

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. ADAK 14 OF 2019

IN THE MATTER BETWEEN

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

AND

BERNARD KIPLANGAT KIBILO..... RESPONDENT

DECISION

Hearing : [Written submissions]

Panel :	John M Ohaga SC; CARb	-	Chair
	Ms. Mary N Kimani	-	Member
	Peter Ochieng	-	Member

Appearances: Mr. Rogoncho for ADAK (the 'Agency') for the Applicant.
No appearances for the Respondent.

I. THE PARTIES

1. The Applicant is the Anti-Doing Agency of Kenya (hereinafter 'ADAK') a State Corporation established under Section 5 of the Antidoping Act, No. 5 of 2016.
2. The Respondent is a male adult of presumed sound mind, an Elite and International Level Athlete (hereinafter 'the Athlete').

II. FACTUAL BACKGROUND

3. The Athlete is an Elite International Level Athlete hence the World Athletics Anti-Doping regulations, the WADC, and the ADAK ADR apply to him.
4. On November 25th, 2018, during the Shenzhen Nanshan Half Marathon in Shenzhen China, CHINADA Doping Control Officers collected a urine sample from the respondent. Assisted by the DCO, the Athlete split the Sample into two separate bottles, which were given reference numbers A 6371560 (the "A Sample") and B 6371560 (the "B Sample") in accordance with the Prescribed WADA procedures.
5. Both samples were transported to the WADA accredited laboratory in Seibersdorf, Austria "the Laboratory". The Laboratory analyzed the A sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL)
6. The analysis of the A sample returned an Adverse Analytical Finding ("AAF") presence of a prohibited substance **19- Norandrosterone** which is listed as endogenous AAS under S.1.1 B of the 2018 WADA Prohibited List.
7. The Doping control process was carried out by competent personnel and using the right procedures in accordance with the WADA International Standard for Testing and Investigations.
8. The findings were communicated to the Athlete by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 30th January 2019. In the said communication, the athlete was offered an opportunity to provide an explanation for the same by 13th February 2019.

9. The Athlete responded via an email dated 25th February 2019. He accepted the charge and stated that in May 2018, he got a thigh muscle injury, tried to use traditional herbs to help with the pain but did not recuperate. He then went to his nearest local clinic for treatment and paid KShs. 10,000 for an injection that the nurses at the clinic said would heal his injury but the pain did not completely go away. He further stated that upon the receipt of the ADRV Notice from ADAK, he suspected that the injection given to him at the clinic might have contained the prohibited substance. He then went back to the clinic and found it closed as it was operating without a license and could not trace where it had relocated to. However, he does disclose the name of the clinic and the prescription for the medication administered to him.
10. The response was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule Violation (ADRV) and referred the matter to the Sports Disputes Tribunal for determination.
11. Charge documents were prepared and filed by ADAK's Advocate and the Athlete presented a response thereto.
12. The matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules and the matter is pending determination resulting to a request for submissions.

III. PROCEEDINGS BEFORE THE SPORTS DISPUTE TRIBUNAL

13. The matter did not proceed to hearing as the Athlete waived his right to be heard. After several attempts by the Applicant to reach the Athlete on the hearing date, the Athlete sent an email stating that he did not wish to participate in the hearing and wanted the matter concluded.
14. The Tribunal issued an order on the 11th June 2020 that the Applicant file and serve its submissions for the Tribunal to issue its decision.

IV. PARTIES SUBMISSIONS

A. Respondent's Submissions

15. Mr. Rogoncho submitted that the Applicant had the burden of proving the ADRV to the satisfaction of the Tribunal using any reliable means including admissions and methods of establishing facts and presumptions.

16. He informed the Tribunal that the Athlete has responsibilities to be knowledgeable of the anti-doping rules, take responsibility, inform a medical practitioner of their obligations not to use prohibited substances and to cooperate with Anti-doping organizations investigating Anti-doping rule violations as provided for under Article 22.1 of the ADAK ADR.
17. In discharging ADAK's burden of proof, Mr. Rogoncho submitted that the Athlete admitted that he had a well-established athletics career since 2016 and that he did not disclose the same to the doctor; he also admitted that he failed to cross-check the ingredients of the medication administered to him and that he was aware of the prohibited substances that was administered to him.
18. He submitted that the Applicant had therefore been able to prove the use and presence of a prohibited substance by the Respondent, being **19-Norandrosterone** which is a Non-Specified Substance and attracts a 4-year sanction. The burden of proof therefore shifted to the Athlete to demonstrate no fault, negligence, or intention. He urged the tribunal to find that an ADVR had been committed by the Respondent.
19. He further submitted that the Athlete had failed to establish the origin of the substance and that it was not sufficient for an athlete to merely protest his innocence, he was required to adduce concrete evidence on the source of the prohibited substance.
20. Mr. Rogoncho went ahead to submit that the Athlete had adamantly refused, declined, and failed to disclose the origin of the prohibited substance and such intention cannot be negated. He therefore did not meet the burden of proof to establish that the violation was not intentional.
21. He urged the Tribunal to find that the Athlete intended to cheat and therefore the reason why he was administered with the substance. He further pointed out that the narrations by the Athlete are meant to mislead, hoodwink, and divert the attention of the Tribunal.
22. He further submitted that the Athlete has a personal duty to ensure that no prohibited substance enters their body and that he did not take any tangible precautions to ensure that whatever he was administered with did not contain any prohibited substance. He pointed out that the Athlete acted negligently and hence failed to discharge his responsibilities under ADAK ADR.

23. Mr. Rogoncho submitted that the Athlete ought to have known better as he was an international level athlete and that he had failed to carefully consider the consequences of whatever was injected into him. This implicate that the Athlete was not keen in upholding his duties and responsibilities under the rules and regulations.
24. He further submitted that the Athlete being a well-established athlete and competing at an international level, knows that he is subject to doping controls as a consequence of his participation at the international competition and cannot simply assume as a general rule that the products or medicines he ingests are free of prohibited specified substances.
25. Mr. Rogoncho pointed out that the principle of strict liability is applied in situations where urine or blood samples collected from an athlete have produced adverse analytical results. This means that the Athlete is strictly liable for the substances found in his urine whether or not the athlete intentionally or unintentionally used a prohibited substance or was otherwise negligent. He submitted that it cannot be too strongly emphasized that the athlete should have taken personal duty and that ignorance is no excuse. He relied on the Arbitration **CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)** where the panel stated that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of the athlete's intention to enhance sport performance.
26. On sanctions the Applicant submitted that the regular sanction of four-year ineligibility period is applicable where the ADVR involves a specified substance and where the Agency can establish that it was intentional. He further submitted that an elimination or reduction of the sentence was only possible if the athlete could establish how the specified substance entered his body and that he did not intend to take the specified substance. In the case before the Tribunal, Mr. Rogoncho pointed out that the Athlete confirmed the origin of the specified substance but failed to demonstrate that there was no fault or negligence on his part.
27. He finally submitted that the Tribunal in making its decision take the following considerations:
- a) The ADVR had been established as against the Respondent.
 - b) Failure of the Athlete to take caution when ingesting prescribed medication
 - c) The Respondent's failure to give explanation for his failure to exercise due care and was therefore negligent.

- d) The knowledge and exposure of the athlete to anti-doping procedures and programs and or failure to take reasonable effort to acquaint themselves with anti-doping policies.
28. He urged the tribunal to issue the maximum sanction of 4 years of ineligibility as no plausible explanation had been advanced by the Athlete.

V. JURISDICTION

29. The Sports Disputes Tribunal has jurisdiction under Sections 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti- Doping Act, No. 5 of 2016 (as amended) to hear and determine this case.

VI. APPLICABLE LAW

30. Article 2 of the ADAK Rules 2016 stipulates definition of doping and anti-doping rule violations.
31. It provides 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; 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.

VII. MERITS

32. The Tribunal will address the issues as follows:

- a. *Whether there was an occurrence of an ADRV and the Standard Sanction;*
- b. *The Burden and Standard of proof;*
- c. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
- d. *What sanction to impose in the circumstance.*

A. The Occurrence of an ADRV and the Standard Sanction

33. With regard to the Athlete's ADRV, the Tribunal notes that it is undisputed that the Athlete's A Sample revealed the presence of the prohibited substance **19- Norandrosterone**.

34. With respect to the appropriate period of ineligibility, Article 10.2 of the RADO 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:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional

....

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

35. The Tribunal notes that the standard sanction for an ADRV involving a non-specified substance is 4 (four) years unless the Athlete can establish that the ADRV was not intentional.

B. Burden and Standard of Proof

36. Having established that it is undisputed that the Athlete's Sample A revealed the presence of the prohibited substance **19- Norandrosterone**, the Athlete having admitted to the same, we find that the Applicant has dispensed with its burden of proof of the ADRV to the satisfaction of the panel.
37. The burden of proof therefore shifts to the Athlete to establish to the satisfaction of the Tribunal that the ADRV was not intentional. Article 10.2.1 of the RADO ADR and it naturally follows that the Athlete must also establish how the substance entered her body.
38. Pursuant to Article 3.1 of the RADO ADR, the standard of proof is the balance of probabilities:

[...] Where these Anti-Doping Rules place the burden of proof 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 balance of probability.

39. The Tribunal notes that this standard requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51.

C. Was the Athlete's ADRV intentional?

40. The main relevant rule in question in the present case is Article 10.2.3 of the RADO ADR, that reads as follows:

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. An anti-doping rule

violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was unrelated to sport performance.

41. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.

Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional, for specified substances, it is also four years if an ADO can prove the violation was intentional.

Note: Specified substances are more susceptible to a credible, non-doping explanation; non-specified substances do not have any non-doping explanation for being in an athlete's system.

42. The Tribunal in the present case aligns with the Panel in **CAS 2016/A/4377** that the Athlete must establish how the substance entered his body that to establish the origin of the prohibited substance it is not sufficient for an Athlete "merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question".

43. In **CAS 2014/A/3820**, the Panel made the following comments:

In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation. In CAS 2010/A/2230, the Panel held that: to permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too

easy to assert either; more must sensibly be required by way of proof given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body.

44. The Tribunal notes that the Athlete has not proved to the satisfaction of the panel on the origin of the specified substance as he alleges that he suspects that the medicine that he had been injected in a local clinic that he had visited for a thigh muscle injury contained the non-specified substance. The Tribunal notes that the Athlete has made no effort to prove lack of fault or intent on his part as he stated that he was unable to locate the medical officers as the clinic had been shut down due to operating without a license and that he was unable to trace where they had relocated to.
45. The Tribunal has further taken cognizance of the fact that the Athlete is an Elite international athlete who has a well-established career in athletics since 2016 and has therefore been exposed to crusades of anti-doping in sports and having competed at an international level is aware of his responsibilities in regard to doping controls. With this in mind the Tribunal cannot offer him the benefit of ignorance until and unless the Athlete can be able to satisfy the court on the requisite standard of proof that he lacked knowledge.
46. In light of this, the Tribunal finds that the Athlete has not met his burden of proof and failed to prove on the balance of probability how the prohibited substance entered his body or the origin of the prohibited substance.

D. SANCTIONS

47. We find Article 10.2 of the ADAK Rules relevant in determining the sentence to be imposed. It stipulates the sanction of Ineligibility where there is Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method. It provides as follows:

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 Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and ADAK can establish that the anti-doping rule violation was intentional. Suggestion: this article is 'dead' as only one substance is involved i.e. Norandrosterone which is an obvious NON Specified so may we delete it?

10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

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*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

48. Against this background, the Tribunal is cognizant of the submission by the Applicant as well as the confession by the Athlete. The Applicant has been able to confirm the ADRV beyond reasonable doubt in this matter and the Athlete has failed to prove the origin of the specified substance and consequentially lack of fault or intention on his part.

49. The Tribunal takes cognizance of the fact that Kenya, an athletics giant has earned herself a spot in the WADA Watch List for Anti-Doping violations in the recent past. While a majority of our sportsmen and women stay true to the call of clean sports, a few have fallen on the wayside and denigrate our beautiful name- this is unacceptable and unfair to genuine athletes who take part in the competitions cleanly. It is also unfair to the pride of the Kenyan people. As we have held before innumerable times, this must not be allowed to continue.

Disqualification

50. 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.

51. The Tribunal finds that the competitive results of the on the 25th of November 2018 during the Shenzhen Nanshan Marathon are disqualified with all resulting consequences. Further any other competitive results obtained by the Athlete from this date are consequentially disqualified.

Period of Ineligibility Start and End Date

52. With respect to the sanction start date, the Tribunal is guided by Article 10.11 of the ADAK ADR which provides as follows:

Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.

53. Article 10.11.3 of the ADAK ADR 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. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.

54. In this case, the sample collection was made on 25th November 2018, and the Athlete was provisional suspended on 30th January 2019. It follows, therefore, that the Athlete should receive "credit" for the period of ineligibility already served. In this regard, the Tribunal determines that the Athlete's period of ineligibility, if imposed, shall commence as from the date of his provisional suspension (that is 30th January 2019) thus giving him full credit for time already served in accordance with Article 10.1.3 of ADAK ADR.

VIII. CONCLUSION

55. In these circumstances, the following orders commend themselves to the Tribunal:

- a. The period of ineligibility (non-participation in both local and international events) for the Athlete shall be for 4 years from 30th January 2019 pursuant to Article 10.2.1 and 10.11.2 of the ADAK Rules and the WADA code;
- b. That all the competitive results obtained by the Athlete on the 25th November 2018 during the Shenzhen Nanshan Half Marathon in Shenzhen and any other competitive results since thereafter is hereby disqualified with all resulting consequences (including forfeiture of medals points and prizes) pursuant to Article 10.1 of the ADAK Rules;
- c. Each party to bear its on costs; and
- d. Orders accordingly.

56. The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of ADAK rules.

Dated at Nairobi this ___4th___ day of _____*February*_____, 2021

Signed:



John M Ohaga, SC: CARb
Chairperson,



Mary N Kimani (Member)



Peter Ochieng (Member)