REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. ADAK 21, 24 & 25 (Consolidated) OF 2017

IN THE MATTER BETWEEN

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

-versus-

AMBAAR MICHAELO..... ATHLETE
SAADA LUKANGACHI MICHAELO.....ATHLETE SUPPORT PERSONNEL
MOHAMMED JOSEPH .....ATHLETE SUPPORT PERSONNEL

DECISION

Hearing : 7th December 2017.

Panel :

Mrs. Elynah Shiveka	-	Chair
Mrs. Njeri Onyango	-	Member
Ms. Mary N Kimani	-	Member

Appearances: Mr. Erick Omariba, Advocate for the Applicant;

Mr. Kakai Mugalo, Advocate instructed by the firm of Kakai Mugalo & Company Associates for the Athlete and both Athlete Support Personnel.

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.

2. The 1st Respondent is a female minor of presumed sound mind, an Elite and International Level Athlete whose address of service is through the Advocates on record for her (hereinafter '**the Athlete**'); the 2nd Respondent is an adult female of presumed sound mind, the mother and guardian of the elite athlete whose address of service is through the Advocate on record for her (hereinafter 'the **ASP1**); the 3rd Respondent is an adult male of presumed sound mind, father of the elite athlete whose address of service is through the Advocate on record for him (hereinafter 'the **ASP2**).

Applicable laws

3. The Athlete was a resident in Kenya at time of this AAF and the Athlete Support Personnel still reside in Kenya. The Athlete has been representing the country at regional and international events as an Elite and International Level Athlete. Accordingly, the FINA Competition Rules, FINA Doping Control Rules, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her and her Athlete Support Personnel.

Background

4. Notices to Charge were filed at the Tribunal by ADAK on 6th September 2017 for Case Number 21 and on 27th September 2017 for Case Number 24 and 25 respectively. The Applicant was directed to serve Notice to Charge, Notice of ADRV, Doping Control Form and all relevant documents on the Respondents by 13th September 2017. Additionally, a panel was named to hear the matter for case No. 21 of 2017 being Messrs. John Ohaga and Robert Asembo and Ms. Mary Kimani.

5. On 19th September 2017 a Notice of Appointment was filed by Kakai Mugalo & Company Advocates for the 1st Respondent Athlete and the professional services were duly extended to the 2nd and 3rd Respondents.

6. The matter was mentioned on 20th September 2017 when both Counsel appeared for their respective parties and wherein the Applicant requested to file and serve charge documents by 22nd September 2017 and Respondent was granted 30 days, that is until 25th October 2017, to respond. Respondent was notified of panel to hear her case. Applicant was also granted liberty to file supplementary response and a hearing was set for 9th November 2017.

7. On 22th September 2017 Applicant filed at the Tribunal the charge document duly served to the Athlete. A mandatory provisional suspension effective on the Athlete from 5th August 2017 was included in the charge document. Also relevant were various documents submitted in the list of documents included with the charge document.

8. On 24th October 2017 the following were received at the Tribunal from the Respondent:

   i. Statement of Defence;
   ii. Witness Statements of Saada Michaelo (ASP1) and the other from a Dr. S.M.H. Mohamed;
   iii. List of documents which included copy of birth certificate, letter from Coast General Hospital and email thread from ASP2.

9. On 27th September 2017 when the Applicant filed a Notice to Charge ASP1 and ASP2 in AD No. 24 and 25 of 2107, two panels were named, that is, Mrs. Njeri Onyango, Ms. Mary Kimani and Mr. Gichuru Kiplagat; and Mrs. Elynah Shiveka, Mr. Robert Asembo and Mr. Gichuru Kiplagat respectively. The Applicant was further directed to serve Mention Notice, Notice to charge, Notice of ADRV, Doping Control Forms and all relevant documents on the Respondent by 18th October 2017 and the matter was set to be mentioned on 25th October 2017 to confirm compliance and for further directions.

10. On 23rd of October 2017 the Tribunal issued fresh directions arising from Gazette Notice 10548 which declared 26th October 2017 a Public Holiday therefore having due regard to logistical considerations vacated the Mention scheduled for 25th October 2017 and varied it to 8th November 2017, ordering the Applicant to serve appropriate notice on the Athlete, the ASPs and their Advocates.

11. During the mention on 8th November 2017 where respective Counsel appeared for their party it was agreed that Anti-Doping Cases 21, 24 and 25 be consolidated since they were interrelated but the ADRV by each individual Respondent be handled separately. Additionally, the Applicant's Counsel would serve all documents by 17th November 2017 while Counsel for the Respondents would put in responses by 27th November 2017 and all three cases were set to be heard on 7th December 2017 by a reconstituted panel of Mrs. Elynah Shiveka, Ms. Mary Kimani and Mr. Gichuru Kiplagat.

12. On 20th November 2017, ADAK filed charge documents at the Tribunal duly served to Athlete Support Personnel in cases No. 24 and 25 of 2017 (see page 6 in respective files for verifying affidavits).

13. Defense Counsel filed at the Tribunal on 29th November 2017 the Statements of Defence and Athlete Witnesses' Statements (sworn by ASP1/ ASP2) in regard to AD Nos. 24 and 25 of 2017.

14. On 7th December 2017 all three cases were fully heard concurrently before the panel.

15. Written submissions were to be submitted by 17th January 2018 and a Mention was set for 17th January 2018 to decide on a date for the decision. The Respondents' submissions were received at the Tribunal on 16th January 2018.

16. At the Mention on 17th January where only Counsel for the Applicant appeared, he told the panel that the Respondents' Counsel had submitted his submission without serving his client with the same. The Applicant also said he had new evidence regarding ASP2 in Case AD No. 25 of 2017 and he would be making an application to re-open the said case. The Tribunal ordered a Mention on 24th January 2018 directed Applicant to issue Mention Notice to the Respondents.

17. The Applicant's submissions were received on 1st February 2018.

18. During mention on 24th January 2018, again attended only by Counsel for the Applicant, Counsel prayed for 7 more days to file submissions which were granted. Counsel also asked for a date to highlight their submissions

and a date was set for same on 21st February 2018 with Applicant to serve Notice to the Respondent which date, because of the absence of the Respondents' Counsel was varied to 28th February 2018 then 7th March 2018.

19. At the mention on latter date the panel heard that the Applicant and Respondents' Counsel had agreed that the verdict be rendered based on the proceedings and written submissions. The ruling was going to be issued via notice.

Arguments by Mr. Omariba Counsel for the Agency:

Charge against Athlete:

20. The Athlete was a minor at commission of this ADRV. Since then, she has turned 18 and is currently in Israel. The Athlete's late father was an Israeli and she was born on 3rd June 1999 at Tel Hashomer Hospital in Israel therefore naturally acquiring citizenship and hence she has been called up for mandatory army service, see copy of Birth Certificate marked **"SM2"** and **"AM1"** in the Respondent's and Applicant's Annexures' respectively. The Athlete was shipped by the Israeli Embassy back to Israel immediately she turned the age of majority to prepare to begin mandatory training/service period.

21. Both her parents (in this case her biological mother and step father) who also doubled up as her support personnel had ADRV cases to answer for their role in the Athlete's ADRV.

22. The Agency preferred an ADRV against the Athlete arising from a test conducted on 2nd June 2017 during the Kenya Long Course Swimming Championship held in Nairobi, Kenya where the Athlete's urine Sample No. A4058482 which was analyzed in an accredited laboratory in Paris, France returned an Adverse Analytical Finding (AAF) for Testosterone, see pages 10 & 11 -the Doping Control Form & Lab Results Form respectively.

23. Notice of the ADRV was served to the Athlete on 29th July 2017 through her parents and in their responses, Mrs. Saada Lukangachi Michaelo (ASP1) and Mr. Joseph Gacheru Mohammed (ASP2) indicated there was a possibility of the substance being present in the Athlete's body owing to the medication she had taken during treatment for hormonal issues.

24. Upon evaluation by the Agency the Counsel said, it was found that there had been commission of an ADRV. The Athlete, he added, did not request for a Sample "B" analysis thereby waiving her right under FINA's DC Rule 2.1.2 thereby accepting the ADRV.

25. The substance traced in the Athlete's body is a non-specified banned substance which attracts a four (4) year period of ineligibility in the absence of plausible explanation under Rule 10.

26. Records of the Agency showed no Therapeutic Use Exemption (TUEs) in regard to the Athlete to warrant use of the prohibited, he added.

27. The Athlete filed a response through her guardian indicating she was a Minor, see page 6 of the Statement of Defense; she claimed she was diagnosed with a condition on 6th January 2016.

28. Athlete did not disclose to the doctor that she was an athlete as required under ADAK Rule 22 therefore Article 2.1 is applicable.

29. While being a minor and prior to the Long Course swimming event the Athlete had been taught about anti-doping and even got a certificate in Zimbabwe in February 2017. Further under Article 21.2 Athlete Support Personnel (in this case the Athlete's parents) had an obligation to acquaint themselves with anti-doping knowledge and should have known that presence of the prohibited substance would result in an ADRV.
30. Hence the Athlete having been trained should have been conversant and should not now be trying to shift the blame; in addition she is an experienced athlete having participate in numerous local and international level events. Therapeutic Use Exemptions (TUEs) are there to assist swimmers and failure to apply for them denies the Athlete remedy for reduction.

31. Athlete was not able to adequately demonstrate the source of substance by way of medical prescription/ purchase receipts or even laboratory examination results to show she actually suffered from the said condition.

32. Regarding training on anti-doping, the Applicant said the Athlete was invited to participate during the Long Course event but her Athlete Support Personnel did not allow the Athlete to attend, that is, ASP1 who

was with the Athlete and signed the Doping Control Form on behalf of the minor; The training Attendance Sheet is available to show the Athlete's name does not appear.

33. The Athlete participated in the 200LC meter i.e. 1m (and emerged 1st position) and also the backstroke 200LC where she took 2nd position. The Athlete may have had comparative advantage due to the prohibited substance found in her system said Applicant's Counsel.

34. Counsel for the Applicant prayed for four (4) year ineligibility sanction.

Charge against Both Athlete Support Personnel (ASP1 & 2):

35. The Agency presented a Charge Document which it wished to rely on in its entirety.

36. By their own admission the ASPs confirmed they administered the prohibited substance on the Athlete. See written admission letter dated 12th August 2017 sent via email and signed by ASP1; at paragraph that reads "*... We as her parents...*" Also see page 17 "*Mother's Statement*"; further refer to page 19 "*I prescribed...*"

37. Counsel referred the panel to Article 22 of ADAK Rules 2.1.4 which required Athlete and/or ASPs "*... to inform medical personnel ...*; 2.2 "*To be knowledgeable...*" The parents he said, did not acquaint themselves with anti-doping knowledge.

38. At the Long Course competition this particular athlete did not attend the ADAK Camp held alongside the races on event day.

39. The substance found in the Athlete's body is prohibited in and out of competition Applicant's Counsel stated.

40. Having admitted administration of the prohibited substance, the ASPs did not produced any evidence in the form of relevant laboratory results, specific prescription with exact dosage that would have proven that the medication was taken for health purposes, in which case Applicant deemed it was administered intentionally. The Athlete was an upcoming swimmer

and had a bright future and medication was used to further brighten her career, Counsel for Applicant argued.

41. Consequent to ASPs having administered the substance intentionally, the Applicant's Counsel asked for 4 years in addition to any other remedy the Agency may have against them under Section 42 of the Anti-Doping Act.

42. Failure to apply for TUE was an omission on the part of the ASP1 and she should be sanctioned for that omission.

43. The letter from the Coast General Hospital was still being investigated but prima facie, it has no Outpatient Number or any other number that could be used to cross-check with the said hospital.

Mr. Mogalo Counsel for the Respondents:

44. Counsel said he would be bringing three witnesses on behalf of the Athlete, two of whom were also Respondents in separate doping cases which though were connected with the present one regarding the Athlete; he said he would also rely on the Witness Statements already filed with the Tribunal.

1st Witness for Athlete affirmed;

45. Dr. Said Ahmed Mohamed - 1st Witness; is a registered medical doctor whose current designation is Assistant Director of Medical/ Senior Medical Officer and has been practicing since 2004 as a General Practitioner.

46. Dr. Mohamed studied in Poland and graduated in 2003. He was stationed at Coast General Hospital for his internship and also was subsequently posted there as a doctor. He was stationed at the Coast General Hospital until early 2016 when he was transferred to Kader Bhai Clinic in Makadara grounds in Mombasa, where he has been in charge as the MOH to date.

47. On 4th January, 2016, Dr. Mohamed saw the Athlete who was accompanied by her parents at the Coast General Hospital He said the Athlete had presented with no menstrual periods for the last 3 months.

48. He ordered that her urine sample be subjected for pregnancy tests but that came back negative.

49. Laboratory results suggested secondary amenorrhea, so he started her on oral contraception estrogen/ progesterone (Microgynon) as hormonal treatment because they are the most commonly used and were also readily available. His target was to (i) Trick the body into believing ovulation had occurred; ii. Thicken mucus; (iii) Create unfavorable lining so no implementation could occur. He prescribed 21 pills at start of period and instructed that she stop in 7 days when expecting menstruation.

50. Secondary amenorrhea can be caused by taking chemotherapy drugs, anti-psychotic, pituitary drugs amongst others, the doctor explained. In the case of the Athlete, Witness No. 1 suspected ovarian dysfunction or polycystic ovary syndrome and he went ahead to write out a prescription.

51. Dr. Mohamed planned to put the Athlete on Microgynon for 3 months and if she did not respond accordingly he would refer her to a gynecologist and/or endocrinologist. He said there was some improvement when the Athlete came back to Coast General Hospital for observation as she reported break-through bleeding.

52. After the 3rd month, Dr. Mohamed reported he did not see the Athlete again until sometime in September 2017 when the Athlete and her parents sought him out for his help in regard to the present case.

Cross Examination of Witness No. 1 by Mr. Omariba, the Applicant's Counsel:

53. Dr. Mohamed confirmed he had done his internship at the Coast General Hospital. The doctor said he was not informed that the Athlete had been treated elsewhere. He also explained that Clinical Officers would superintend over patients needing treatment for cuts and other relatively simple ailments while the more complex cases were referred to the Triage; complicated cases were taken straight to the Medical Doctors.

54. The Doctor clarified that he left the lab results of the pregnancy tests with the Athlete i.e. they were her property. Asked if he conducted further tests to arrive at his diagnosis the Doctor answered to the negative; he further

said he deduced that she was suffering from amenorrhea because from his experience, the positive history/symptoms of mood swings described by the Athlete most likely fitted with a lot other similar cases presenting / discerned in the course of his work.

55. Dr. Mohamed categorically stated that he had not been sensitized about sports anti-doping and had no guidelines regarding prohibited substances so would treat the Athlete the same way prior to this new information; he admitted that he did not know if there were alternative medication for the condition he had diagnosed the Athlete to have. He clarified that the prescription he gave the Athlete contained 150mg --- and 30mg Levenog--, further explaining that if testosterone is too high in a female person then it causes amenorrhea. He continued to state that, specialists in the area of the condition he suspected the Athlete had, may investigate existence and/or confirm it using brain MRI scans which are prohibitively high and that is why at the public hospital where he worked in, the tendency was to use symptoms, a less expensive method, as prognostic tool.

56. Asked why he used the Coast General Hospital letterhead to write his report regarding the Athlete, the Doctor said it was because that was what the Athlete's parents requested; since he does not work there anymore he sent a messenger to have the report authenticated with the official Coast General Hospital stamp.

57. The doctor clarified that the medication/ period of time he prescribed Microgynon could not have an effect that would last one and half years. He also said that the levels of testosterone that showed up in the Athlete's Doping Control Form were not possible in a teenage girl.

2nd Witness for Athlete affirmed;

58. Dr. Mrs. Saada Lukangachi Michaelo/ ASP1, 2nd witness - who is a Herbalist by profession, is the mother to the Athlete. She confirmed that her daughter is now 18 years old having been born on 3rd June 1999.

59. That indeed the Athlete committed the ADRV when she was a minor and therefore can be represented by a guardian in this matter. In any case ASP1 said, having come of age, the Athlete was bound by the law of her native country, Israel, which required her mandatory service in the country's

army and as such has already been conscripted and is now in Israel by order, through the Embassy of that nation, to begin her due attachment.

60. ASP1 said the Athlete holds the junior record for high jump and has been swimming since the age of six. She said the Athlete started her menses when she was eleven and half years old and they flowed three months in a row then disappeared. She said took the Athlete to a doctor in Israel when she was twelve years over the periods blight. That particular doctor asked her to let the Athlete be.

61. The Athlete continued without her periods and when she clocked fifteen years a Doctor Luria, also in Israel, finally gave a prescription which was written in Hebrew hence ASP1 is not able to describe its qualities since she is not adept at this language. The Athlete continued this medication albeit with no improvement.

62. In January 2016, ASP1 took the Athlete to Dr. Mohamed at the Coast General Hospital and he prescribed Microgynon. The Athlete used the first round but by the second month the side effects set in; these included headaches, enlarged breasts, weight gain and mood swings so a distraught Athlete discontinued the prescribed medication.

63. ASP1 said she too had a problem similar to the Athlete's when she was a teenager. The Athlete's mother said it was the intervention of her late husband who being a medical doctor prescribed medication that cured her, enabling restoration of her fertility so she was able to bear her first two children, one of whom being the Athlete.

64. ASP1 went on to say that after the Athlete flatly declined to continue with the medication prescribed by Dr. Mohamed, she (the mother) decided to start her on the same medication that her late husband had years ago prescribed for her, for a similar condition.

65. Around April 2016 ASP1 began to inject the Athlete with Sustanon. By July 2016 the Athlete was recording improvements and thus they continued the self-medication with the last dosage being administered in May 2017. ASP1 explained that the Athlete received a monthly injection of Sustanon 250mg.

66. The Sustanon was purchased at Makupa Chemist (though no evidence in the form of receipts was adduced to confirm such purchase). ASP1 said her late husband practiced Chinese medicine while she was trained and became a herbalist to continue with a lineage which had maintained this discipline from time immemorial.

67. The first time she heard about ADAK was at the event during which the Athlete was tested ASP1 said. When ASP1, who signed the Doping Control Form (DCF) on behalf of the minor, was told about the doping tests at the event she said she was excited as she believed that this represented progress in Kenya. ASP1 categorically stated that she never thought a medicine could be administered to make the Athlete swim faster and she went on to say the Athlete was number eight in Kenya.

68. ASP1 conceded that she was aware of the 2nd June 2017 ADAK training conducted in conjunction with the main swimming competition but she did not attend because she was sporting a broken ankle plus she had a small boy to care for in addition to supervising the Athlete who was racing as a minor at the time. She says the tests were done 'military style' which left her rather shocked and laments that the way they picked out the swimmers was not good.

69. Asked when the last Sustanon jab was given she stated it was on 27th May 2016 and that she did not state the actual medication given instead only indicating *"Hormonal therapy"* because she did not know it was necessary to state the exact medication given within the seven day window mandated by the DCF.

70. The Athlete's step father did not give the injections, neither did he know what medication was being administered to the Athlete ASP1 said. The only times he assisted was when she (ASP1) had travelled and therefore not available to perform the tasks herself. ASP1 said a nurse would administer the injection on the Athlete.

Cross Examination of Witness No. 2 by Mr. Omariba, the Applicant's Counsel:

71. Asked if the Athlete attended the ADAK training conducted during that particular event, ASP1 responded 'no' and why not, she said 'just like that' yet as at Para 19 of charge document the Applicant contended that under

Article 22.1 of the ADAK ADR the Athlete is responsible to be knowledgeable of and comply with the anti-doping rules.

72. Reminded that the Athlete received a certificate on anti-doping training while attending an event in Zimbabwe, ASP1 admitted and she even said that she herself accompanied the Athlete to that event but that she did not delve much into the certification, dismissing it as one of the many papers the Athlete and other swimmers receive for their swimming exploits.

73. ASP1 confirmed she has a medical cover with Resolution Health which also covered the children when they are living with her but stated that the cover is only for in-patient and not for out-patient purposes which is why she looks for affordable hospitals when consulting for her family's out-patient medical needs.

74. At Coast General Hospital ASP1 said, the staff filed the Athlete's details in a book they retained and did not issue her with a booklet. She assured the Counsel for Applicant that if he goes to Coast General Hospital he would find those recorded details. The Lab results were handed over to the doctor and since she paid for them she could access the receipts from the auditors who kept the books for her family. Likewise, the receipt for medication purchased from Makupa Chemist could be availed. However, she said she did not retain a copy of the prescription issued by Dr. Mohamed.

75. Asked at the hearing why she did not present all those receipts as evidence, ASP1 said it was because she was not asked to do so and that she had prepared her written explanation(s) and accompanying evidence as directed by one Ms. Damaris Ogama of ADAK.

76. ASP1 volunteered that she herself suffered a similar condition to that of the Athlete when she around 13 years until 24 years when she was married – she is now 48 years. She and her late husband purchased the same medication from the same chemist those many years ago from the same man who still mans the pharmacy today and that is why he allowed over the counter purchase without a doctor's prescription.

77. AAR nurse(s) injected the Sustanon she said. Their regular haunt was an AAR outlet in Nyali where she would pay KES.250 at the receptionist's

desk and nurse on duty would administer the injection and here also she said, the prescription from the doctor was not demanded for by the management. The Sustanon was administered to the Athlete for 3 months then she would take a 1 month break before resumption. This cycle was the maximum her late husband had advised her. For dosage, ASP1 borrowed that administered to herself 24 years ago.

78. ASP1 said that she did not educate the Athlete on the medication she was administering on her and insisted that the Athlete did not search it on the internet despite the Athlete being a well-travelled 'Dot-Com' teen. She also confirmed the Athlete completed school in 2017 and passed her final examinations. Her current husband did not know the details of the Athlete's treatment program ASP1 said. Only she alone was privy to the details.

79. Sporting an A-Level certificate herself, ASP1 said she graduated from Matuga Girls High School having attained 15 points in her KACE but opted not to proceed onward to university to study medicine which she qualified for but instead chose to study herbalism under the tutelage of her grandmother.

80. Despite this highly educated background ASP1 said she could not decipher the Doping Test Results Form. Instead she consulted her sister who is a Medical Doctor to interpret those details. When her sister told her it was testosterone that had been unearthed, she in turn explained to her sister that she had been using Sustanon on the Athlete.

3rd Witness for Respondents' affirmed;

81. Mr. Mohamed Gacheru Joseph (ASP2), 3rd witness - said the Athlete was his step-daughter and his family resides in Nyali. He stated that he was a businessman in hotel supply area and that he imports but also makes some of the products he supplies.

82. ASP2 said he met the Athlete's mother in 2006 and they married in 2009 when the Athlete was 6 years old. He said he learnt that the Athlete was born with chest complications and thus has had to take precautions all her life including staying away from colored drinks.

83. Asked if he was aware of the issues pertaining to her menses he replied those were girl problems and Mom handled those and therefore he had no detailed knowledge of the same.

84. At a restaurant in Mombasa where they met, ASP2 said he was shocked when Counsel for the Applicant, Mr. Omariba and his colleague a Ms. Damaris Ogama gave him the news of a positive AAF concerning the Athlete.

85. ASP2 reiterated that cultural conditioning does not lend it to male persons like himself to deeply concern themselves with issues which culturally fall in the female realm and that is why even if the matters might have been serious, it was still his wife's role to deal with the Athlete's reproduction challenges. He did intermittently undertake the task of ferrying the Athlete to the Nyali Health Care facility and even then he did not administer any medication to the Athlete nor check what type it was; all he did was take the Athlete with the medication to the clinic.

Cross Examination of Witness No. 3 by Mr. Omariba, the Applicant's Counsel:

86. ASP2 confirmed that he was aware that the Athlete had long running developmental issues and he understood she was not getting her cycles which was a serious concern. He also confirmed that they saw a doctor who prescribed some medicine. He also said when the Athlete's mother was not around he was tasked with carrying out the extra work of ensuring the Athlete was duly medicated. However, since the Athlete was a female adolescent he did not go into the room with her for the injection, the times when he drove her to the clinic.

87. Asked whether he knew if the Athlete's cycle was back to normal, ASP2 said he thought it was.

88. ASP2 said the first time he heard about doping issues was inside the restaurant when he met up with the Agency officials. He confirmed he attended the swimming event where the test leading to the AAF was taken in Nairobi. He did not attend the ADAK training event there because he was busy meeting friends; being a business person based in Mombasa, he took every chance he was in Nairobi as a business exploration/ expansion

opportunity, he confessed. Since the Athlete's AAF incident he said he now attends doping training, the last one being at the Coast Swimming Gala.

89. ASP2 admits to having seen the Zimbabwe doping certificate issued to the Athlete during a competition there but that he did not pay much attention to it. (At this point matters got emotional) ASP2 said things are not done by force i.e. that they must always go the ADAK way!

90. ASP2 said he stood together with his wife and respected the decisions she took in areas that fell in her realm. However he stated that he had no knowledge of anti-doping, saying that if he was ever caught again with doping issue, for example with his 10 year old who is also an ardent swimmer, then he would be culpable.

91. Receipt of WADA material through the local federation after the June 17th event was acknowledged by ASP2. He further said he and his family had no ill motive and were only medicating the Athlete to try cure the condition she had over a long period of time.

Mr. Mogalo- Cross Examination:

92. Asked if he knew the name of the drug(s) his daughter was using, ASP2 answered in the negative.

Submissions by Applicant - Regarding the Athlete:

93. The Applicant stated that it would adopt and own its charge document dated 22nd September 2017 and annexures thereto and further said it had charged the Athlete for ***"Presence of Testosterone in samples she provided on 2nd June 2017 in violation of Article 2.1 of ADAK, ADR"***.

94. Further, the Applicant stated that the Athlete in an in-competition testing at the Kenya National Long Course Swimming Championships held in Nairobi submitted to the DCO a urine sample reference numbers A4058482 and B4058482 under prescribed WADA procedures. Both samples were transported to a WADA accredited laboratory in Paris, France where analysis of 'A' Sample returned an Adverse Analytical Finding (AAF), specifically, presence of a prohibited substance, testosterone.

95. When the findings were communicated to the Athlete through Provisional Suspension dated July 28, 2017 and she was given an opportunity to provide an explanation, her mother responded in a letter dated July 28, 2017 stating that the Athlete had a history of amenorrhea, obesity, stress and hormonal related issues due to treatment given which otherwise culminated in hypogonadism which was treated with exogenous testosterone and that this information was disclosed in the DCF dated June 2, 2017.

96. The Athlete's mother further attributed blame of the AAF to themselves, as parents, as they administered the drug to the Athlete without having cross-checked to see if the same contained any prohibited substance.

97. The Athlete did not request a 'B' Sample analysis thus waiving her right to the same under ADAK Rule 7.3.1.

98. It was the Applicant position that the burden of proof expected to be discharged by ADAK under Article 3 of ADAK Rules and WADC was ably done as the Athlete, in accepting the results of sample A admitted to the presence of prohibited substance in her sample as per Article 3.2 of ADAK ADR and also the Athlete admitted having not declared treatment information fully on the DCF.

99. The Applicant submitted that the burden of proof, having shifted back to the Athlete, she was required to (i) establish how the prohibited substance entered her body; (ii) lack of intention and/or; (iii) demonstrate no fault, negligence in order to entitle her to a reduction of sanction pursuant to WADC Articles 10.2.1 .1 and 10.2.3.

100. Sustanon, the substance traced in Athlete's body was a 'prescription only' drug yet no diagnosis or prescription was provided by the Athlete to show her warranting use of the drug plus the administration mode described by the Athlete's mother was unclear, thus creating doubt on purpose for which the drug was administered the Applicant argued.

101. The trio's sole independent witness confirmed that he had only administered 'microgynon' on the Athlete which could have lasted in the Athlete's body for only 30 days after administration, hence the same had

long lapsed and was not medically expected to be in the Athlete's system at the time of sample collection.

102. Quoting CAS A2/2011 **Kurt Foggo v. National Rugby League (NRL)** it was the Applicant's submission that the Athlete must demonstrate that the substance was not intended to enhance her performance, therefore the Athlete's mother's claim that she did not know the drug contained banned substances did not suffice.

103. Further, Counsel said standard CAS jurisprudence put the burden on the Athlete to establish that the violation was not intentional, following which the Athlete must necessarily establish how the substance entered her body, yet, the Athlete's mother claimed to have used an AAR outlet in Nyali for the administration procedures but provided no receipts to prove it. Likewise, there were no receipts to prove her alleged purchase of drug at Makupa Chemist and consequently the origin of prohibited substance was unsatisfactorily established, Counsel argued.

104. The Applicant submitted that the Athlete's mother said that she put aside the doctor's prescribed treatment program for unknown reasons and instead resorted to one based on information and knowledge acquired from her late husband and biological father of the Athlete. The Athlete's mother said her late husband administered Sustanon upon her when she had a similar ailment and she got cured. She also said that she was able to purchase the said medication over the counter without requiring a prescription because she was already known at the Chemist.

105. Regarding fault/negligence Counsel for the Applicant argued that the Athlete's mother on whom the then minor wholly relied on, fell short of the requirement to *"exercise due care in administering any drugs to the Athlete even though the mother was well aware that the minor was an athlete who was scheduled to participate in a competition on June 2, 2017"*.

106. Additionally, the Athlete despite being a minor, had participated in an anti-doping education hence had an understanding of the fight against doping. Applicant's contends the Athlete failed to enquire about the drugs being administered to her by her parents or at least inform her parents of her responsibilities in relation to doping.

107. In failing to inform the doctor that she was an athlete, the Applicant said the Athlete acted negligently and recklessly against the requirement under Article 21.1.4 of ADAK, ADR. And the Athlete also was grossly negligent pursuant to Article 2.1.1 as she ought to have known better the responsibilities bestowed upon her before receiving any medication.

108. Regarding knowledge, the Applicant contended that the Athlete was bound by the principle of strict liability where if urine or blood samples collected from an athlete produced adverse analytical results, an ADRV was assumed, whether or not an athlete intentionally or unintentionally used a prohibited substance and/or was/was not negligent.

109. Pursuant to Article 10.2.1 of the ADAK ADR, the Applicant argued that the Athlete having adduced no actual evidence in support of the origin of the prohibited substance but instead pleaded ignorance which Applicant contended cannot be used to feign lack of intent to enhance performance, hence a regular sanction of four (4) year period of ineligibility should be imposed.

Applicant's Submissions - Regarding both Respondent ASPs:

110. The Applicant affirmed it would adopt and own the charge document dated 16th November 2017 and annexures therein. The female and male ASP (as captured in the DCF and by oral admission), were charged with an ADRV pursuant to Article 2.8 of the WADC ***'Administration or Attempted administration to any athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted administration to any athlete Out-of Competition'***.

111. In regard to background facts please refer back to paras. 4 - 19 and 58 - 60 and 81 - 82 herein which also apply to both Respondent ASPs.

112. The Applicant contended that pursuant to Article 3.2, facts relating to an ADRV may be established by any reliable means including admissions and the Respondent ASPs admitted that they had administered a prohibited substance on the Athlete, Ambaar Michaelo, their daughter. While giving their evidence in chief, the Applicant said the Respondents accepted having not crosschecked to confirm the drug they administered did not contain prohibited substances and having discontinued prescribed medicine, resorted to self-medicating the Athlete. The parent duo also admitted to

always accompanying the Athlete to her local and international swimming engagements and were therefore actively involved in the Athlete athletic life.

113. Regarding the origin of the prohibited substance the Applicant submits at No. 31 of its submission that *"from the explanation given by the ASP, it was without doubt that the Athlete's positive AAF was occasioned by drug administered to her by the ASP"*.

114. The Applicant averred that the circumstances leading to the administration of Sustanon left a lot to be desired because, while it was true that the Athlete had a history of hormonal imbalances, one Dr. S.M.H. Mohamed confirmed during the hearing that the Athlete had begun to positively respond to the treatment that he recommended, *"why the Athlete's mother chose not to continue the treatment is unknown"*, the Applicant's submission canvassed.

115. It was also contended by the Applicant that as was admitted by Dr. Mohamed, *"Sustanon could not contain the kind of levels of testosterone as was found in the Athlete's sample and in normal prescription level"*, leading the Applicant to conclude *"the levels were extraordinarily high hence the conclusion that the same was administered for performance enhancement"*.

116. Though ASP1 had a duty to take care of her/their ailing daughter, the Applicant was of the opinion that such care should have been reasonable. ASP1, the Applicant said was reckless in withdrawing her daughter from the treatment that was being provided by the doctor and which seemed to have been yielding good results given the Athlete had already begun receiving her menses. Further, it was reckless of the ASP1 to start administering the said drug based on her own previous ailment, Applicant said.

117. The Applicant noted that ASP1 had accompanied the Athlete to the event where the she received an anti-doping certificate - after undertaking doping sensitization - a training exercise which ASP1 actually allowed the Athlete to participate in so it was unfathomable that the ASP1 *"had no knowledge of the fight against doping"*.

118. The Applicant expressed shock that Athlete's father who said he accompanied the Athlete twice for administration of the prohibited substance did not care to know why or how exactly the drug was being administered to the minor Athlete and he claimed he only acted as per instructions left behind by his wife.

119. It was the Applicant's stand that both Respondent ASPs were charged with the responsibility to be knowledgeable of and comply with anti-doping rules and that they failed to discharge their responsibilities under Rules 22.2.1 and 22.2.6 of ADAK, ADR.

120. The Applicant submitted that the Respondent ASPs having admitted administration of the prohibited substance, Article 10.3.3 subjected the said ASPs to a sanction of not less than four years of ineligibility depending on the seriousness of the violation. In event that the administration involved a Minor and for non-specified substances, the same shall result in lifetime ineligibility for the ASP, stated the Applicant.

Submissions of all the Respondents:

121. Counsel of the three Respondents submitted that all his clients were charged with "Administration or attempted administration to any athlete in competition of any prohibited..."

122. He reiterated that the minor Athlete was unable to be present in court to defend herself as she was now based in Israel so her mother who was present would take up her defense.

123. Counsel confirmed that the ASP1 stated that she took it upon herself to treat the minor based on a prognosis predicated on similar problems she herself had suffered as a teenage girl and which she said her late husband (a doctor in Chinese medicine) treated. The Athlete's mother said she used the same treatment program which she averred was taught to her by her late husband, purchasing the medication from a chemist in Makupa and this was done without the knowledge of ASP2.

124. ASP1 pleaded ignorance in face of the banned substances contained in the drug she used to treat her daughter. Counsel for Respondents argued that ASP1 was fulfilling her parental responsibilities towards the minor Athlete as provided for under Article 53 (i), (e) of the Constitution and

Section 9 & 23 of the Children's Act and having taken full responsibility for her error in judgment, requested that the Athlete and ASP2 be not punished as they were not privy to the kind of medication she had been administering to the minor and also were not aware where it was from.

125. ASP2, Counsel submitted, only came to know about the drug that had been administered to the Athlete after ADAK preferred charges against their daughter in September, 2017. Even when he acted on his wife's instructions to take the Athlete for administration of the said drug, he only assumed it had something to do with women's issues.

126. Counsel said the ASP2, at the June, 2017 event embraced the testing program by Doping Control personnel terming it a new development and a step in the right direction and reiterated that if indeed he knew he had intentionally administered a prohibited substance to enhance performance, then they would not have participated, but since they had nothing to hide they allowed the Athlete to actively participate in the event, including the subsequent testing by DCOs.

127. Counsel urged the tribunal to be lenient to the Respondents as they were not aware and more so the Athlete and ASP2. The Athlete's mother Counsel stressed, was remorseful for her actions and therefore he requested a lenient sentence for her and issue of a warning to the ASP2 and Athlete *as* they were clueless and innocent, not knowing anything about the drug that was being administered and that it contained a prohibited substance.

Discussion:

128. Matters not in contention were: the occurrence of an ADRV with both parties acknowledging that an ADRV had occurred; the Respondents waived analysis of Sample B pursuant to FINA DC **7.1.4** '... An *Athlete* may accept the A *Sample* analytical results by waiving the requirement for B *Sample* analysis...', consequently accepting presence of prohibited substance found in her 'A' sample.

129. Further, the Athlete's mother confirmed in her written explanation (see page 17 of charge document) where she restated that she had administered to the Athlete the drug which she believed had caused the AAF which admission suffices under Article 3.2 of ADAK ADR & WADC.

130. Furthermore, both parents categorically owned up to being the Athlete Support Personnel of the Athlete as defined in the Appendix One (Definitions) of WADC, acting variously as her coach/ manager, over and above their parenting roles.

131. The outstanding issues the Tribunal will address regarding each Respondent are as follows:
   a. Whether the Athlete's ADRV was intentional;
   b. The Burden and Standard of proof;
   c. Whether there should be a reduction based on the Athlete's and ASP1's admission on the DCF;
   d. What sanctions to impose in the circumstances.

Athlete - Ms. Ambaar Kaundime Michaelo:

132. The Athlete, the panel was told could not attend her hearing as she had travelled to begin mandatory service in her country Israel - see copy of her birth certificate (unnumbered) in the Athlete's list of documents - having recently attained 18 years. We shall excuse her absence but would like to note that it would have greatly assisted the panel if she had availed herself (or been availed) before the panel as this would have allowed panel to directly interrogate her ascertainable wishes. But nevertheless, the same would be gauged through her legal guardian, her mother, who represented her at the tribunal - the Athlete being a minor at the time of commission of the ADRV - with the same definitiveness as that outlined in CAS 2006/A/1032 Sesil Karatancheva v/International Tennis Federation No. 145 *'... the Panel finds that in this case the player's responsibility under articles 5.1 and 5.2 of the TADP must be assessed according to the same criteria as for an adult even if she was only 15-years old when the doping offences occurred, and that to the extend she was represented by her father in exercising her anti-doping duties his degree on diligence must count as hers in determining the degree of fault.'*

133. It is noted that the Athlete's Counsel erroneously submitted that the minor Athlete was charged under Article 2.8, like the ASPs, whereas the factual position was that the Athlete's ADRV fell under WADC's Article 2.1, FINA's DC 2.1 or 2.1 ADAK, ADR specifically *'Presence of a Prohibited Substance Testosterone in the Athlete's Sample'*.

134. It was argued on behalf of the Athlete by ASP1 that the Athlete had a history of amenorrhea, obesity, hormonal issues and stress issues due to medications administered during due treatments. A medical practitioner – testifying on behalf of the Respondents – with whom the Athlete had at the outset begun her treatment program and whose prescription was not the prohibited substance traced in the Athlete's 'A' urine sample, testified to a history of amenorrhea. Further, the doctor's written explanation – which he expanded upon at the oral hearing – dated 18th September 2017, in Page 20 of the charge documents showed that the doctor put the Athlete on Tabs Microgynon IOD but not before *"It was first explained how a Mocrogynon pill works and the side effects they may cause"* thus collaborating evidence of the amenorrhea and perhaps giving a pointer to the origin of the host of other 'ailments' the Athlete's mother alluded to in her explanation. The medical doctor, at the hearing confirmed to the panel that on follow-up, the Athlete had begun to positively respond to the prescribed program. Arising therefrom, the panel is comfortably satisfied that the Athlete had a medical condition which necessitated medical intervention which her mother said she had sought on behalf of the Athlete since she was aged 13 years.

Nevertheless, ASP1 in her written explanation said *"Further on follow up of her (Athlete's) complains and symptoms, a suspicion of hypogonadism was made and hence treated with exogenous testosterone."* If the last doctor to see the Athlete over her condition had surmised that the Athlete was improving why did ASP1, based on a mere suspicion make the decision to treat the Athlete with exogenous testosterone? Further, the doctor(s) in Israel where the ASP1 first sought medical help, had advised the Athlete's mother to let the youngster be in view of her tender age; this we construe to be the doctor's avoidance of overly intrusive treatment for a person at that young age.

135. Still the ASP1 despite not being a qualified doctor went on ahead to diagnose and treat with a Prescription Only Medicine (POM) what she perceived to be the Athlete's ailment. ASP1 had recounted that she reconsidered the medication on account of the Athlete's refusal to proceed with one offered by Dr. Mohamed as she bitterly protested the side effects; and we ask, was it possible that the mother was solely egged on by the Athlete's petulance? The wisdom or lack thereof of resorting to self-medication to appease the youngster is then called into question regarding ASP1. Further, in her explanation, the ASP1 mentioned that the Athlete was *"lethargic"*. It is obvious that a 'lethargic' sportsperson could not have been performing as she herself (i.e. Athlete) and her parents, who also doubled

up as her coaches/manager, would have desired and it is here the red flags begin to fly.

136. ASP1 in her explanation related the Athlete's stress with medications administered during Coast General Hospital's treatment, in fact dismissing the oral contraceptives as not having much effect; this was against the observations of Dr. Mohamed who stated that at the Athlete's last visit to his office, he had noted an improvement. We note that it is possible, that to hasten the disappearance of *"loads of body aches and pain"*, the mother resorted to use of prohibited substance on the Athlete.

137. It is telling that the Athlete's mother knew which substance to buy, which guaranteed speedy recovery from the lethargy, unlike the conventional but gradual regime of oral contraceptives prescribed by the doctor; the Athlete on the other hand was in attendance at anti-doping awareness clinics including holding certification of same and could not have been totally oblivious to medication being administered on her especially since this particular one, it was said, was being injected into her body. That it never occurred to the Athlete to inquire after her medication, given she was a bright student and well-travelled teen nearing her age of majority sounds farfetched.

138. From the written explanation and articulations at the hearing, we note there was a vigorous attempt to shield the Athlete from any blame by both ASPs. Given the anti-doping education the Applicant proved the Athlete had garnered, we doubt that the Athlete herself was totally in the dark and we aver that she must have guessed that she was a recipient of an 'important' medication at the very least, which necessarily had to be administered to her on 'time', seeing as to seriousness with which her parents took their responsibilities of ensuring its due injection by ensuring her visitations to the AAR clinic. It was the decision of her parents to not insist on the Athlete appearing before the panel, to enable it verify her demeanor in regard to her prior knowledge of participating in the systematic uptake of a prohibited substance and therefore in her absence, the panel will go ahead and draw an inference on the matter of knowledge and thereto intention pursuant to Article 3.2.5 of the WADC.

139. As argued by the Applicant, the Athlete, having chosen to engage in competitive swimming had obligations to the Code under Article 21.1 (21.1.1) - (21.1.6). These included knowledge of and compliance with anti-doping rules, responsibility for what she ingested plus also the duty to inform medical personnel of her obligation to not use prohibited substances and prohibited methods, thus making sure that any medical treatment received did not violate the ADRs.

140. The Athlete's admission necessarily meant that it was upon her to demonstrate no fault, negligence or intention, including how the prohibited substance entered her body, to entitle her to a reduction of sanction. The Athlete furnished the panel with precious little in order to discharge her burden of proof on the aforementioned Code prerequisites; on a balance of probabilities, her claim that she did not know that the drug she supposedly used did not contain a prohibited substance was in our opinion a lazy excuse and sketchy at the very least. She could not acquiesce to having received certification in anti-doping awareness and in the same breath claim she had never heard of say, TUE or, be unable to inform her mother about her Code obligations before her mother commenced the treatment program, unless in the unlikely event that her mother forced her into going through with the treatment, which if it were the case, would be criminal. We thus conclude that the treatment program was administered with the knowledge and cooperation of the Athlete.

141. We agree with the Applicant's averment that there was no diagnosis or authorized prescription for the POM she claimed she had used. Further should it have been necessary for the Athlete to use the said drug then her obligations under the Code required her to request for a TUE which she did not ask for. Additionally, the genesis of the prohibited substance, that is, exactly how it entered the Athlete's body depended only on hearsay from the Respondent ASPs as no actual proof was adduced. Neither, in hyper negligence, did the Athlete even appear to try to fulfill any of her Code obligations under Article 22.1 (a) - (f), short of one i.e. availing herself for the sample collection process.

142. We deem it was the 'lethargy' the Athlete (and her ASPs) was interested in having 'quick-fixed' with substance, so that she could go on with her career relatively unimpeded by the condition the qualified medical practitioner had diagnosed and prescribed apt treatment for, but which the Athlete rejected and replaced with one not in keeping with her Code

obligations. We hasten to add that a steroid is a doping substance as classified by the WADA list and not the usual herbal merchandise. It should be administered by qualified medical personnel for properly diagnosed medical conditions and if it must of necessity be administered to a sportsperson, then a TUEs is a prerequisite. Suffice it to say that the Athlete's feigning ignorance of the ADRs or being unaware of their existence could not be a basis upon which culpability of intentionality could be denied.

143. Even though the Athlete did not vigorously canvas the matter of reduction based on declaration of substance in the DCF, it was nevertheless alluded to by the Applicant and in this regard we shall delve into plea for reduction based on Athlete's penned declaration on the DCF. It is noted that rather vague terms were written on the form and such did not allow discernment as to the exact medication used. It was only after the laboratory reported its results, that anti-doping authorities were alerted of the AAF. 'Admission' in the sense defined by the Code, Article 10.6.2 is, '*... Where an Athlete or other Person voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample Collection which could establish an anti-doping rule violation... and that admission is the only reliable evidence of the violation at the time of admission, then the period of Ineligibility may be reduced, but not below one-half of the period of Ineligibility otherwise applicable.*' Therefore, the Athlete's declaration of the prohibited substance which was otherwise couched in opaque/vague terms, was not useful for purposes of extrapolation pursuant to this article.

144. It would appear that this was the Athlete's first ADRV, though we are not clear whether this was the first time ever that she was subjected to doping test and if it was not the first time, we were not told how many doping tests she had gone through during her illustrious career. Nonetheless, pursuant to Article 10.2.1 of WADC, '*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***'.

145. The above is further clarified by Article 10.2.3 as follow: '*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.'

146. Testosterone, a non-specified substance prohibited at all times, meaning in and out of competition, was traced in the Athlete's 'A' Sample and consequently *a four year period of Ineligibility* ensued unless the Athlete could establish that the ADRV was not intentional. Establishing that the ADRV was not intentional meant the Athlete had to, on the existing burdens of proof convince us that, by a balance of probabilities, she had absolutely no basic knowledge of anti-doping and its attendant rules/responsibilities. The Athlete (through ASP1) steadfastly pleaded ignorance but based on the abundant educational supplementation given through her relevant federation, including certification, we are not convinced the Athlete was a complete ignoramus when it came to doping. We surmise that she knew there was a significant risk that the conduct of allowing herself to be subjected to injections without having applied for TUEs or prevailing on her mother to double check *her medication* might constitute or result in an anti-doping rule violation and evidence at hand shows she manifestly disregarded that risk.

147. Following from the above, the pertinent question that the panel must pose and answer is if we should consider the Athlete's sanction with sole regard to her age and in fact, whether in the first place the Athlete should have been taken through the whole prosecution process as an individual or rather it was her guardian/parent who should squarely bear total responsibility and the Athlete is let off scot free, considering as her Counsel stated, *"she was fully reliant on her parents..."*.

148. WADC does not specify if minors should be given special treatment per se in determining the applicable sanction. Reference in the WADC concerning minors is made in Article 10.3.3 and the main thrust of this article is on people who dope Athletes/minors especially or cover-up doping and the recommendation is severe sanctions for such persons, which we opine is designed to protect minor athletes from the abuse. The event at which the Athlete was 'caught' using banned substance was an open event, meaning it was not a junior or minor's only event. The Athlete regardless of her age, was welcome to participate on equal competitive terms with all the other individuals entered at the event. Equally the event was governed by anti-doping rules which applied uniformly across the board and the Athlete together with her parents in signing up or entering

themselves into the competition knew/understood the terms and/or were presumed to know/understand the terms and bound themselves to participate by those terms. So attempting to administer a sanction differentially on the Athlete based on any other criteria other than the laid down rules in WADC, FINA DC or ADAK ADR would be tantamount to discrimination whether it is against the Athlete herself or her other competitors at the event, of age of majority, who might happen to find themselves in an ADRV bind like the Athlete.

149. In addressing a similar question a CAS panel in CAS 2006/A/1032 **Sesil Karatancheva v/International Tennis Federation** - page 35 cited as follows: *'Similarly, the introduction to the WADC indicates that: "Anti-doping rules, like competition rules, are sport rules governing the conditions under which the sport is played. Athletes accept these rules as a condition of participation. Anti-doping rules are not intended to be subject to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters" and under "Participants Comments" adds that "By their participation in sport Athletes are bound by the competition rules of their sport. In the same manner Athletes and Athlete Support Personnel should be bound by anti-doping rules based on Article 2 of the Code ..."*

150. Further the panel notes in No. '137. *In other words, it is not the age, sex or any other personal characteristics of an individual that determines the application of the anti-doping rules but the participation of an athlete in events governed by the rules. This criteria of application of the rules is further emphasized in the following definition of an "Athlete" in the WADC: "For the purposes of Doping Control, any Person who participates in sport at the international level (as defined by each International Federation) or national level (as defined by each National Anti-Doping Organization) and any additional Person who participates in sport at a lower level if designated by the Person's National Anti-Doping Organization. For purposes of anti-doping information and education any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code". 138. In addition, the introduction to the WADC underlines that: "The purposes of the World-Anti-Doping Program and the Code are: "To protect Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide ..." 139. The Panel considers that the foregoing provisions and definitions of the TADP and WADC clearly imply that, in order to achieve the goals of equality, fairness and promotion of health the anti-doping rules are pursuing, the anti-doping rules must apply in equal fashion to all participants in competitions they govern, irrespective*

of the participant's age. 140. *More specifically, with respect to athletes' duty of care in ensuring they do not ingest any prohibited substances, the regime of sanctions which applies if they do and the conditions under which they can establish "no fault or negligence" or "no significant fault or negligence", there is no wording in the provisions of the TADP or WADC, or in the official comments in the latter, indicating that the responsibility of younger athletes, notably minors, should be assessed by a different yardstick. The rules, therefore, do not anticipate a different regime for minors.'*

151. The said panel then concluded at No. 141. *'In these circumstances the panel considers that there is no automatic exception based on age. Such an exception is not spelled out in the rules and would not only potentially cause unequal treatment of athletes,but could also put in peril the whole framework and logic of anti-doping rules.'*

152. The key elements upheld by the WADC is the need for uniformity across individuals participating in sports locally and across borders so that a level playing ground is secured and ensured for sportspersons. The quest for fairness calls into play the need for universality of doping rules as captured under ***'Purposes, Scope and Organization of the World Anti-Doping Program and the Code:*** *To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping'.*

153. Thus after individual case-specific attributes such as principle of proportionality, seriousness of offence, fundamental responsibility, lack of experience and other appropriate/ exceptional circumstances, have been taken into consideration, the deterrent stand this panel takes then has to be in harmony with international standards. Flowing from the above it is evident that the plea for consideration of Athlete's sanction only on account of age is not tenable and instead more effort should have been made by defense/ Respondent Athlete to adduce evidence that met the strict liability stricture threshold, in place of anticipating automatic exemption by merely pleading her innocence based on her ignorance, supposedly occasioned by her young age. The panel will therefore accordingly review the issue of her sanction at the latter part of the judgments together with the ASPs'.

Athlete Support Personnel 1 - Mrs. Saada Lukangachi Michaelo:

154. The Respondent ASP1, mother to the Athlete, was the Athlete's manager during the June 2, 2017 in-competition testing where the Athlete, then a minor, returned an AAF in regard to her urine sample. Thereafter she submitted an explanation to ADAK on behalf of the Athlete - in which she notably admitted liability for the AAF. Her admission, supported by analytical data procured from a reliable laboratory regarding the Athlete's 'A' Sample was entertained by the panel pursuant to FINA's **DC 3.2** ***'Methods of Establishing Facts and Presumptions*** *Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases: [Comment to DC 3.2: For example, FINA or the Member Federation may establish an anti-doping rule violation under DC 2.2 based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to DC 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples such as data from the Athlete Biological Passport.]'* and *'**DC 2.1.2** Sufficient proof of an anti-doping rule violation under DC 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;...'*

155. Further, in the absence of the Athlete, she represented the minor during the hearing in her capacity as parent/guardian. Therefore Nos. 132- 153 above are also fully applicable to ASP1, as her role in the Athlete's ADRV we note right at the outset, is, inextricably intertwined with that of her own AAF by virtue of the parent/ASP conjunction, thus we shall proceed with analysis in respect of ASP1 flowing from aforementioned numbered paragraphs in addition to other ASP1- specific observations.

156. In the initial text recorded by ASP1, her admission contained therein did not seem to be unequivocal. In her written record (refer to her email dated 12th August 2017 in page 17 of the charge document), ASP1 alluded to a condition of *"hypogonadism"* which required *"medication with exogenous testosterone"* which it later clearly emerged was her own diagnosis and not that from a qualified medical doctor but that clarified information was not what was clearly communicated by the email. She penned the explanation in a manner meant to throw a cloak over the real genesis of need to medicate the Athlete with her particular choice of medication; for example,

"Part of the management programme she was under use of oral contraceptives of which not much effect was noted... Further follow up of her complains and symptoms, a suspicion of hypogonadism...", net result being to tactfully subsume her own self diagnosed/prescribed medication on the Athlete into the duly designated medical programme, while simultaneously abrogating the qualified doctor's, in order to achieve her desired results, yet, all the time, making it seem like her newly self-introduced prognosis was a continuation of the proper medical advice authorized by the doctor, in what we discerned was an obvious attempt to hedge against her own (and Athlete's) AAFs. In ASP1's recorded explanation, we detected an attempt to veil reason for administration of the 'medication' so it would seem to appear to be a genuine and necessary medical intervention attributable to the medical doctor under whose wing the Athlete was. We conclude that this initial explanation was cleverly designed to mask her administration to the Athlete of the prohibited substance.

157. Trying to mask and/or cover up essentially presupposes knowledge which by extension generally points to intentional action. The ASP1 having facilitated or administered the prohibited substance (as we deduced in retrospect) tried at the earlier stage to pass the buck onward to the medical authorities and when that fell flat on its face with the Applicant, she varied it in a later Athlete Witness Statement filed by her Counsel and received by the tribunal on 24th October 2018. In the later statement, ASP1 still not explaining exactly why and how, admitted using the medication on the Athlete whereby she insisted that *"We as her parents also did not use the medication for any performance purposes but to assist our daughter with all her complications and conditions she was undergoing as a young lady."*

158. In the same statement she introduced a narrative she elaborated upon at the hearing whereby she admitted to purchasing and having substance administered by nurses at an AAR facility and further explained that she herself had experienced similar medical challenges like the Athlete during her teenage years. These challenges she detailed to the panel, finally came to an end when her late husband put her on similar medication to the one she procured the Athlete to use. Hence, she said her late husband had endowed to her the method she used on her daughter. Plausible as the narrative sounded it remained a matter of conjecture as she adduced no collaborating evidence to support the theory.

159. POM medicine has its place in the health sector and is indeed legitimate mode of treatment used the by medical profession to treat those classes of conditions necessitating such. Therefore let us posit that, with her background training in herbalism, ASP1 was well guided by that body of knowledge to arrive at her diagnosis and therefrom, her chosen medication. Then, logically we would have expected her, coming from an alternative healthcare background, to defend her treatment programme by adducing supporting prognosis from expert independent witness (es) from medical or herbal practice and/or literature. Such was glaringly missing. It is notable that in his testimony - conveyor of the only reliable circumstantial evidence available to this panel from the Respondents' side, Dr. Mohamed - not only steadfastly defended the appropriateness of his prognosis and prescription, (refer to page 19 of charge document) but he also seemed to distance himself from any malpractice by stating that he had not been informed that the patient brought to him was an athlete. He majorly contradicted ASP1 stating that on review he conducted, the Athlete had begun to exhibit an improvement. He also confirmed to the panel that the level of testosterone reported by the laboratory relating to the Athlete was not consistent with his prescription which contained 150mg --- and 30mg Levenog--, further, those levels were not naturally possible in a teenage girl. It is also etched in our minds that previously, about two medical practitioners in Israel had already appropriately advised ASP1 in relation to the Athlete's condition. One Dr. Luria had ostensibly diagnosed the Athlete with an endocrine condition; when requested for evidence thereof ASP1 brushed aside the Applicant in the email and at hearing she said whatever the doctor prescribed was in a language she could not understand - yet the other documents she wished the panel to access were expressly translated, for example, the birth certificate (see pages 27 & 28 of the ASP1's charge document); our conclusion thereof is that the elite-level Athlete, who started her swimming career at a tender age was (and had for a long time now been) logging in strenuous training which was bound to affect her normal growth, and whereas medical experts concerned mainly with the Athlete's health, were more inclined to treat her with conventional medication while ASP1, perhaps concerned more by the sport participation - in which she partook by accompanying the Athlete as ASP - chose to help things along by resorting to medication whose justification she was hard pressed to furnish the panel with.

160. Granted that ASP1's treatment by her late husband took place a long time ago, it was understandable that raising collaborative evidence regarding it -

if it indeed took place - would have been very difficult; what was most disturbing though, was the dearth of collaborative evidence for the more recent 'treatment program' on the Athlete in such form as lab tests' results, prescription chit, purchase receipts for medication(s) or payment receipts for the injections administration yet, all these were said to have been procured at authorized outlets e.g. Makupa Chemist and AAR Clinic in Nyali; if the medication was for genuine medical needs then such evidence should have been easily forthcoming and provided in a straight forward manner.

161. We conclude that it was only after the Applicant engaged the prosecution gear and perhaps in the face of Athlete Witness Statement by Dr. S.M.H. Mohamed, that ASP1 realizing she could no longer hide behind the doctor hence made up the explanation, proffering a narrative which we dismiss as conjure.

162. Further, ASP1 told her sister (the medical doctor who allegedly deciphered the DCF for her) that she had used Sustanon, (a sign that she knew it had testosterone). Further to this, why then did she allegedly keep the information of its use from ASP2 and the Athlete ostensibly long before she was caught out by anti-doping authorities if she truly did not know it contained a prohibited substance? Our answer to first part of this query is that she did not hid what she was using from ASP2 and they both knew they were enforcing the partaking of a performance enhancer and for second part, is that she knew all along that Sustanon contained testosterone and that this substance was banned by anti-doping rules and that is why she went on over-drive to deny any knowledge of doping matters (and by extension ASP2 followed suit in well-choreographed move, locking into same ploy) to try ward off the consequences when the AAF inevitably came knocking on the door. That both ASPs collaborating each other's testimony while testifying under oath, (that ASP1 withheld such information), was just part of a plot hatched by the two but otherwise found out by a slip of the tongue at oral hearing under cross-examination. As for the Athlete, the Applicant proved that she had attended anti-doping training and obviously had an understanding of doping so it is likely the systematic injections had sounded the warning bells and she may have expressed her alarm to ASP1 and reason ASP1 was keen to represent her so as to make sure that did not come out in the open. It will be noted that either by design or by a stroke of good luck the Athlete did not testify before the tribunal.

163. There was what we view as a belabored effort at explaining the absence of the Athlete at the hearing before the panel. In the written witness statement ASP1 stated the Athlete was "*staying in Israel where she is schooling but I and my husband are here in Kenya.*". Whereas at the hearing, the panel heard that the Athlete, having recently been conscripted for mandatory army training was whisked away on short notice immediately she reached the age of majority by the relevant embassy here. The inconsistency was suspect and we were not clear which situation was abiding at the time; but irrespective of true facts concerning the Athlete's absence, the panel will be guided by Article 3.2.5 of WADC in regard to ASP1's responsibility in ensuring the Athlete duly attended her due hearing.

164. At this juncture we highlight two core aspects that kept recurring in all written and oral submissions of Respondent ASP1:
   (a) A contention by ASP1 that she did not know that the medication she had administered to the Athlete contained banned substances;
   (b) ASP1's submissions were also tailored so that great emphasis was laid on the minor status of the Athlete and her innocence stressed therefrom; in the words of ASP's Counsel: "*The tribunal will note that the Respondent athlete was a minor at the time the test was done and was solely reliant on her parents to take care of her well-being and followed her parent's instructions.*"

165. We shall deal with these aspects in same order above: Having admitted she was the Athlete's ASP (together with the father) and indeed it was an undisputed fact that she was the one who accompanied the Athlete for this particular test, additionally signing the DCF on behalf of the Athlete, Article 21.2 (and the WADC in general) took full effect on ASP1.

166. Revisiting the roles and responsibilities of ASPs under WADC's Article 21.2, sub articles (21.2.1 - 21.2.6), we note that being knowledgeable was presumed at the top of these, therefore, fronting an ignorance plea was not propitious i.e. trying to cower in the dark shadows of ignorance was inevitably a doomed dead-end plea. The Applicant had presented evidence showing that ASP1 was fully immersed in the Athlete's swimming career, accompanying her to various events including the Zimbabwe competition, where the Athlete received a certificate, after attendance at a doping training course. ASP1 during cross-examination did not deny knowledge of the Athlete's attendance though she herself said she had not attended any doping training but not because she was not offered a chance to participate

by the federation, we deciphered. In fact, at the last one held in alongside the June 2017 competition, she told the panel that she did not attend because she had to juggle her various roles as mother and ASP to the Athlete. This sounded like a lame excuse and indeed we adjudged it to be one, especially in light of the fact that the father was in attendance at the same event ostensibly to support the Athlete; her not acquainting herself with doping details was gross negligence in view of her Code responsibilities. Doping, we surmise was not an alien term to ASP1 and she knew there were banned substance and yet went on to administer such to the Athlete without a valid justification; it will be recalled that no evidence was adduced to confirm her 'suspicions' in way of lab test results inter alia.

167. Further to this, ASP1 came through as a well-educated individual and with a background in herbal training she ought have to been generally well versed with issues of basic medication and the sensitivities involved in handling the class of medication termed as 'prescription only'. It was obvious she knew her daughter was an Athlete and an elite athlete for that matter. She may have been just a teenager when the 'medication' was used on her by her late husband but by the time she used the medication on the Athlete, she was a mature mother and trained, experienced herbalist to boot. If as her Counsel submitted she was a *"mother who was fulfilling her parental responsibilities toward her minor child as provided under Article 53(i), (e) of the Constitution, Section 9 & 23 of the Children's Act 2001"*, with best interests of her daughter at heart as these articles connote, it is rather strange (in fact it sound totally incredulous) that, educated as she was, it did not occur to her to crosscheck the ingredients in order to judge the efficacy of the substance she chose, if for no other reason than just because it was many long decades since the same was used on her. You would wonder if in her profession as a herbal doctor if that is how she handled medication, without a thorough understanding of it?

168. Regarding fault or negligence there is no evidence to show ASP1 took any particular precaution to avoid treating the Athlete with the banned substance. The evidence available shows that on the contrary, she nonchalantly ditched the doctor's prescription and substituted it with her own banned substance then back pedaled furiously to try seek shelter under the real doctor's program when confronted by doping authorities, after the Athlete's AAF became apparent. In so doing, in her role as a user (like all other healthcare seekers) she ignored her duties under the Health Act 2017, Section 13. *'Duty of users: A user of the health system has the duty, in*

the absence of any observable incapacity – ... (b) ***to adhere to the medical advice and treatment provided*** *by the establishment; ... (d) to cooperate with the healthcare provider;'*

169. ASP1, usurping the role of a qualified medical practitioner purported to treat the Athlete against MEDICAL PRACTITIONERS AND DENTISTS CAP 253 22. (1) *'...or who, not being registered or licensed under this Act,* ***practises*** *or professes to practise or...'* but, when caught up with by doping authorities changed tact and 'remorsefully' pleaded she did not know the medication she had used contained banned substances. Her demeanor in court though did not exhibit this remorse but rather revealed a cunning smooth-talking character.

170. It is our take that it is highly improbable that ASP1 did not know that the medication she elected to administer to the Athlete had banned substances as she claimed. This view is lent credence by observation that the Chemist probably chose to sell her the Prescription Only Medicine (POM) on account of PHARMACY AND POISONS CAP 244 Section 29. *'Power to sell Part I poisons (2) Subject to the provisions of this Act, an authorized seller of poisons may sell Part I poisons to any of the persons, institutions and others referred to in subsection (1) of this section, and in addition may sell such poisons to any person who is – (c) a person known by the seller to be a person to whom the poison may properly be sold.'* This could be interpreted to mean the seller not only knew her as a regular customer as ASP1 told the panel, but that the seller sold it to her because it 'may properly be sold' to her in view of her known herbalist status and her presumed knowledge in the efficacies of some modern medicine such as Sustanon meaning, she had full knowledge of its properties, including it being in the class of steroids. Coming from her background, ASP1 more than anyone else would know the dangers of dabbling in POMs. In a nutshell, ASP1 was well versed with the product she was purchasing and that it contained banned substances and while all the other qualified doctors she had visited with the case of the Athlete made professional decisions not to resort to its use, she made a conscious/ personal decision to subject the Athlete to the drug. We come to that conclusion because, allowing the sale of Prescription Only Medicine (POM) to non-qualified persons has legal consequences under the Pharmacy Act which, registered sellers are well aware of and would dispense their products with due diligence required and the apt justification to avoid being on the wrong side of the law.

171. Regarding the thematic approach of fending off all the ADRVs based entirely on the Athlete's minor aspect, the panel took a dim view of the attempt by ASP1 to play up the said 'minor' card. The overemphasis on minor status belied an intent by the ASP1 to seek reprieve utilizing standard legal protocol governing minors by leveraging on the Athlete's age of minority. As discussed above, CAS jurisprudence frowned on such maneuvers; in the face of the question as to whether in a doping context in particular, a minor has sufficient discernment and autonomy to be considered totally responsible for his actions and thus be regarded as an adult, or whether like in the existing system of criminal law he should receive more lenient treatment, CAS panels have demurred assessing doping sanctions based entirely on age limit: CAS 2006/A/1032 **Sesil Karatancheva v/International Tennis Federation** - No. 142 exemplifies those leanings as follows; *'The reason for ignoring the age of the athlete is that either an athlete is capable of properly understanding and managing her/his anti-doping responsibilities, whatever her/his age, in which case she/he must be deemed fully responsible for her/his acts as a competitor, or the athlete is not mature enough and must either not participate in competitions or have her/his anti-doping responsibilities exercised by a person - coach, parent, guardian, etc. - who is capable of such understanding and management. In the latter case, the only way to ensure equality of treatment between participants and to protect the psychological, moral and physical health of younger athletes is to require that their representatives meet the same standards as any adult athlete. Otherwise, unscrupulous or negligent coaches, parents, guardians, etc. will be in a position to take the risk of blame while knowing that their protégés are safe from sanction.* ***That would open the door to a possible system of doping abuse that would put the youngest athletes at the highest risk when in fact they need the most protection.*** *In other words, **any attempt to reduce the responsibility of younger athletes due to their age will in fact increase their vulnerability.**' 143. This is all the more true in today's world of amateur and professional sports, where there is a growing tendency in many if not all disciplines for athletes to begin their sporting activities at increasingly younger ages and to perform at extremely high levels and peak much earlier. As a result, there is a growing number of very young athletes competing seriously at national and international levels who are subject to extremely demanding training and competition regimes and who are managed by parents, guardians, coaches, etc. Furthermore, with larger sums of money being invested in most sports and increasingly younger athletes becoming professional and being sponsored, the pressure exercised on them by their environment is also increasing. 144. Accordingly, neither the TADP nor the WADC deem age to be a distinguishing factor in terms of anti-doping duties and responsibilities,and*

provide instead that all persons participating in competitions subject to the anti-doping rules are bound by them, whether they are adult or still a minor and whatever their age.'

172. As a result of modern tendencies elucidated above, the temptation is great among ASPs to overstep the rules in their efforts to super train their malleable charges in the chase after the pot of gold at the end of the rainbow. It was not lost on Code developers that such undesirables could run rife, being reason that counter measures were inbuilt in the WADC. We cannot over emphasize the need to protect by all means the most vulnerable amongst us and find pathetic the approach by ASP1 to try and shield herself using an otherwise vulnerable individual who was her own daughter. Exploitation of minors by whosoever must be curtailed. It is the reason why the WADC advocates serious sanctions for ADRVs which involve persons who administer dope to youngsters and in this case we take exemption to persons who not only administer but also actively seek to hide/shield selves from consequences behind minors.

173. Consequently we find that ASP1 failed to discharge her burden of proof on origin and use-justification of prohibited substance; she was not honest in regard to the serious matter levelled against her and was especially manipulative, for example, she tried to reengineer the bona fide doctor's data regarding the Athlete's medical regime in order to achieve the aim of masking the ADRVs which behavior we state is against rules of common decency.

174. The WADC takes great exception to persons who dope minors and from a standard four (4) year period of Ineligibility for persons who dope athletes, the Code snowballs that period into a direct lifetime Ineligibility for persons who commit the transgression on minors. The Children's Act No. **8 of 2001** [Rev. 2017] is equally protective with Section **16.** ***'Protection from drugs*** *Every child shall be entitled to protection from the use of hallucinogens, narcotics, alcohol, tobacco products or psychotropic drugs and any other drugs that may be declared harmful by the Minister responsible for health and from being involved in their production, trafficking or distribution.'*, not countenancing abuse of minors by expressly disallowing indiscriminate use of POM in the name of health provision.

175. We shall deal with sanction later.

Athlete Support Personnel (ASP2) - Mr. Mohamed Gacheru Joseph:

176. On account of the mutuality of all three Respondents in these cases, again many observations made above abiding by the ASP1 and Athlete shall automatically apply to the ASP2.

177. ASP2, father of the Athlete, at the hearing testified that he escorted the Athlete on at least more than one occasion to have the medication administered at the clinic insisting though, that he did it on instructions from ASP1 while she was away. WADC's Article 3.2 states: '*Facts related to anti-doping rule violations may be established by any reliable means, including* ***admissions***.' His oral admission nestled in Article 3.2 and it is accepted that he administered a prohibited substance to an Athlete who was a minor.

178. In his oral testimony he vehemently denied knowingly administering the prohibited substance saying he did not even know what type of medication it was that the Athlete he accompanied to the clinic received - and ASP1 vouched for him in her own testimony saying she was the only one who knew what medication she had prescribed to her daughter. In a show of supreme ignorance he declared that he assumed it was '*women's issues*', possessed of initial knowledge that the Athlete had a condition relating to her reproduction development. His insistence on innocence lay on shaky ground, relying as it did purely on circumstantial evidence from ASP1 who, herself, undeniably facilitated the administration of the prohibited substance. We cannot rule out connivance.

179. Is it probable that he did not know anything about doping until ADAK personnel brought to his notice the Athlete's AAF? The Applicant argued that ASP2 did not hear about doping for the first time then, but that he had prior doping knowledge, having seen the Athlete's doping certification from the Zimbabwe training. Indeed the panel notes that ASP2 contradicted himself when he theatrically proclaimed never ever having encountered anything to do with doping and shortly thereafter, at cross-examination agitatedly admitted he was privy to the certification, only, in his own words, "*I did not pay it much attention*". The ASP2 also admitted to seeing a tent mounted by ADAK at the June 2017 swimming event but did not venture therein choosing instead to attend to attend to business matters with associates and visit with friends and relatives living in the city which was far flung from his base in Mombasa. A vital sign that doping was not the 'stranger than fiction theory' he tried to make the panel believe it was to

him, was his admission that he did receive WADA reading material from his local federation not long after the June 17th, 2017 event. ASP2 also stated in his Athlete Witness Statement at 2nd paragraph *"I have no medical knowledge or education with regard to anti-doping issues and or prohibited medication as I am a businessman by profession."* was suspect, perhaps a tad illogical because shortly at hearing he told us he knew about swimming yet he was a businessman.

180. The Athlete was not the only swimmer he coordinated; The ASP2 did say he served in the management of Dolphin Swimming Club which natured and trained youngsters meaning swimming trends in the country may not have been novel to him since he was engaged in the day to day affairs of swimmers in his community.

181. We are not convinced that his knowledge of anti-doping matters was as compromised as he claimed and even though he might not have authorized or otherwise ordered the administration of the prohibited substance to the Athlete, he definitely was a willing participant in its administration and quoting him *"I stand together with my wife and stand by the decisions she takes"*. Intent then becomes just a matter of semantics in the ASP2's case as we see nowhere whereby he says he was forced to cooperate neither, was it true that he was totally ignorant of matters doping, rather it is most probable that he chose to trust his wife, perhaps because he figured that she had some health knowhow or background in herbal medicine or simply because she was his wife and the biological mother of the Athlete anyway.

182. That when he took the Athlete to the clinic, he did not care to investigate or at least find out what medication it was that the minor was receiving for a health condition simply on account that he trusted his wife, we find was unacceptable given that he identified as one of the Athlete's ASP. During the hearing he seemed well informed and equally eloquently discussed all matters swimming except when it came to doping, where it seemed some sort of selective amnesia kicked in. If even short glances at the anti-doping materials that he admitted had already passed through his hands did not pique his interest, then we can only conclude that he shortchanged his responsibilities to the Code in a most irresponsible manner.

183. Keen examination of the facts and evidence available above leads us to conclude that ASP2, by his own admission, administered or facilitated the administration of the prohibited substance and his justification was that he

was instructed to do so by ASP1 which is a manifestly unsatisfactory justification in view of his stated responsibilities to the Code.

Decisions:

Athlete:

184. (1) Assessing the totality of factors we arrive at the following;

(a) It was tough on the Athlete weighed down by the pains of physically growing and gruesome training/competitions and it would not be an overstatement to say that she was under extreme pressure. Given the age at which she had to endure this pressure and from no less than her own parents, it is probable that she was indeed under the huge stress alluded to by ASP1. Here were two ASPs collaborating to dope the Athlete perhaps just because it was their parental prerogative and that they had influence and control over her, she being their daughter and a minor at that and we have to admit that hers was a mismatched battle; if perchance she offered any resistance then likely she was outmaneuvered perhaps resulting with her offering least resistance or became subdued and the internalized pressure exhibiting itself as ill-health and erratic physical growth, therefore her mental state compounded by her impressionable age is taken into consideration.

(b) If it is indeed true that ASP1 did not let her know what medication it was that was administered to her, which is highly improbable but not impossible (and let us give her the benefit of doubt), then the Athlete could not have been in a position to make an informed decision.

(c) WADC's Article 10.8 *'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 of the resulting Consequences including forfeiture of any medals, points and prizes.'*, is considered because the testosterone systematically introduced altered the Athlete's blood values during the

ingestion period and that culminated in her ill-gotten victories therefore in all fairness she had an undue advantage over other competitors. Additional attention was paid to WADC's Article 10.1 including comments thereof; *'10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs – An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.* which inter alia states: *'10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.* (2) In these circumstances, the following orders commend themselves to the panel:

(i) The Athlete is sanctioned to a four (4) year period of Ineligibility backdated to 2nd June 2017, when the sample was collected;
(ii) All competitive results at all events obtained by the Athlete from and including 2nd July 2017 be disqualified, with the resulting consequences (including forfeiture of medals, points and prizes);
(iii) Both parties shall meet their own costs;
(iv) Orders accordingly.

(3) The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule DC 13 (in particular 13.2.1) of FINA DC and Article 13 of ADAK, ADR.

ASP1

185. The Constitution at Article 53(1) *'(c) guarantees a minor basic nutrition, shelter and healthcare'* while 53 (2) states: *'A child's best interests are of paramount importance in every matter concerning the child.'* We believe that an unqualified person in the name of ASP1, indiscriminately feeding the Athlete with POM did not equate to provision of healthcare and was instead abuse and this was not in the best interests of the Athlete. It in fact inevitably landed the Athlete an ADRV, with the resultant immediate provisional suspension being slapped upon her, thereby abruptly curtailing her swimming career.

186. If it is true that ASP1 neglected or elected not to inform ASP2 about the exact medication she was using on their child prodigy then for sure she had ulterior motives because health information is guaranteed by Health Act Section 8. *'(1) Every health care provider shall inform a user or, where the user of the information is a minor or incapacitated, inform the guardian of the – (a) user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;'* ASP1 might have elected to keep the Athlete in the dark because perhaps she doubted her cognitive abilities (or perhaps ASP1 worried that the Athlete, in her youthful exuberance might have gossiped or blurted it out to unintended recipients, therefore let the cat out of the bag) but was ASP2 also of similar comprehension incapacitation, therefore the non-disclosure to him too? We think not; ASP2 was mature, not the direct user and a very interested party in the Athlete's career being also her sport support personnel. Rather that ASP1 was a reckless individual bent on circumventing all that stood in her path, by way of commissions and/or omissions, is our verdict.

187. The last paragraph in the Athlete Witness Statement by ASP1 on page 18 of her charge document read, *"Now that we have put her {Athlete} and her swimming career to {re}present her beloved country Kenya in jeopardy, we sincerely regret this and we intend to educate ourselves further on all medications before administration."*, yet given an opportunity to manifest this 'sincere regret' by way of substantial evidence/explanations which could help in the fight against the vice of doping, both ASPs instead spun tales and meandered around trying to banish the doping subject into the woods. This same written language of a pretentious, flippant and unrepentant attitude was repeatedly exhibited by both ASPs at the hearing; such similar attitude was captured by a CAS panel which had this to say: CAS 2016/A/4615 Asli Çakir Alptekin v. WADA, award of 4 November 2016 (operative part of 5 July 2016) NO. 4.19 *'After a prior doping violation involving steroids when she was a junior athlete, the Athlete engaged in an intentional, sophisticated doping scheme whereby she manipulated her blood values during a period of two years that ultimately culminated in her (ill-gotten) victory at the Olympic Games in London. The Athlete* ***has never clearly admitted her wrongdoing. The Athlete's primary interest is not to aid in the fight against doping, but to engage in a calculated plea-bargaining exchange in an effort to participate in the*** *Olympics. In this context, any further suspension of her period of ineligibility could only be obtained further to information or assistance that would genuinely and substantially advance the fight against doping going forward. The*

Athlete has not provided information and assistance that comes close to meeting this standard.' Similarly, with just one primal agenda which was to extricate themselves unscathed, that was the fate of ASPs, who did not provide information or assistance anywhere near to meeting the standard necessary to expedite the burden of proof against their respective AAFs therefore in the end, attracting to themselves the full consequences of WADC.

188. We find FINA's Rule DC 10.3.3 appropriate in considering sanction for ASP1 (and ASP2): **DC 10.3.3** *'For violations of DC 2.7 or DC 2.8, the period of Ineligibility imposed shall be a minimum of four years up to lifetime Ineligibility, depending on the seriousness of the violation. A DC 2.7 or* ***DC 2.8 violation involving a Minor shall be considered a particularly serious violation and, if committed by Athlete Support Personnel for violations other than for Specified Substances shall result in lifetime Ineligibility for the Athlete Support Personnel.*** *In addition, significant violations of DC 2.7 or* ***2.8 which also may violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.'***

189. In light of total proceeding above we find that the violations of both ASPs fall at the extreme serious end of the spectrum. Thiers was an unconscionable intentional doping behavior occasioned on a minor for enjoyment of bragging rights over her wins, not understanding that in the chase of the thrill, they in any event, put her swimming career in jeopardy, which is unpardonable - (and we have not even dissected the issue of health risk, not being the competent authority to do so). And at the end of it, in a show of superficial remorse wiggled in as an attempt at mitigation of their AAFs, it was their chosen defense tactic though, which tactic solely constituted trying to hide behind the back of the minor, which proved to be the straw that broke the camel's back for this panel. This kind of behavior must be doused with all legal arsenal available in order to extinguish it, as, it simply has no place in the fight against doping in sport.

190. In considering the sanction for ASP1 (and ASP2), comments to WADC's Article 10.3.3: will also be taken into account; *'[...Those who are involved in doping Athletes or covering up doping should be subject to sanctions which are more severe than Athletes who test positive...'* That ASAP1 used her privileged position as mother to the Athlete to negatively influence, even actively and unapologetically dope the Athlete is truly reprehensible behavior. That she is a knowledgeable herbalist, therefore not a total ignorable in regard to

healthcare and doping matters, only adds insult to injury, calling for the severest sanction.

191. Regarding additional relief, the Applicant's attention is drawn to FINA's Rule **DC 10.10** ***'Financial Consequences*** *Where an Athlete or other Person commits an anti-doping rule violation, FINA may, in its discretion and subject to the principle of proportionality, elect to (a) impose upon the Athlete or other Person recovery costs associated with the anti-doping rule violation, regardless of the period of Ineligibility imposed and/or (b)* ***fine*** *the Athlete or other Person in an amount up to ten thousand American dollars (USD 10'000),* ***only*** *in cases where the maximum period of Ineligibility otherwise applicable has already been imposed.'*

192. (1)Flowing from above the panel is compelled to grant the Applicant's prayers as follows:

(i) The maximum sanction of lifetime ineligibility is imposed from date of provisional suspension which was 5th August 2017;
(ii) Additionally it is recommended to Applicant to consider Rule DC 10.3.3 and report to relevant authority for deterrent action as specified in Section 42 (4) (a), (b) & (d) of the Anti-Doping Act 2016;
(iii) The Athlete Support Personnel-1 shall bear the costs of this cause;
(iv) Orders accordingly.

(2) The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule DC 13 (in particular 13.2.2) of FINA DC and Article 13 of ADAK, ADR.

ASP2

193. The Applicant's charge against ASP2 Article 2.8 sticks firmly on account of WADC's definition of the term 'Administration' which is given as follows: *'Providing, supplying,* ***supervising, facilitating, or otherwise participating*** *in the Use or Attempted Use by another Person of a Prohibited Substance or Prohibited Method. However, this definition shall not include the actions of bona fide medical personnel involving a Prohibited Substance or Prohibited Method used for genuine and legal therapeutic purposes or other acceptable justification and shall not include actions involving Prohibited Substances which are not prohibited in Out-of-Competition Testing unless the circumstances as a whole demonstrate that such Prohibited Substances are not intended for genuine and legal therapeutic purposes or are intended to enhance*

sport performance.' No amount of remonstrations about the Applicant's methods would erase the paint from the picture on his easel in the absence of an appropriate justification from him for supervising the administration of the prohibited onto the Athlete.

194. In any case, the incongruity of his explanations pointed to a person working in cohorts with ASP1. His flippant attitude toward his AAF did not lend credence to his case either. He offered the panel little in the way of actual evidence, therefore failed to establish his burden of proof for his serious AAF and in the absence of any mitigating factors, the following orders lend themselves to the panel:

(1)
(i)The maximum sanction of life time Ineligibility is imposed on ASP2 from date of provisional suspension which was 5th August 2017;
(ii) The Athlete Support Personnel-2 shall bear the costs of this cause;
(iii) Applicant may consider FINA's DC 10.10;
(ix) Orders accordingly.

(2) The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule DC 13 (in particular 13.2.2) of FINA DC and Article 13 of ADAK, ADR.

Dated at Nairobi this __7th_____day of _____November, _____2018

Shiveka.

Mrs. Elynah Shiveka, Panel Chairperson

Ms. Mary N. Kimani, Member

Mrs. J Njeri Onyango, Member