d. The Respondent was at fault and negligent in his conduct leading to ingesting and using the purported medication which resulted in the AAF
- e. The origin of the offending substance has been established

9.22. The Panel notes that the Respondent has no known previous charge (s) or ADRV.

9.23. Under Article 10.1.2 of ADAK ADR, the period of 4 years may be avoided or reduced by establishing that the violation was not intentional in which case a reduction of up to two years may apply.

9.24. Any period of ineligibility may be eliminated under article 10.4 if it can be established that there was "*no significant fault or negligence*"

9.25. The period of ineligibility can be reduced to a maximum of 2 years if the ADRV is promptly admitted (Article 10.6.3) but contingent upon:

- i. The athlete's degree of fault; and
- ii. Assessment of the seriousness of the ADRV, contrary to article 10.2 ADR

9.26. Considering the panel's finding on the degree of fault, further considering the substance leading to the AAF and the manner of entry to the body, this panel is of the view that the Respondent may benefit from prompt admission made as his fault is significant.

**10. SANCTION**

**10.1.** Having reviewed the circumstances of this matter, the panel imposes the following sanctions

- d. The period of ineligibility for the Respondent shall be for 2 years from 7<sup>th</sup> August, 2019 the date of the provisional suspension pursuant to Article 10.2.2 of the WADC.
- e. The disqualification of the Bucharest Half-Marathon in Bucharest Romania results of 12/05/2019 and any subsequent event pursuant to Article 9 and 10 of the WADA code.
- f. Each party to bear its own costs.
- g. Parties have a right to appeal pursuant to Article 13 of the WADC and ADAK ADR.
- h. Any other prayers and motions are dismissed.

**DATED** at **NAIROBI** this.....day of .....20.....

Signed

**J NJERI ONYANGO**



Panel Member

**GICHURU KIPLAGAT**



Panel Member

**MARY KIMANI**

