REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
CAUSE NO. 7 OF 2020

IN THE MATTER BETWEEN

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

-Versus-

JANE WANJIRU MURIUKI.....RESPONDENT

DECISION

Hearing:	Written Submissions		
Panel:	John M. Ohaga	-	Chairperson
	Elynah Sifuna Shiveka	-	Member
	Mary N. Kimani	-	Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant;

Dr. Maurice Ajuang Owuor as instructed by the firm of Agan & Associates Advocates for the Respondent.

I. The Parties

1. The Applicant 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, tasked with the responsibility of carrying out anti-doping activities in the Country in order to ensure and safeguard the right of athletes to participate in a doping free sport.

2. The Respondent is an adult female of sound mind and a National Level Athlete (hereinafter '**the Athlete**'). Her address of service for purposes of this suit has been in the care of Agan & Associates Advocates.

II. Facts & Background

3. The Applicant vide the Charge Document filed at the Tribunal on the 4th March 2020 brought charges against the Athlete observing that on 1st December 2019, CHINADA Doping Control Officers ("**DCOs**") in an In-Competition testing during the Nanning International Marathon in China, collected a urine sample from the Athlete. Assisted by the DCO, the Athlete split the urine samples into two separate bottles, which were given reference numbers **A 6393821** (the "**A Sample**") and **B 6393821** (the "**B Sample**") in accordance with the prescribed World Anti-Doping (WADA) Procedures.

4. Both samples were subsequently taken to the Labor GmbH, WADA accredited laboratory in Seibersdorf, Austria. The laboratory analyzed the A Sample in accordance with the procedure set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") presence of a prohibited substance ***Prednisolone and Prednisone***.

5. The findings were communicated by the Applicant to the Athlete via a letter dated 10th February 2020 which communication informed the Athlete of her right to request for an analysis of the **B Sample**. The said letter also offered the Athlete an opportunity to provide an explanation by 24th February 2020.

6. The Athlete in her responded via her letter dated 25th February 2020 in which she acknowledged receipt of the ADRV Notice. She denied the charges and stated that she had used Prednisolone medication for the purpose of curing her chest problems and not to enhance her performance.

She further stated that she had disclosed the information of the medication on the Doping Control Form and she attached a doctor's prescription form dated 6th November 2019 in support of her defence.

7. The Applicant dissatisfied with the Athlete's explanation commenced proceedings before the Tribunal by filing a Notice to Charge against the Athlete dated 25th February 2020 which was received the Tribunal on 26th February 2020.

8. Consequently, directions were issued on 3rd March 2020 and a Panel constituted as follows to hear the matter:

   (a) John M Ohaga, Panel Chair
   (b) Njeri Onyango, Member
   (c) Mary N Kimani, Member
   The matter scheduled for mention before the Tribunal on 25th March 2020.

9. On 4th March 2020 the Applicant filed the Charge Document at the Tribunal.

10. At the mention held via Zoom on 11th June 2020 Mr. Mwakio, the Applicant's Counsel was present. He indicated that this was the first time the matter was being mentioned before the Tribunal. Mr. Mwakio requested for time to contact the Athlete to request her attendance. He stated that ADAK was willing to provide transportation for the Athlete who lives in Kasarani to enable her attend the proceedings. The matter was to be mentioned again on 11th June 2020.

11. During the mention on 11th June 2020 Mr. Mwakio who was in attendance for the Applicant informed the Tribunal that he had spoken to Athlete; she had travelled to Nakuru to take care of ailing mother; The Athlete had requested for pro bono Counsel to handle her matter. Dr. Owuor was prepared to take on her matter. The Tribunal ordered Mr. Mwakio to serve Charge Document and next mention set for 2nd July 2020.

12. On 2nd July 2020, Mr. Mwakio said Dr. Owuor had agreed to take up the matter and had served his notice of appointment with ADAK. Mr. Mwakio confirmed that the Charge Document had already been served to Dr. Owuor. The Tribunal directed and ordered that the Athlete's Counsel take

instructions and file his response within 21 days and the matter be listed for mention on 23rd July 2020.

13. On 6th July 2020 a Notice of Appointment of Advocates was filed at the Tribunal by Agan & Associates Advocates on behalf of the Athlete.

14. At the mention on 29th July 2020 Dr. Owuor said he had filed their Response to Charge electronically and Mr. Mwakio confirmed receipt of same. On hearing both parties, the Tribunal ordered that they file their written submissions within 21 days and the next mention set for 10th September 2020 to confirm compliance.

15. On 19th August 2020 the Athlete's submissions were filed at the Tribunal while those of the Applicant were filed thereafter on 22nd September 2020.

16. During the mention on 10th September 2020 Dr. Owuor for the Athlete and Mr. Rogoncho for the Applicant were present. Upon hearing both Counsel the Tribunal directed and ordered that the Tribunal delivers a considered decision on 15th October 2020.

III. Parties' Submissions

Applicant's Submissions

17. The Applicant stated that it wished to adopt and own the Charge Documents dated 3rd March 2020 and the annexures thereto as an integral part of its submission.

18. Regarding their legal position the Applicant submitted that, "under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel."

19. The Applicant also listed the various presumptions and roles/responsibilities of the Athlete as stipulated under WADC/ADAK ADR's Articles 3 & 22.1 respectively. The Applicant also stressed the Athlete's duty to uphold the spirit of sports as laid down the WADC's Preface.

20. The Applicant submitted that the Athlete, "In her defence ... made the following admissions.

a) She admitted ingesting the prohibited substance which she indicated in the Doping Control Form
b) She admitted to not confirming and crosschecking the ingredients of the medication before ingesting them.
c) She admitted to not informing the doctor that she was an athlete before she received treatment
d) The Respondent admitted to being aware of sample collection rules.
e) The Respondent denied that he negligently or intentionally consumed any prohibited substance with the intentions of enhancing her performance."

21. Regarding proof of an ADRV, the Applicant said that "[...] a violation of Article 2.1 of the ADAK ADR. **Prednisolone and prednisone** are Specified Substance and constitutes to a 2-year sanction," and "Where 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."

22. It was the Applicant's contention that "[...] Article 10.2.1 the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction." urging "the Tribunal to find that an ADRV has been committed by the Respondent herein."

23. Laying down its arguments regarding 'intention' the Applicant submitted that, "For an ADRV to be committed non-intentionally, the Athlete must prove that, by balance of probability, **she/he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV. According to established case-law of **CAS 2014/A/3820, par. 77** the proof by a balance of probability requires that **one explanation is more probable than the other possible explanation**. For that purpose, an athlete must provide actual evidence as opposed to mere speculation." adding that, "To prove lack of intention, the athlete must clearly demonstrate that the substance "was not intended to enhance" his performance. It does not suffice to say that one did not know that the supplements contained a banned substance.

24. The Applicant conceded that the origin of the proscribed substance had been established by the Athlete.

25. Relying on **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26 and PERIERA-CAS 2016/A 14609**, the Applicant stated that "34.From the foregoing, the onus is on the Respondent to ensure that she does not ingest medication in a careless manner.

26. On sanction, the Applicant submitted, "For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance "and the agency ... can establish that the (ADRV) was intentional". If Article 10.2.1 does not apply, the period of ineligibility shall be two years."

27. The Applicant went on further to say, summing up "In the circumstances, the Respondent has adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on her part as required by the ADAK rules and the WADAC to warrant sanction reduction."

28. The Applicant concluded by praying that "The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding."

Athlete's Submissions

29. In her submissions the Athlete denied "use of prohibited substances namely Prednisolone for purposes of enhancing her performance *vide* her letter dated 25 February 2020"

30. Further the Athlete's Counsel submitted that, "[...]. An Athlete can usually qualify for a reduced sanction if they are able to determine the source of his or her positive test and establish a lack of intent to cheat.[3] This is where a complete disclosure of medications and supplements used by the athlete can be so important.[4] *Frequently where the Athlete has declared medication and supplements which later turns out to be the source of their positive result the Athlete's declaration is considered a powerful evidence of the Athletes*

intent to comply with rules and leads to a finding that the athlete had not intended to cheat.[5]**(emphasis mine)** More specifically the inclusion of a prohibited substance or a product containing substance in the doping control form prior to a positive test can lead to a more advantageous adjudication outcome for the athlete, as opposed to a situation in which the athlete neglected to properly complete their declaration.[6]"

31. Counsel argued that "Article 10.4 of the WADA Code provides that, "where an athlete can establish how a specified substance entered his or her body and such a specified substance was not supposed to enhance the athletes sports performance or mask the use of performance enhancing substance the period of ineligibility found in article 10.2 shall be replaced with the following:

    First violation at a minimum a reprimand and no period of ineligibility and at maximum two years of ineligibility.

    To justify any reduction or elimination an Athlete must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance or the absence of intent to mask the use of performance enhancing substance. The Athletes' degree of fault shall be the criterion considered in reduction of any period of ineligibility."

32. Relying on Ashley Johnson Counsel wrote, "In this case the Wasp's RFC player was given a six month ban backdated to the date of sample collection as opposed to the four year ban for intentional doping. The explanation given by Johnson was that he mistakenly took his wife's weight loss pills which were contaminated with hydrochlorothiazide instead of his own supplement which was in a similar bottle. The Panel accepted Johnson's evidence and were satisfied that it was the truth The Panel explained that the " No Significant Fault or Negligence" (NFS) provisions are designed to provide flexibility of sanction depending on the degree of fault in a particular case, as seen in the cases of Marin Cilic and Maria Sharapova. It stressed the need to avoid a literal interpretation of NSF, instead taking a purposive approach, in line with CAS jurisprudence. The Panel explained that NSF does not mean that any fault must be de minimis,

rather that a panel must weigh up degrees of fault and negligence and decide the sanction accordingly. Finally, the Panel considered that, under Regulation 21.10.11.2, Johnson's ban should be backdated to the date of the sample collection owing to his "prompt admission".

33. Commenting on the role of the adjudicating panel, Counsel urged, "the hearing panel is to *strike a balance between letting the "guilty" Athletes escape and the risk of occasionally convicting an "innocent" one.*[8] The hearing panel can only be satisfied to its comfortable satisfaction that use/non use of a prohibited substance or prohibited method did/did not occur, if it is able to simultaneously and independently-weigh the evidence adduced on the one hand by the prosecution and the evidence adduced on the other by defense."

34. In regard to burden the Athlete's Counsel submitted as follows: "The burden of proof lies with he/she who alleges. Rule 33 (1) (2) Proof of Doping of IAAF COMPETITION RULES 2016-2017 relating to burden of proof *vide* subsection (1) states as follows:

    The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred.
    In view of the above, the World Anti-Doping Code 2015 *vide* article 3 on proof of doping and specifically article 3.1 on Burdens of Proof provides that:

    > *The anti-doping organization shall have the burden of establishing that an anti- doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made."*

35. While in regard to the standard of proof he submitted: *"Nota bene,* whereas in relation to ***Standards of Proof vide article 32 subsection (2)*** of IAAF COMPETITION RULES 2016-2017 ***it states as follows:***

    "Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, ***the standard of proof shall be by a balance of probability. (Italics and emphasis mine)"***

Whereas the Standard of proof *vide* the World Anti-Doping Code 2015 in article 3 (1) provides that in all cases the standard is greater than a mere balance of probability but less than proof beyond a reasonable doubt. The standard of proof where the burden of proof is on the accused is on a balance of probability."

36. Further to this, Counsel for the Athlete relied on following case law for burden of proof: "It was stated in *Republic v. Subordinate Court of the first Class Magistrate at City Hall, Nairobi and another, exparte Yougindar Pall Sennik and another Retread Limited [2006] 1 EA 330 (Nyamu J),* that when a person is bound to prove the existence of any fact it is the law that the burden of proof lies on that person. According to section 107 (1) of the Evidence Act, the burden is on the party who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts to prove the existence of those facts. Section 107 (2) of the Evidence Act states that when a person is bound to prove the existence of a certain fact the burden of proving that fact lies on that person.

In Kioko v Republic [1983] KLR 289 [1982-88] 1 KAR 157 (Madan, Kneller and Hancox JJA), it was held that the law does not require the accused to prove his innocence, and therefore it is erroneous for a court to refer to certain acts or omissions of the accused as being inconsistent with his innocence. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. This is founded on the maxim that 'he who alleges must prove.' The burden of proof rests always with the prosecution, and there is never a burden on the accused person to disprove the charge."

37. He relied on the following case law in regard to standard of proof: "It was stated in *Mwakima and three others v. Republic [1989] KLR 530 (Bosire J),* that where the law places the burden of proof on the accused person, the standard of proof is never, unless the law clearly says so, as high as that on the prosecution to prove a charge beyond reasonable doubt. In that case, the trial court had erroneously held that the duty on the accused to explain the circumstances of possession of the item in question was beyond reasonable doubt."

38. It was the Counsel's submission that, "In criminal law presumptions can either be rebuttable or irrefutable. In case of rebuttable presumptions, such cannot be the basis of determining culpability. The prosecution must discharge its burden and standard of proof beyond a balance of probability. It is not enough to make mere allegations. The proof must be tangible, cogent and substantial.

    The presumption made by the Petitioner in this matter is that the presence of prohibited substances, metabolites or markers and specifically Prednisolone has been occasioned by the ingestion of the said substance into the body and therefore artificially enhancing their performance and thus giving the respondent an unfair competitive advantage over other competitors is ***rebuttable***. Presumptions cannot substitute the requirement of the prosecution to discharge its burden of proof and its standard of proof."

39. The Athlete's Counsel had the following to say in regard to the role of the Athlete: *"The role of the athlete is not disputed in terms of being responsible for all that finds its way into their bodies, however, the athlete should not be punished where they have demonstrated that they bear no fault/ significant fault or negligence/significant negligence for the ADVR.*

40. Addressing the issue of remedy, Counsel for the Athlete submitted, "in view of the Athlete's plausible explanation, and forthrightness as demonstrated in her accurate completion of the Doping Control Form, where she voluntarily without coercion indicated her use of Predisolone as medication, supported by a prescription from a medical Doctor which corroborates her plea of no fault/no negligence, the above charge be dismissed and the suspension be lifted considering that athlete has learnt her lesson painfully and to allow the athlete pursue her athletics career which is her source of livelihood and gainful employment and that all competitive results obtained including on the 1st December 2019 be reinstated."

IV. The Charge

41. The Anti-Doping Agency of Kenya preferred the following charge against the Athlete:-

Presence of a prohibited substance Prednisone in the Athlete's Sample contrary to Article 2.1 of ADAK ADR, Article 2.1 of the WADC and Rule 32.2 (a) and Rule 32.2 (b) of the IAAF rules.

42. *Prednisone* is listed as a Glucocorticoids under S.9 of the 2018 WADA Prohibited List.

V. Jurisdiction of the Tribunal

43. The Tribunal has jurisdiction under Section 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 and hear and determine the case.

44. The Athlete also admitted the jurisdiction of this Tribunal to determine the case.

VI. Applicable Law

45. Article 2 of the ADAK Rules 2016 stipulates the definition of doping and anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*

2.1.1 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*. 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 rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: 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 ...

VII. MERITS

46. In the following discussion, additional facts and allegations may be set out where relevant in connection with the legal discussion that follows.

47. The Tribunal will address the issues as follows:
    a. *Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*
    b. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
    c. *Reduction based on No Fault/No Negligence/Knowledge;*
    d. *The Standard Sanction and what sanction to impose in the circumstance.*

A. The Occurrence of an ADRV, the Burden and Standard of proof.

48. As used in WADC's Article 3.1:

> *The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*
>
> *Where the Code places the burden upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*
>
> *[Comment to Article 3.1: This standard of proof required to be met by the Anti- Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]*

Burden and Standard of Proof

49. First in regard to the **Standard of proof,** the Panel would to point the attention of the parties to the aforementioned 'Comment to Article 3.1' in regard to WADA Code's applicable standards in response to Counsel for the Athlete's elaborate submissions regarding applicable standards.

50. In particular Athlete's Counsel submitted that, *"The Athlete like any other person must enjoy presumption of innocence as provided in the Kenya Constitution 2010 vide Article 50 (2), MUST be adhered to and not derogated from on account of statutory provisions inter alia strict liability."* This Panel is of the opinion that there is no derogation whatsoever and in this regard it points parties to the Code's introductory comments on Purpose, Scope and Organization of the World Anti-Doping Program and the Code:

The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are:

- *To protect the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide, and*
- *To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.*

The Code

The Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. it is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The Code has been drafted giving consideration to the principles of proportionality and human rights.

The World Anti-Doping Program

The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs. The main elements are:

Level 1: The Code

Level 2: International Standards

Level 3: Models of Best Practice and guidelines'

51. Further to this, Kenya became the 123rd State Party to ratify the UNESCO International Convention against Doping in Sport on 25/08/2009; in particular,

'The UNESCO Convention allows Governments of the world to align their domestic laws and policies with the World Anti-Doping Code, which in turn creates synergy between the rules governing anti-doping in sport and national legislation. Therefore, whenever a country ratifies the Convention, it further strengthens the global system.'

52. It is furtherance of this ratification that Kenya passed legislation for effective implementation of the WADA Code namely, Anti-Doping Act of 2016 (together with its subsidiary Anti-Doping Rules-ADR), see Code INTRODUCTION:

'All provisions of the Code are mandatory in substance and must be followed as applicable by each anti-doping organization and athlete or other Person. The Code does not, however, replace or eliminate the need for comprehensive anti-doping rules to be adopted by each anti-doping organization. While some provisions of the Code must be incorporated without substantive change by each anti-doping organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each anti-doping organization or establish requirements that must be followed by each anti-doping organization but need not be repeated in its own anti-doping rules.'

Additionally,

'Each Signatory shall establish rules and procedures to ensure that all athletes or other Persons under the authority of the Signatory and its member organizations consent to the dissemination of their private data as required or authorized by the Code, and are bound by and compliant with Code anti-doping rules, and that the appropriate Consequences are imposed on those athletes or other Persons who are not in conformity with those rules. These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, ***are distinct in nature from criminal and civil proceedings****. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent*

the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.'

53. The Athlete in this matter, exercising her right to compete in the sport of athletics, without any coercion submitted herself to WADC's jurisdiction by registering to participate in the IAAF sanctioned Nanning International Marathon in China - needless to say, IAAF is a Code Signatory and so is CHINADA (whose Doping Control Officers who undertook the initial Results Management). Furthermore, on 1st December 2019, she signed the DCF binding herself to the WADC whose rules are considered sports rules and which are an essential prerequisite for participation in her chosen sport, see Code INTRODUCTION:

'Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. ***Athletes*** *or other Persons* ***accept these rules as a condition of participation and shall be bound by these rules.*** *Each* ***Signatory*** *shall establish rules and procedures to ensure that all* ***athletes*** *or other* ***Persons*** *under the authority of the* ***Signatory*** *and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant* ***anti-doping organizations.'***

54. Suffice it to say that the aforementioned irrevocable factors required parties appearing before this Tribunal to pursue Code compliant rules, procedures/processes. Likewise, the said factors informed the Tribunal's adherence to the Code, including its recognized burden/standards of proof, rather than those based on criminal law and heavily relied upon by the Athlete's Counsel.

Occurrence of an ADRV

55. Going back to the issue of the ADRV this Panel observes that, the 'presence' of the prohibited substance in the Athlete's body was not a contested fact in this case. In actual fact, the Athlete's Counsel submitted that the Athlete herself listed down the proscribed substance in her Doping Control Form (DCF) on 1st December 2019 on the occasion of the Nanning International Marathon in China, during her Urine Sample taking process, as the same Sample was packaged for subsequent testing at the WADA Accredited Lab.

56. Further, the Panel notes that WADC's Article 3.2 provides that *'[...] Facts related to anti-doping rule violations may be established by any reliable means, including admissions. [...]'*. Having looked at and satisfied itself that indeed the Athlete declared use of the prohibited substance in her DCF on that particular occasion, (see a copy of DCF, Pg. 8 of the Charge Document) the Panel rules that via her own admission coupled by the reliable analytical results from the accredited laboratory (another uncontested issue), the fact of her commission of the ADRV had been established to its comfortable satisfaction.

57. It is worth bringing to the parties attention that, under WADC's Article 2.1 *'Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample'* constitutes an ADRV. Following therefrom, WADC's Article 2.1.1 stipulated, *'It is each Athlete's personal duty to ensure that 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.* 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 rule violation under Article 2.1.'

58. For fine measure, the Panel also notes that in absence of a Sample B analysis to contradict the A Sample result as is in this case, the Panel finds that as per WADC's Article 2.1.2, an ADRV had been committed by the Athlete:

> '2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: 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.'

B. Was the Athlete's ADRV intentional?

59. The prohibited substance in question being a Specified Substance, the burden still lingered in the Applicant's domain for the Applicant to prove the Athlete's ADRV was committed intentionally pursuant to Article 10.2 of the WADC:

'10.2 *Ineligibility* for Presence, *Use* or *Attempted Use* or *Possession* of a *Prohibited Substance* or *Prohibited Method*

> The period of *Ineligibility* for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:
>
> 10.2.1 The period of Ineligibility shall be four years where:
>
> 10.2.1.2 The anti-doping rule violation involves a *Specified Substance*, and the *Anti-Doping Organization can* establish that the anti-doping rule violation was intentional.

60. The clear wording of WADC's Article 10.2.1.2 therefore cancelled out the Applicant's contention that *"[...] Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no [...] intention to entitle him to a reduction of sanction."*

61. At very outset as argued by her Counsel, the Athlete had denied the 'intention to cheat' and in her own words she had written, *"[...] ningependa kusema* ***nemekataa hio mastaka*** *ningependa kuesema kwamba* ***nilitumia hio dawa juu ya kifua nasio nilikua nataka kuchinda mbio,*** *na hio dawa niliandika kwa hio form ya kupimwa nimepatia Adak hio prescription"*, (see copy of Athlete's handwritten letter dated 25.2.2020 on Pg. 15 of the Charge Document). In support of the Athlete' s claim her Counsel submitted that, *"The Athlete vide her letter dated 25th February 2020 explains that due to a chest problem, Prednisolone was prescribed to her by a doctor for purposes of treating her chest complications and the said prescription is dated 6th November 2019."* Was it probable that the Athlete had an illness that required treatment requiring use of the prohibited substance?

62. In absence of a rejoinder from the Applicant challenging the claim to a bona fide treatment purpose this Panel would accept the Athlete's claim.

63. Further it is this Panel's opinion that having misconstrued which party's burden it was to establish that the ADRV was intentional, it appears the Applicant concentrated its efforts on arguments which did not lend much weight to its duty to prove that the Athlete committed the ADRV with the intention to enhance her performance i.e. intentionally. Whereas the Applicant contends that, *"it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional."*, this Panel observes that while that is true under WADC's Article 10.2.1.1, it is also self-evident that, as under WADC's Article 10.2.1.2 which is operational in this case, that burden clearly abides at the door of the ADO, which is in this case the Applicant.

64. Jurisprudence such as **"CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** 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 absence of intent"*, relied upon by the Applicant does not assist this Panel because for instance, this Panel is not seized of any evidence indicating that the Athlete did not know what/where the prohibited substance originated but rather the opposite was established by both parties, which was that the Athlete herself listed the proscribed substance in her own DCF prior to the analytical tests confirming its presence in her Sample.

65. Striving to establish that the Athlete's ADRV was intentional the Applicant submitted that *"the Athlete has had a long career in athletics, and it is only questionable that she has had no exposure to the crusade against doping in sports."* Further the Applicant wrote, *"We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product."* The Applicant relied on **CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** where *"the panel observed that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of athlete's intention to enhance sport performance.[8]"*

66. Juxtaposing the Applicant's foregoing contentions against the Athlete's handwritten explanation, it is the analysis of this Panel that:
    (a) While the Applicant variously questioned the Athlete's knowledge of the doping program or emphasized her continuing personal duty to the Code or cautioned against unintended consumption of a prohibited substance and completed this particular submission with its observance that an athlete's lack of knowledge [...] is not enough to demonstrate the absence of athlete's intention to enhance sports performance, aside from the obvious which was that the Athlete had committed an ADRV, little more in the way of collaborating evidence was offered by the Applicant to anchor its allegation that she took the medication in order to enhance her sport performance.
    (b) On the other hand, Athlete did not claim not to have not known about doping but said she had read and understood the letter from ADAK (Notice of Charge) and thereto clarified that she denied the allegation that she had used the medicine to enhance her performance but rather had taken the medication because of a chest matter (attaching a prescription to support her claim).
    (c) It's our observation that the collaborating evidence, for instance the doctor's prescription, offered by the Athlete was not contested or rebutted by the Applicant and thereby her claim to have used the proscribed substance on medicinal grounds was effectively unchallenged.

67. It is our general view that when a specified substance is involved as herein, the Applicant is laden with what we could refer to as a double burden of proof responsibility, (a) first for establishing the occurrence of the ADRV via comfortable satisfaction, (see WADC's Article 3.1), and (b) second for establishing that the ADRV was intentional via a balance of probability, (see WADC's Article. 10.2.1.2.). Illustrative of this conundrum was the Athlete Counsel's submission that, *"The proof of ADVR against the athlete is based on rebuttable presumption, namely that the presence of a prohibited substance can only find its way into a person's body for purposes of cheating via enhancing one's performance and thus gaining unfair advantage over others."* In this instance, the Athlete's Counsel confused proof of occurrence of the ADRV with the requirement of the party seized of relevant burden to establish that the ADRV was intentional.

68. Since in this case it was a Code requirement for the Applicant to establish that the Athlete's ADRV was intentional, from the foregoing, we are inclined to be persuaded by the Athlete's Counsel argument that, *"The Respondent's honesty and provision of information in good faith is evident in the details provided in the Doping Control Form dated 1st December 2019, where the Respondent indicated that she had taken Predisolone as medication, even before the charges were preferred against her. In other words the revelation of the use of the medication drug came earlier, than the results of the anti-doping laboratory test. "Inadvertent rule violation are relatively rare* ***but they are possible, and when they do occur they are typically the result of supplements or medication..."*** **(emphasis Counsel's).**"

69. We also call parties attention to WADC's Article 10.2.3:

> *'10.2.3 As used in Articles 10.2 and 10.3, 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 or result in an anti-doping rule violation and manifestly disregarded that risk.* ***An anti-doping rule violation resulting from an adverse analytical finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the athlete can establish that the Prohibited Substance was used out-of-Competition.*** *[...].'*

Further to this, the Athlete had adduced evidence of a prescription dated 6th November 2019 indicating the substance was being administered out-of-competition – in particular the In-competition Sample was taken on 1st December 2019.

70. Flowing from the aforementioned, we are of the considered opinion that the Applicant failed to convince this Panel on a balance of probability that the Athlete's ADRV was intentional.

C. Reduction Based on No Fault or Negligence/No Significant Fault or Negligence/Knowledge

71. It was the Applicants assertion that, "On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension."

72. The prohibited substance was notified by the Athlete in her DCF and by consensus it originated from her ingestion of medicine prescribed by a doctor, therefore, having found that the Athlete committed an ADRV but not intentionally the Panel shall examine if any reduction could accrue from her pleadings. On TUE, her Counsel stated; *"Therapeutic Use Exemption (TUE) is an exemption that allows an athlete to use, for therapeutic purposes only, an otherwise prohibited substance or method (of administering a substance)*[1]. *An Athlete vide section 4-3 (a) of the Therapeutic Use Exemption Committee (TUEC) ".....**may only be granted retroactive approval** for his therapeutic use of a prohibited substance or prohibited method (i.e. a retroactive TUE) **if:** **a. Emergency treatment or treatment of an acute medical condition was necessary; or b. Due to other exceptional circumstances, there was insufficient time or opportunity for the Athlete to submit or for the TUEC to consider an application for TUE prior to sample collection.***
*In view of the above it is clear that the International Standards Therapeutic Use Exemption (ISTUE) (January 2019), envisages situations where an Athlete due to emergencies or exceptional circumstances, **is not able to submit an application for TUE to a Therapeutic Use Exemption Committee (TUEC) in time.** And therefore may seek retroactive approval. In this specific case it appears that the Athlete unexpectedly required medical attention and did not have the luxury of time to seek such a permission (TUE)."*

73. If Counsel for the Athlete summation may have been the position, then the next logical question was why the option of a retroactive TUE mentioned in his submission was not pursued and thence, this Panel is curious why no evidence was placed before it indicating, at least, a duly processed request for a retroactive TUE. The doctor's prescription proffered by the Athlete was dated 6th November 2019 while collection of the Sample that gave rise to the ADRV was conducted on 1st December 2019; the Panel wondered whether the intervening period of about three (3) weeks qualified to be considered

as 'other exceptional circumstances' and/or the Athlete's emergency treatment stretched out that long or yet still why within that three week span of time a TUE could not have been sought pursuant with the ADR. We caution that applying for a TUE before ingesting Prohibited Substance or undertaking a Prohibited Method is not optional for athletes under Code duty but rather it is an obligation. Further, a retroactive TUE option is provided for in the Code for those situations where athletes do not have the 'luxury' of time in appreciation of the fact that athletes are not immune to disease or injury like all other mortals.

No Fault/Negligence

74. The Athlete's Counsel also submitted that, ***"In this case it is our humble view that the Respondent has demonstrated that she bears no fault/ significant fault, no negligence/significant negligence ab initio, when even before the charges were preferred against her she truthfully provided her use of Prednisolone as medication. She could easily have filed wrong and misleading information which she deliberately chose not to".*** further stating that *"If an athlete can show that they bear no fault or negligence for the ADVR, the period of ineligibility (as defined in the Code vide Article 10.4) is eliminated altogether.*
If an Athlete can show that their fault or negligence was 'not significant', the period of ineligibility applicable to them may be reduced based on the degree of fault. This can be as little as a reprimand (and no period of ineligibility) in the case of ADVRs involving Specified Substances or Contaminated Products, or a reduction of one half of the otherwise applicable period of ineligibility in the case of other ADVRs."

75. On the other side of the divide the Applicant countered that, *"The Respondent 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 they ingest and use. The respondent hence failed to discharge her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR."*

76. Crucially the Panel inquired if indeed the Athlete had 'demonstrated' No Fault/No Negligence as claimed by her Counsel. As stated by the Applicant, the Athlete's roles/duties under the Code included strictly avoiding ingesting proscribed substances and if, or when that was completely unavoidable, she was duty bound to follow the ADR prescribed process of going about usage of the same. In the Athlete's case it would have been an

ADR legitimate expectation that she acquired the TUE before and if that was impossible, then after, (retroactively). The fact that the Athlete listed down the prohibited substance did not equal to registering for an TUE (retroactive included), as laid down by ADR and therefore the act of listing down the substance did not absolve her from her Code duties.

77. It was also the contention of the Applicant that *"[...] Based on her experience, she ought to have taken measures to ensure that whatever she ingests does not contain any prohibited substance."* We were not told how long the Athlete had conducted her career; what was clear was that this was her first ADRV. Her experience then worked like a double edged sword in her case i.e. having been in sports business for seemingly long but only incurred her first ADRV after a good length of time, (and which she had either the honesty, or presence of mind, to accurately document - i.e. the rogue Prohibited Substance) in advance of scientific testing/confirmation, was laudable. On the other hand, her experience ought to have informed her of her Code duties and need to observe the necessary protocols before ingestion of Prohibited Substance or at least undertake remedial steps in the aftermath.

78. The Panel also noted that reliance by the Athlete's Counsel on 'Ashley Johnson' did not assist it as the 'Johnson' case involved a different, non-comparable situation; 'Johnson's' was a mistaken ingestion of a Contaminated Product pursuant to WADC's Article 10.5.1.2 whereas the matter at hand fell under WADC's Article 10.5.1.1 which specifically deals with Specified Substances.

79. In line with the purposeful approach advanced by the Athlete's Counsel, this Panel asks if WADC's Article 10.4 should be applicable to the Athlete's case on account that the Athlete established how the Specified Substance entered her body and that such Specified Substance was not supposed to enhance her sports performance or mask the use of performance enhancing substances? In any case were these arguments advanced by the Athlete's Counsel not already spent in anchoring the Athlete against the buffeting winds of intent establishment by the Applicant?

80. Coupled with our caution that TUE rules were not observed by the Athlete, 'Comments to Article 10.4' shed more light on what qualities would encapsulate those unique situations that could crystalize an Article

10.4/10.5 'No Fault or Negligence/ No Significant Fault or Negligence' finding:

> *'[Comment to Article 10.4]: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred.*
> *They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor.*
> *Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited*
> *Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink).*
> *However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.]'*

81. Pursuant to WADC's Article 21.1 ***Roles and Responsibilities of Athletes*** that by all means bound the Athlete in this case were:
'21.1.1, *To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code;*
21.13, *To take responsibility, in the context of anti-doping, for what they ingest ad use;*
21.1.4, *'To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code.'*

82. For the Athlete to side step her responsibility of making sure that the medication she received did not violate anti-doping policies and rules adopted pursuant to the Code and then unilaterally abrogate the TUE rules while pleading No Fault/Negligence would not be legitimate and thereby her actions/omissions placed her outside the category of unique circumstances anticipated in WADC's Article 10.4.

83. In due consideration of the aforementioned Code factors, it is the finding of this Panel that the Athlete did not adequately discharge her responsibilities under the Code and hence a pleading of No Fault/ Negligence under WADC's Article 10.4 could not be sustained. As stressed in CAS 2017/A/5015 FIS v. Therese Johaug & NIF para. "185. **CAS jurisprudence is very clear that a finding of No Fault applies only in truly exceptional cases**. In order to have acted with No Fault, Ms Johaug **must have exercised the "utmost caution" in avoiding doping**. As noted in CAS 2011/A/2518, the Athlete's fault is *"measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance"*. It also emphasized the personal duty of care, citing the basic principle that it is *"each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body"*. 186. Even where the circumstances are "extraordinary" and there is minimal negligence, athletes are not exempt from the duty to maintain "utmost caution" (CAS 2006/A/1025)."

No Significant Fault/Negligence

84. That said, the Athlete's Counsel did rightly argue that, *"[...]. The Athletes degree of fault shall be the criterion considered in reduction of any period of ineligibility.[7]"* therefore this Panel shall consider No Significant Fault/Negligence pursuant to WADC's Article 10.5. The Athlete's Sample tested for a Specified Substance hence Article 10.5.1.1 applied:

> *'10.5.1.1 Specified Substances*
> *Where the anti-doping rule violation involves a Specified Substance, and the athlete or other Person can establish no Significant fault or negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the athlete's or other Person's degree of fault.'*

85. Were the afore stated inadequacies exhibited by the Athlete so serious as to condemn her to no reduction? Other athletes, probably of measurable or even higher experience and exposure had also found themselves running afoul of the anti-doping laws and this Panel turns to the Johaug case for guidance:

> *'An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations; he or she cannot delegate away his or her responsibilities to avoid doping. The standard of care for top athletes is very high in light of their experience, expected knowledge of anti-doping rules, and public impact they have on their particular sport. It follows that a top athlete must always personally take very rigorous measures to discharge these obligations. The prescription of medicine by a doctor does not relieve the athlete from checking if the medicine contains forbidden substances or not. Athletes always bear personal responsibility and the failure of a doctor does not exempt the athlete from personal responsibility. Furthermore, athletes have a duty to cross-check assurances given by a doctor even where such a doctor is a sports specialist.'*

86. From the above summation in Johaug it does appear that personal responsibility of the Athlete takes the upper hand. And will be noted elsewhere in this discussion, lack of knowledge would not be an adequate shield for the Athlete in this case. Other jurisprudence placed emphasis on the Athlete's duty to the Doping Program: Johaug, para. *'191. Numerous cases before the CAS have consistently emphasized that an athlete's personal responsibility requires him or her to cross-check assurances given by a doctor. This was summarized in CAS 2012/A/2959 as follows:*

> *"8.19 [...] Dr. Tachuk's role does not relieve Mr. Nilforushan of responsibility. In CAS*
> *2008/A/1488, the CAS panel commented at paragraph 12 that "in consideration of the fact that*
> *athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent thate medication does not contain prohibited substances". In CAS 2005/A/872, a CAS panel ruled that for a reduction based on no significant fault or negligence there must be more*

than simply reliance on a doctor. Further, Koubek [...] makes clear that an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist".
192. The Panel remarks that the consistent findings in this line of cases is relevant to Ms Johaug's circumstances. An athlete cannot abdicate his or her personal duty to avoid the consumption of a prohibited substance by simply relying on a doctor. [...]'

87. It was the Athlete's Counsel Submission that '[...] ***she*** (Athlete) ***could easily have filed wrong and misleading information which she deliberately chose not to*** [...].' This Panel observes that it could be equally easy for the opposite to pertain, so that athletes could file Prohibited Substances/Methods, then plead they acted honestly, (no to prejudice the Athlete in this case).

88. Consequent to the afore-stated discussions, this Panel is of the opinion that the Athlete did not act with No Significant Fault.

Knowledge

89. In regards to knowledge, the Panel formed the opinion that the Athlete had some experience under her belt but it also noted that the number of times she had been tested was not indicated neither was information regarding any attendance at formal anti-doping awareness forums. That said, WADC's Article 21.1.1 placed responsibility of being knowledgeable hence ignorance of sports doping Program by adherents of the Code would be not be an adequate shield; as averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF):** *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules. A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.*

Commencement of Ineligibility Period

90. This Panel recalls that the Athlete's ADRV was established via her 'Admission' to usage of the same for her chest issues and thereby finds WADC's Article 10.11.2 Timely Admission applicable in commencement of her Ineligibility

D. Sanctions

91. With respect to the appropriate period of ineligibility, Article 10.2 of the WADC/ ADAK ADR provides that:

> *The period of ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:*
> *10.2.1 The period of ineligibility shall be four years where:*
> *10.2.1.2 The anti-doping rule violation* ***involves a Specified Substance*** *and the Anti-Doping Organization can establish that the anti-doping rule violation* ***was intentional****.*
> ....
> *10.2.2* ***If*** *Article 10.2.1* ***does not apply****, the period of Ineligibility* ***shall be two years.***

92. Article 10.11.3 of the ADAK ADR is titled "Credit for Provisional Suspension or Period of Ineligibility" and states as follows:

> *If a Provisional Suspension is imposed and respected by the Athlete or other Person, then the Athlete or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. ...*

93. In regard to Disqualification, Article 10.8 of the ADAK ADR reads as follows:

> *Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation*
> *In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all the resulting Consequences including forfeiture of any medals, points and prizes.*

VIII. DECISION

94. Consequent to the discussions on merits of this case:

(i) WADC's Article 10.2.1 does not apply hence the period of Ineligibility shall be two (2)years;

(ii) The period of Ineligibility shall be from 1st December 2019 the date on which the Athlete's Sample was collected up until 30th November 2021;

(iii) All Competitive results obtained by the Respondent Athlete from and including 1st December 2019 are disqualified including prizes, medals and points;

(iv) Each party shall bear its own costs;

(v) The right of appeal is provided for under Article 13 of WADA Code, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this _3rd ___day of __*December*___ , _____2020

Mr. John Ohaga SC, CArb,
Panel Chairperson

Mrs. Elynah Shiveka, Member

Ms. Mary N. Kimani, Member