REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
APPEAL NO. ADAK 20 OF 2019

IN THE MATTER BETWEEN

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

-versus-

PAUL KIPKORIR KIPKEMOI…….……..…….... **ATHLETE**

DECISION

Hearing: Matter of the Preliminary Objection proceeded on 30th January 2020 whose ruling was rendered on 19th August 2020. Both Counsels heard again on in regard to the ADRV on 23rd September 2020.

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

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant; Mr. Brian Tororei of TLO Law Associates R8, Lange Lange Apartments (Behind Heron Portico), Jakaya Kikwete Road, P. O. Box 12189 – 00100, Nairobi, Advocate for the Athlete.

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 Respondent is a male adult of presumed sound mind, an Elite and International Level Athlete, (hereinafter **'the Athlete**').

II. Factual Background

3. The Athlete is an International Level Athlete hence the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.

4. On 31st December 2018, ABCD Doping Control Officers in an In - competition testing, during the Sao Paulo Corrida de Sao Silvestre Marathon in Sao Paulo, Brazil, collected a urine sample from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 6376649 (the **"A Sample"**) and B 6376649 (the **"B Sample"**) in accordance with the prescribed WADA procedures.

5. Both Samples were transported to the Brazilian Doping Control Laboratory, a WADA accredited Laboratory in Rio de Janeiro. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") being the presence of a prohibited substance ***1,3dimethylbutylamine (4- methylpentan-2-amine),*** (see test reports in page 8-9 of the Charge Document).

6. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.

7. The findings were communicated to the Athlete by Mr. Japhter Rugut, ADAK Chief Executive Officer through a Notice and Optional Provisional Suspension from participating in any IAAF and AK-sanctioned Competitions dated Monday 9th April 2019. In the said communication the Athlete was offered an opportunity to provide an adequate explanation for the AAF by 23rd April 2019, (see page 12 of the Charge Document).

8. The Athlete responded to the Notice from ADAK in a handwritten letter dated 8th May 2014; he also attached copies of pictures of supplements he said he had taken, (see the copies in page 15-19 of the Charge Document).

9. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule Violation. A Notice to Charge dated 16th May 2019 was filed at the Tribunal by ADAK on the same date.

10. The matter was mentioned at the Tribunal on 27th June 2019 and following directions issued on 28th June 2019:

(i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form and all relevant documents on the Respondent Athlete by Wednesday, 11th September 2019.

(ii) The Panel constituted to hear this matter shall be as follows; Mr. Gichuru Kiplagat Panel Chair, Ms. Mary Kimani, Member and Mr. Gabriel Ouko, Member.

(iii) The matter to be mentioned on 24th July 2019 to confirm compliance and for further directions.

11. **T**he mention on 24th July 2019 was attended by Mr. Rogoncho for ADAK while the Athlete appeared in person. The Athlete requested for a pro bono lawyer whom the Tribunal undertook to source and the matter was set to be mentioned again on 7th August, 2019.

12. The Charge Document (including various attachments) was filed at the Tribunal on 7th August, 2019 and at the mention on same date Counsel for the Athlete Mr. Tororei came on record. He was served with the Charge Document at the Tribunal and he requested for time to respond. Mr. Rogoncho appeared for ADAK. The matter was mentioned for 28/8/2019.

13. On 28th August 2019 a Notice of Appointment of Advocate was filed at the Tribunal for the Respondent Athlete by TLO Law Associates. At the mention on same date Mr. Tororei reported that he was in contact with the Athlete and would comply in 14 days' time. The matter would come up again on 12th September, 2019 to confirm compliance and for further directions.

14. When the matter came up for mention on 12th September 2019 Mr. Rogoncho Counsel for the Applicant said ADAK had not been served with any response. The Counsel for the Athlete was not present and the Tribunal ordered that the matter be mentioned on 3rd October 2019; ADAK was to serve the appropriate notices upon the Athlete.

15. At the mention on 3rd October 2019 Mr. Njoroge held brief for Mr. Tororei while Mr. Rogoncho and Mr. Mwakio appeared for the Applicant. Mr. Njoroge requested a further 14 days to file and serve the Statement of Defense which was allowed albeit as the last adjournment.

16. Mr. Mwakio held brief for Mr. Rogoncho for the Applicant while Mr. Tororei appeared for the Athlete during the mention on 24th October 2019. Mr. Tororei reported that the Athlete was presently at Cherenganyi where he had a farm and communication was not good so he requested a further 14 days. Mr. Mwakio did not object and by consent a mention was set for 6th November2019.

17. On 6th November 2019 the matter was brought before the Tribunal for hearing. In attendance was Mr. Rogoncho and Mr. Mwakio for the Applicant and the Athlete was also present. However, the Panel was uncomfortable with the fact that the Counsel for the Athlete was not present. The CEO of the Tribunal called the Counsel for the Athlete who was very unhappy that a hearing had been scheduled without his knowledge, when in fact he had been given 21 days to put in his submissions i.e. by 7th November 2019 and a mention set for 7th November2019. Given the aforementioned circumstances the Panel was of the view that going through with the hearing would be inappropriate. Thus, the Respondent Athlete's advocate was allowed to put in submissions by 7th November 2019 and a mention was set for 14th November, 2019.

18. Mr. Tororei for the Athlete attended the mention on 14th November 2019 while Mr. Mwakio held brief for Mr. Rogoncho for the Applicant. Mr. Tororei confirmed filing his response and Mr. Mwakio requested 7 days to respond. A mention was slated for 21st November, 2019.

19. The matter was next mentioned on 4th December 2019 where Mr. Mwakio held brief for Mr. Rogoncho; he informed the Tribunal that the Athlete's Counsel had requested that the matter be postponed to 5th December 2019, during which mention both Counsel for the Applicant and the Athlete, Mr. Rogoncho and Mr. Tororei were present. The matter was listed for hearing on 30th January 2020.

20. At the mention on 30th January 2020, Mr. Peter Njoroge Maina who held brief for Mr. Tororrei said that the Athlete had put in an application to the effect that in view of the sanctions that may be meted out, '*we think that ADAK has not met the*

threshold for the Athlete to be put on his defense'. Mr. Rogoncho representing the Applicant stated as follows: '*we admit that we did not notify the Athlete that he had a right to have his sample'B' tested. We think that this is not fatal to the charge. We would like this threshold issue to be determined before we can proceed to advice whether the Athlete should testify*.'

21. The Tribunal then ordered as follows:

'*As Counsel for the Athlete raises a due process issue which goes to the root of the ingredients of a fair trial in anti-doping jurisprudence, the Tribunal will determine this threshold issue before the hearing can proceed. The Tribunal has heard brief arguments by Counsel for ADAK as well as Counsel for the Athlete and will render its decision on 20th February 2020. Counsel are at liberty to provide any material they would like the Tribunal to consider.*

22. A fresh panel consisting Mr. John Ohaga, Ms. Mary Kimani and Mr. Peter Ochieng was named and the Ruling on the Preliminary Objection was read on 19th August 2020 with the Panel in its No. 75 of that ruling concluding as follows:

Consequent to the discussions as above,

(i) No departure from the ISL/ISTIs was established by the Athlete;

(ii) A departure from other rules specifically WADC's Article 7.3 (c) was proven by the Athlete;

(iii) ADAK proved to the comfortable satisfaction of this Panel that the WADC's Article 7.3 (c) departure did not cause the AAF;

(iv) The threshold to put the Athlete to his defence had been met;

(v) The impact of the Applicant's omission shall be determined after hearing of the ADRV suit.

23. At the mention held virtually on 3rd September 2020 Counsels for both parties were present, Mr. Rogoncho for the Applicant and Mr. Njoroge for the Respondent. The Tribunal after hearing Counsel for the Applicant ordered that the matter be mentioned again on 10th September 2020 and the Applicant shall serve Mention Notice to the Respondent as soon as possible before the Mention date. It was noted that Mr. Njoroge joined the virtual platform after the Tribunal mentioned all matters in the cause list.

24. Evidence of the Applicant's service of Mention Notice dated 4th September 2020 was tabled by the Applicant at the mention on 10th September 2020 during which Counsels for both parties were present. Parties agreed on a hearing date of 23rd September 2020 to be conducted physically. Witness statements were to be filed and served by 17th September 2020.

25. On 23rd September 2020 the hearing proceeded physically before a recomposed panel of Mrs. Elynah Shiveka Panel Chair, Mrs. Njeri Onyango Member and the Ms. Mary Kimani Member. The Athlete appeared before the Tribunal and testified. The Athlete was requested by the hearing Panel to submit the painkiller he took and which 'tab' was recorded in his DCF. The matter would next be mentioned on 30/10/2020 for compliance.

26. The matter was mentioned on 1st October 2020 when only Mr. Rogoncho for the Applicant made appearance whereupon the Tribunal set a further mention of 8th October 2020 for further directions.

27. When the matter was mentioned before the Tribunal on 5th November 2020 and the Panel heard Counsels for both parties present the Tribunal directed that the Respondent Athlete provide a copy of the Respondent Athlete's prescription or a sample of the drug in question to the Tribunal and Applicant within 7 days. The matter was set for mention on 19th November 2020.

28. On 18th November 2020 a bottle of the Zandu/Sudashan tablets requested by the Tribunal from Counsel for the Athlete was received at the Tribunal.

29. At the mention on 3rd December 2020 when Mr. Rogoncho for the Applicant was present but Counsel for the Athlete was absent, the Tribunal directed that the Applicant file his submissions within 14 days. The matter was set for mention again on 17th December 2020 to allocate a date for the decision or for further mention.

30. On 14th of December 2020 the Applicant filed with the Tribunal copy of Mention Notice it has served the Respondent Athlete for the mention due on 17th December 2020.

31. When the matter next came before the Tribunal on 21/01/2021 Mr. Rogoncho appeared for the Applicant while Mr. Njoroge for the Athlete was absent. The Tribunal heard that the Applicant had filed its submissions. The Tribunal directed that ADAK would serve a Mention Notice to Athlete for 4/02/2021 and

would also submit a soft copy of their submissions to panelists on this case.

32. During the mention on 4th February 2021 Mr. Rogoncho appeared for the Applicant while Mr. Oriku held brief for Mr. Njoroge advocate for the Athlete. Upon deliberations the Tribunal directed that (a) the Applicant serve its submissions on the Respondent Athlete by close of business on 5th February 2021; (b) The Respondent Athlete had 7 days thereafter to file and serve its response if any; and (c) The Tribunal shall mention the matter on 25th February 2021.

33. On 01 March 2021 the Tribunal received a copy of the Respondent Athlete's submissions.

34. At the mention on 03/03/2021 where only Counsel for the Applicant was present, the Tribunal heard that both parties had filed their submissions. Mr. Rogoncho was requested to resend ADAK's submissions to the Tribunal. The Tribunal directed that the decision would be delivered on 07/04/2021.

III. Summary of Hearing on the ADRV held on 23rd September 2020

35. The hearing was conducted physically; the Athlete after being sworn and led by his Counsel Mr. Njoroge, described how he received his AAF Notification. He said he first received a call from a friend, one Kipkemei on 8th May 2019, then thereafter another call from one Milcah Chemos and soon after from Mr. Rogoncho Counsel for the Applicant who asked him if he had been paid for his race in Brazil, (to which he replied no) and who then told him that they would like to pay him. The Athlete said he was perturbed because he knew it was the manager who pays. In the call with Milcah she mentioned about 'madawa' (drugs) while his own Coach (name not provided) asked him if he was on whereabouts to which he answered no and his coach also mentioned ADAK. The Athlete said he was very worried at mention of ADAK.

36. The following day he received another call from Stanley who explained he was from ADAK and he had a letter for him. Stanley said he would be in Eldoret and the Athlete travelled from his base in Kapsabet and met Stanley in a hotel in Eldoret. On perusing the letter, down there he saw the ***Dimethylbutylamine.*** The Athlete said he received the letter on

9th April 2019 (and he confirmed it was the same copy dated 9th April 2019 marked Pg. 10 in the Charge Document).

37. Flanked by Stanley the Athlete said, he hand-wrote the letter marked Pg. 15 in the Charge Document which read as follows:

"Chief executive officer
Anti-doping agency of Kenya
Ref: Notice of Charge and Provisional suspension under the anti-doping agency of Kenya (ADAK) Rules.
I confirm to receive ADRV notice dated 9th April 2019 on 8/05/2019. I deny the charges during the race we were told to write any medication and supplements we used 1 week before the race of which I wrote on the doping control form the any medication I used before the race was flue-gone which I used 1 month before the race
I have participated in many races and I been tested severally and never be found with (AAF) I ask adak to forgive me as I have always participated in clean athletics have also attached photos of the suppliments I used Kindly concider me because my family depends on me
Yours faithfully
(signed)
Paul Kipkemoi Kipkorir"

38. Asked why he wrote as he was told by Stanley the Athlete answered that it was because Stanley explained that letter was late (the Athlete clarified that he (Athlete) had been in Korea). The Athlete said that Stanley alerted him that he should have a lawyer to represent him. Asked if Stanley informed him if he could ask for Sample B testing, the Athlete answered in the negative.

39. Briefly the Athlete started running in 2005; 2008 Brazil was his first time out of the country; been tested severally never been found with drugs; that ADAK did not send feedback to say if what he had written in his DCF had the substance found in his body.

40. Life has been very hard especially since his athletic career was halted and he has been forced to bring his children to a low- cost school; he is the first born and his father died, his mother is unwell so he is the bread winner all around; asks the Tribunal to forgive him; stated he has never been to hospital; and he wished to have his witness statement adopted.

41. On cross-examination by Counsel for the Applicant the Athlete said he lived in Iten; has no job; was married with 4 children. The Athlete said he attended school up to Standard 8 in Kiptebet Primary School; he said he has run most of his races abroad; Germany, Switzerland, Sweden, Italy, Turkey, China, Brazil, Argentina. He does 10k, 21k & a few marathons; he was tested for the first time in Germany in 2009; he has won many races; about doping he said he knew how to divide into two samples and he always got a copy of the form.

42. Asked for example 'if you use BCAA you check if there is something in it i.e. ingredients *('bidhaa' iwe ni chakula*)' the Athlete answered 'if it written it does

not have a problem I use it'. Asked why he divides his urine sample he answered because rule is that you divide; said he knows if first sample has a problem then the second can be tested '*kuona kama iko na shida'* (i.e. to see if it has a problem). The Athlete said he had never been taken for doping training; he heard ADAK were in Eldoret but he was not invited. The Athlete said he had a manager Luis Antonio from Brazil from 2008 up today but he has no coach.

43. Queried about the letter he hand–wrote after Stanley handed him the ADAK letter, the Athlete answered that he read/understood what he had written; asked why he was using supplements, the Athlete said he wanted amino acids and other energy.

44. Reexamined by his Counsel, the Athlete said he had in his custody about 9 DCFs, others were lost; asked how he was sure his same sample would be tested he said, *'namba zimefanana so hii iki testiwa ingine inaweza tumika'* meaning the numbers on his samples are the same so if one is used up in testing the other spare one can be used. The Panel when examining his DCF noticed the Athlete had also declared some sort of 'tabs' and requested the tablet be provided by the Athlete to try find out what was in the tab and if it might be the source of proscribed substance. The Athlete said he was born in 1982 (was 38 years old) and his own children were between the ages of 4-13 years.

IV. Summary of Submissions by the Parties

45. Below is a summary of the main relevant facts and allegations based on the Parties written submissions.

A. Applicant's Submissions

46. The Applicant "wishes to adopt and own the charge documents dated 1st September 2020 and the annexures thereto as an integral part of its submissions. In its No. 3 the Applicant states: "*The Athlete herein is charged with an Anti-Doping Rule Violation for the* ***Presence of Prohibited substance; Dimethylbutylamine*** *in contravention of the ADAK ADR (herein referred to as ADAK Rules)*."

47. Mr. Rogoncho, Counsel for the Applicant in number 4 of its submissions submitted that "*The athlete is a National Level Athlete and therefore the result management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2015 to constitute a hearing panel which the athlete was comfortable with*."

48. The Applicant stated its background and legal stand including in its No 17 the Presumptions listed under WADC's Article 3.2:

a) ***Analytical methods or decision limits*** *...*

b) WADA accredited Laboratories and other Laboratories approved by WADA are ***presumed to have conducted sample analysis*** *and custodial procedures in accordance with the international standards for laboratories*

c) Departures from any other International Standards or other anti-doping rule or policy set forth in the code or these Anti- Doping ***Rules which did not cause an Adverse Analytical Finding*** *or other anti-doping rule violation shall* ***not invalidate*** *such evidence or results.*

d) The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.

49. It also listed the Athlete's duties as spelt out in ADAK ADR/ WADC. Laying down its position the Applicant in its No.21 stated: "*In his defence, the Athlete made the following admissions and denials.*

a) The Respondent admitted to being aware of the sample collection rules.

b) The Respondent denied that he negligently or intentionally consumed any prohibited substance with the intention of enhancing his performance.

c) *The Respondent conveniently evaded stating the origin of the prohibited substance by not listing it in the Doping Control Form.*"

50. Regarding proof of the ADRV the Applicant submitted; "*22. The Athlete is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR.* ***Dimethylbutylamine*** *is a Specified Substance and attracts a period of Ineligibility of 4 years.*

23. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence or intention to entitle him to a reduction of sanction.

24. We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent herein."

51. Quoting **Arbitration CAS 2014/A/3615 World Karate Federation (WKF) v. George Yerolimpos** the Applicant contended that "*In the instant case, the athlete failed to establish the origin of the substance found in his system*"

52. Relying on **CAS 2017/A/5260 World Anti- Doping Agency WADA) v South Africa Institute for Drug- Free Sports (SAIDS) & Demarte Pena** the Applicant arguing the aspect of intention submitted that, *"[…] the Court held that;* ***"Identification of the origin of the prohibited substance is a prerequisite to negate intention"***

53. Further the Applicant in its No.32 said, "*It is worthy to note that in the instant case; the Respondent has adamantly refused, declined and failed to disclose the origin of the prohibited substance and as such intention cannot be negated.*

33. The Applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional.

34. It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on his evasive behavior in providing the specific supplement that contained the prohibited substance."

54. The Applicant submitting on Fault/Negligence said that, "*35. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR*."

55. Additionally, it was the Applicants assertion that, "*36. The Respondent must not only demonstrate that he did not and could not reasonably know or suspect that he was ingesting a prohibited substance, but he must satisfy the threshold requirement of establishing how the prohibited substance entered his system by a balance of probability in Article 3.1 of ADR states "****No Fault or No Negligence: The Athlete's or other Person's***

establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule. Except in the case of a minor, for any violation of Article 2.1, the Athlete must establish how the prohibited substance entered his system.*"*

37. The Applicant argues to benefit from the institute of no fault or negligence, the Respondent must establish how the prohibited substance entered his system. The Respondent did not give any explanation how ***Dimethylbutylamine*** *entered his system. In the* ***Arbitration CAS 2011/A/2414 Zivile Balciunaite v Lithuanian Athletics Federation (LAF) & International Association of Athletics Federations (IAAF) Par 12.5*** *states the athlete is responsible for the presence of a prohibited substance in her body system. The Appellant is an experienced athlete and even if it would be true-what was never proven in this case- that the prohibited substance suddenly appeared in her body by taking Duphaston, it already is negligent by the Appellant willing to compete in a continental or world championship, to use a medical product "not leaving no reasonable stone unturned" in researching whether such a substance might cause effects prohibited by anti-doping rules.*

38. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him as an international level athlete. He was thus grossly negligent."

56. Regarding Knowledge it was the Applicant's contention that, *"[…] the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited*

substance (or its metabolites or markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

40. The Applicant holds that an athlete competing at international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances.

41. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product.

42. In Arbitration ***CAS A2/2011 Kurt Foggo v. National Rugby League (NRL)*** *the panel observed that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of athlete's intention to enhance sport performance*."

57. The Applicant posited in its No. 44 that, "*On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension*."

58. It was the Applicant conclusion that, "*45. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK ADR rules and the WADA code to warrant sanction reduction.*"

59. Regarding the Sanction, it was the Applicant's submission that, "*49. The maximum sanction of 4 years ineligibility ought tobe imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.*"

B. Athlete's Submissions.

60. Counsel for the Athlete's submitted that, "*9. The Applicant has pressed a charge under paragraph 10 of the Charge Document, "presence of a prohibited substance Dimethyl butylamine in the athlete's sample," which is contrary to Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2(a) & (b) of the IAAF rules*."

61. It was the Athlete's contention that, "10. Article 2.1 at paragraph 2.1.2 of the ADR Rules 2021 bears forth the procedure to be followed thus:

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

62. Counsel submitted that, "*11. We note that (i) Applicant conceded that the Athlete did not waive analysis of Sample B; (ii) the Applicant has not provided any evidence before the Honourable Tribunal that Sample B was analysed; and (iii) this Honourable Tribunal has ruled that a departure from other rules specifically ADC's Article 7.3 (c) was proven by the Respondent.*" Consequently he urged "*the Honourable tribunal to be guided by the law set out under Article 2.1.2 that an ADRV was not established by the Applicant. The applicable stature provides for only three (3) ways to meet the burden and standard of proof. No additionally ways should be imported to statute and there are*

sufficient reasons for this including the protection of the rights of an athlete (which are extremely limited despite the significant consequences that any charge brings forth) some of which are codified under the Athletes Anti-Doping Rights Act including the right to justice (Article 4) and right to B Sample analysis (Article 12)."

63. It was the Athlete's contention that, "*13. In order to protect sports, the tribunal should emulate sportsmen and follow the rules as set by the referee – the ADR Rules. If the drafters of the ADR Rules wished to have additional ways of establishing an ADRV, nothing would have been easier than to include these under Article 2.1.2. We appreciate that Article 3.2 provides that, among other things, facts related to an ADRV may be established by any reliable means, including admissions. However, it is trite law that specific clauses in a statute prevail over general ones. Article 2.1.2 is specific enough in dealing with the burden and standard of proof required to establish an ADRV and therefore Article 3.2 should not be used to discharge the Applicant from its statutory mandate. This would set a dangerous precedent including setting the stage for pressured confessions*."

64. Further the Athlete's Counsel contended that, "*14. Despite the foregoing, and even if the Tribunal was to rely on Article 3.2, the Comment to Article 3.2 provides examples of how ADAK may establish an ADRV under Article 2.2 based on (i) the Athlete's admissions (none has been provided), (ii) the credible testimony of third Persons (none has been provided), (iii) reliable documentary evidence (none has been provided) and reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2(none has been provided), or (iv) conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport(none has been provided).*"

65. Submitting regarding intention Counsel stated in his No. 15 that, "*Article 10.2.3 provides context for determining the intention of an Athlete. It provides, among other things, that the term "**intentional**" is meant to identify those Athletes or other Persons who engage in conduct which they 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.*"

66. Further Counsel said that, "*16. During his examination and cross-examination, the Respondent denied that he had any*

intention of cheating and that he has never attempted to cheat at any time in the course of his career as a sportsman. Indeed, there is sufficient evidence to show that the Respondent had no intention to cheat as he not only filled the Doping Control Forms in an honest and transparent manner as shown in page 8 of the Applicant's Bundle but also provided the Applicant with evidence of all medication and supplements, he was taking as shown under pages 16 to 19 of the Applicant's bundle. Indeed, at the request if this Honourable Tribunal, the Respondent provided one of the supplements to be examined by the Tribunal. He has at all times been forthright with the Applicant and the Tribunal about any supplement and/or medicine ingested by him."

67. Counsel added that, "*17. An internet search of the supplements contained in pages 16 to 19 of the Applicant's bundle shown that the supplements in page 16 and 19 contain an ingredient called Dimethylbutylamine.*
Dimethylbutylamine is also known as 2-amino-4-methylpentane."

68. Counsel for the Athlete argued that, "*18. The Respondent had no intention to cheat. He stated in the Doping Control Forms that he was taking Amino Acids and subsequently provided the Applicant with pictures of all supplements include amoni acids he had ingested. Comment 58 (under Article 10.2.1.1 of the ADR Rules) provides, among other things, that it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance. Therefore, the Respondent having established the source of the Prohibited Substance proves that he had no intention to cheat. In* ***ADAk vs Jane Wanjiru Muriuki (2020)****, this Honourabe Tribunal held that the* ***Respondent's honesty and provision of information in good faith is evident in the details provided****. We urge you to hold as such in these circumstances.*"

69. Responding in regard to Knowledge, Athlete's Counsel submitted that, "*19. While the Applicant has questioned the Athlete's knowledge of the doping program and emphasized his continuing personal duty to the ADR Rules, no evidence has been offered by the Applicant to support its allegation that the Respondent intended to cheat.*"

70. Regarding No Fault/Negligence it was the Athlete's submission that, "*20. Pursuant to Article 10.6 of the ADR Rules, where the anti-doping rule violation involves a Specified Substance, and the athlete or other Person can establish no*

Significant fault or negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the athlete's or other Person's degree of fault. Comment 66 to Article

10.6.1.2 provides, inter alia, that the Athlete or must establish not only that the detected Prohibited Substance came from a Contaminated Product, but must also separately establish No Significant Fault or Negligence… In assessing whether the Athlete can establish the source of the Prohibited Substance, it would, for example, be significant for purposes of establishing…whether the Athlete had declared the product which was subsequently determined to be contaminated on the Doping Control form."

71. It was the Athlete's Counsel's argument that, "*21. The athlete honestly filled and submitted the doping forms and cooperated with ADAK. The fact that he declared the supplements ingested indicate no significant fault and knowledge if of the ADRV. If the athlete knew of the ADRV, then why would he voluntarily state as such in the doping forms and hand over all the supplements ingested by him to ADAK?*"

72. Athlete's Counsel's pleading on Sanction was couched thus: "*22. It is trite law that an Athlete usually qualifies for a reduced sanction if they are able to determine the source of his or her positive test and establish a lack of intent to cheat. This is where a complete disclosure of medications and supplements used by the athlete can be so important. The Respondent declared supplements which later turns out to be the source of their positive result. Indeed, the Respondent's declaration is evidence of the Athletes intent to comply with rules and should lead to a finding that the athlete had not intended to cheat.*"

73. Quoting ***ADAk vs Jane Wanjiru Muriuki (2020)***, Counsel submitted that, "the inclusion of a prohibited substance or a product containing substance in the doping control form prior to a positive test can lead to a more advantageous adjudication outcome for the athlete, as opposed to a situation in which the athlete neglected to properly complete their declaration. The Respondent not only included the prohibited substance in the doping forms, but also supplied the same to the Applicant and this Honourable Tribunal."

74. Counsel added that "*we note that the Respondent has been provisionally suspended since April 2019, which is close to two years now. The Respondent is nearly the end of his athletics*

career and at best he has one or two years left to compete. Consequently, any additionally sanctions imposed upon him would be tantamount to a lifetime ban and would occasion a great injustice upon him. Fairness requires that if any period of ineligibility is imposed, the same be imposed for not more than a period of two years commencing the 23rd April 2019."

V. Jurisdiction

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

VI. Applicable Law

76. Article 2 of the ADAK Rules 2016 stipulates the circumstances and conduct which constitute anti-doping rule violations as follows:

The following constitute anti-doping rule violations:

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

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A *Sample* where the *Athlete* waives analysis of the B *Sample* and the B *Sample* is not analyzed …

[Comment to Article 2.1.2: The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analyzed even if

the Athlete does not request the analysis of the B Sample]

77. Additionally as used in WADC's Article 3.1 provides as follows:

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

78. Further, Article 3.2 details 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: 3.2.1 Analytical methods or decision limits approved by Wada after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically***

valid. ***Any athlete or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify Wada of the challenge and the basis of the challenge. CaS, on its own initiative, may also inform Wada of any such challenge. At Wada's request, the CaS panel shall appoint an appropriate scientifi c expert to assist the panel in its evaluation of the challenge. Within 10 days of Wada's receipt of such notice, and Wada's receipt of the CAS file, Wada shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in such proceeding.***

3.2.2 Wada-accredited laboratories, and other laboratories approved by Wada, are presumed to have conducted Sample analysis and custodial procedures in accordance with the international Standard for Laboratories. The athlete or other Person may rebut this presumption by establishing that a departure from the international Standard for Laboratories occurred which could reasonably have caused the adverse analytical finding.

if the athlete or other Person rebuts the preceding presumption by showing that a departure from the international Standard for Laboratories occurred which could reasonably have caused the adverse analytical finding, then the anti- doping organization shall have the burden to establish that such

departure did not cause the adverse analytical finding.

[Comment to Article 3.2.2: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person does so, the burden shifts to the Anti-Doping Organization to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding]

3.2.3 ***Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or anti-doping organization rules which did not cause an adverse analytical finding or other anti-doping rule violation shall not invalidate such evidence or results. if the athlete or other Person establishes a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an adverse analytical finding or other anti-doping rule violation, then the anti-doping organization shall have the burden to establish that such departure did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.***

3.2.4 ~~***The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the athlete or other Person to whom the decision pertained of those facts unless the athlete or other Person***~~

establishes that the decision violated principles of natural justice.

VII. MERITS

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

80. The Tribunal will address the issues as follows:

a. Whether there was an occurrence of an ADVR, the Burden and Standard of proof;

b. Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;

c. Reduction based on No Fault/No Negligence/Knowledge;

d. The Standard Sanction and what sanction to impose in the circumstance.

Uncontested issues:

81. Following were the uncontested issues:

- That the Athlete's urine was duly collected and labelled A 6376649 and B 6376649 on 31.12.2018 by NADO Doping Control Officers during the Sao Paulo Corrida de Sao Silvestre' marathon in Sao Paulo Brazil;
- That the Athlete received alongside the Notice to Charge, the Test Report submitted on 28.03.209 by the WADA Accredited Rio de Janeiro Laboratory;
- That in the process of Notification, there was an omission on the part of the Applicant in informing the athlete of his right to request to have his "B" Sample analyzed;
- That the Athlete had attended an anti-doping sharing workshop on 16th September 2018 at Kellu Resort in Iten;
- The Tribunal's jurisdiction on this matter as a first instance court.

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

82. The Applicant herein is seized of the burden of establishing that an ADRV has occurred. The Applicant in its Charge Document asserted occurrence of an ADRV and submitted scientific support in form of the Athlete's Test Report alongside a

copy of the Athlete's DCF (see Pg. 9 & 8 of its Charge Document). From thence the Panel shall examine the Respondent Athlete's argument that the Applicant cannot establish the ADRV as charged under Article 2.1 Presence of Prohibited Substance. In particular the Athlete's Counsel stated: "*11. We note that (i) Applicant conceded that the Athlete did not waive analysis of Sample B; (ii) the Applicant has not provided any evidence before the Honourable Tribunal that Sample B was analysed; and (iii) this Honourable Tribunal has ruled that a departure from other rules specifically ADC's Article 7.3 (c) was proven by the Respondent.*"

83. Regarding his argument above we wish to point out that the Counsel for the Athlete omitted a crucial part of the ruling of the Tribunal which was *'para.**75 (iii) ADAK proved to the comfortable satisfaction of this Panel that WADC's Article 7.3 (c) departure did not cause the AAF***' and therefore in as much as the Athlete did not waive analysis of Sample B as stated by his Counsel and thereafter both parties did not exercise their right to request for the Sample B analysis and therefore Sample B was not analyzed, the departure proven by the Athlete against ADAK was adjudged by the Tribunal not to be the root cause of the AAF. Cumulatively, as pointed out in para. 53 of the Tribunal's PO ruling it is not an ISTI and/or ISL requirement that a Sample B **must** be analyzed and therefore lack of its analysis is not fatal to the Applicant's case. This Panel also noted that after the PO ruling none of the parties – in actual fact – filed a request for the Sample B test as advised under Guideline 3.4.4.1 (see para.54 of the PO's ruling). Further, no evidence was tabled before this Panel to show that 2016 ISL 5.2.2.7 & 5.2.2.8 were untenable and that as a result, there was an incurable departure in regards to the Athlete's Sample B; therefore, either party could have pursued analysis of the unopened B Sample which both parties elected not to do and thus essentially waived their right to have it (Sample B) analyzed.

84. As such, in as far as Article 3.2.3 was concerned,

'***Departures from any other International Standard or other anti-doping rule or policy set forth in the Code or anti-doping organization rules which did not cause an adverse analytical finding or other anti-doping rule violation shall not invalidate such evidence or results***.' And this rule in effect rendered the scientific evidence of the AAF recorded in the Athlete's Test Report in regard to the his Sample A valid (or left his stated AAF alive and well).

85. The Applicant stuck to his guns and charged the Athlete over '*presence of the prohibited substance*' as the AAF was recorded after an accredited Lab analyzed his (Athlete's) urine Sample collected on December 31st, 2018 in Sao Paulo, Brazil, attaching a copy of both the Athlete's DCF and Test Report as evidence. It was noted that the Athlete did not deny the DCF document was not his. In regard to the Test Report the Athlete was unable to overturn the fact stated by the Applicant thus, *"The clerical mistake could not have caused the AAF*" and most importantly that *"[…] the error has no bearing on the test result".*

86. Athlete's Counsel then urged *"the Honourable tribunal to be guided by the law set out under Article 2.1.2 that an ADRV was not established by the Applicant. The applicable stature provides for only three (3) ways to meet the burden and standard of proof. No additionally ways should be imported to statute and there are sufficient reasons for this including the protection of the rights of an athlete (which are extremely limited despite the significant consequences that any charge brings forth) some of which are codified under the Athletes Anti-Doping Rights Act including the right to justice (Article 4) and right to B Sample analysis (Article 12)."*

87. The Panel is in agreement with Athlete's Counsel that no additional ways should be imported to statute that being one of the Code's strict commandments and thereby looks at Counsel's very next argument: *"13. In order to protect sports, the tribunal should emulate sportsmen and follow the rules as set by the referee – the ADR Rules. If the drafters of the ADR Rules wished to have additional ways of establishing an ADRV, nothing would have been easier than to include these under Article 2.1.2. We appreciate that Article 3.2 provides that, among other things, facts related to an ADRV may be established by any reliable means, including admissions. However, it is trite law that specific clauses in a statute prevail over general ones. Article 2.1.2 is specific enough in dealing with the burden and standard of proof required to establish an ADRV and therefore Article 3.2 should not be used to discharge the Applicant from its statutory mandate. This would set a dangerous precedent including setting the stage for pressured confessions*."

88. Following from the 'waiver' arising by both parties (and in this case, chiefly the Athlete) electing not to pursue analysis of the Sample B after the Applicant's departure from WADC/ADR's Article 7.3 (c) was proven by the him (Athlete), then clearly

Article 2.1.2 was applicable, '***Sufficient proof of an anti- doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed***' and therefore no '*additional ways*' would be needed to establish the ADRV in this particular case.

89. The operative principle according to the applicable IST & ISL: - was there a departure that denied the Athlete a right? Yes, one which was occasioned by the Applicant. Was the departure incurable? No, it was curable. Was it mandatory that the Sample B be tested? No, it was not mandatory. So could the Athlete test his Sample B if he so wished? Yes, he could. Was he out of time to test his Sample B? No, he was not. Had the Athlete waived his right to have his Sample B tested as according to the Applicant's Charge Document? No, he had not waived his right to Sample B testing. Once he (Athlete) proved his case against the claim by the Applicant that he had so waived, the Athlete acquired a new chance to decide to or not to waive his right and it was not for anybody to instruct him to or not to request for the Sample B tests as indicated in both the guidelines and/or applicable IST/ISL, (not even the Applicant who failed to 'notify' him in the first instance). It was up to the Athlete to decide how to or not to exercise his right when he achieved the new lease. In similar fashion he (Athlete) could not decide for the Applicant how to or not to exercise its rights to Sample B testing.

90. Further, having said Article 3.2 should not be used to discharge the Applicant from its statutory mandate the Athlete's Counsel still went on to state:

"14. Despite the foregoing, and even if the Tribunal was to rely on Article 3.2, the Comment to Article 3.2 provides examples of how ADAK may establish an ADRV under Article 2.2 based on (i) the Athlete's admissions (none has been provided), (ii) the credible testimony of third Persons (none has been provided), (iii) ***reliable documentary evidence*** *(none has been provided) and* ***reliable analytical data from either an A or*** *B Sample as provided in the Comments to Article 2.2(none has been provided), or (iv) conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport(none has been provided).*"

91. This Panel would like to reiterate that even in regard to Article 2.2, reliable documentary evidence and reliable analytical data from an A Sample as provided in Comments to Article 2.2 – set out hereunder for clarity purposes – were indeed provided by the Applicant in the form of a copy of the Athlete's DCF and Test Report:

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1.

For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

92. Therefore, in addition to the fact being established that the departure from Article 7.3 (c) did not cause the AAF as laid under Article 3.2.4 '***The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the athlete or other Person to whom the decision pertained of those facts unless the athlete or other Person establishes that the decision violated principles of natural justice***', we are persuaded that the Applicant has established the Athlete's ADRV to the comfortable satisfaction of the Panel that the Athlete committed an ADRV in the form of the presence of a prohibited substance under Article 2.1 WADC/ADAK ADR. The Sample B which was not waived in the first instance by the Athlete as he was not duly notified stood waived in the second instance as,

after the Athlete proved his lack of waiver in the first instance he still did not pursue its analysis as set out in the applicable IST and ISL. In this particular case the departure was curable albeit such cured status was achieved only via a successful plea by the Athlete.

B. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional*

93. The Panel then examined the Applicant's pleadings in regard to intention and its No. 22-23 stated: "*22. The Athlete is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR.* ***Dimethylbutylamine*** *is a Specified Substance and attracts a period of Ineligibility of 4 years. 23. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence or intention to entitle him to a reduction of sanction.*" This submission by the Applicant, the Panel rules must fail for the following reason: While Article 10.2.1 generally refers to four years, the proviso in Article 10.2.1.2 is specific to Specified Substances which the Test Report clearly showed to be the prohibited substance involved in this case. Unmistakably Article 10.2.1.2 lays the burden on the Applicant and for avoidance of doubt it states: '***10.2.1.2 The anti- doping rule violation involves a Specified Substance and the anti-doping organization can establish that the anti- doping rule violation was intentional***'. Hence the Applicant shifting the burden to the Athlete to demonstrate no intention would be tantamount to the Applicant turning this particular case on its head.

94. Further, pleadings like *"33. The Applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional."*, in regard to intention are of little assistance to this Panel because while jurisprudence is very important, it does not quash the Code requirement in Article 10.2.1.2 in this particular case.

95. The Applicant went on to submit that, *"32. It is worthy to note that in the instant case; the Respondent has adamantly refused, declined and failed to disclose the origin of the prohibited substance and as such intention cannot be negated. […]*

34. It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on his evasive behavior in providing the specific supplement that contained the prohibited substance." While the Athlete responded, *"18. The Respondent had no intention to cheat. He stated in the Doping Control Forms that he was taking Amino Acids and subsequently provided the Applicant with pictures of all supplements include amoni acids he had ingested. Comment 58 (under Article 10.2.1.1 of the ADR Rules) provides, among other things, that it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance."*

96. It would appear the tussle between the two parties before the Tribunal centered on the Athlete proving the origin of the prohibited substance in order for him (Athlete) to establish that the ADRV was not intentional which this Panel points out to be a preserve of another Article 10.2.1.1 which involves Non-Specified Substances and which substance is Not involved in this particular case.

97. Be that as it may be, should origin even have been the sole argument or the only tool for establishment of lack of intention by the Athlete notwithstanding that both parties alluded to supplements and therefore there was suspicion that some form of contamination might have been involved and not to mention that the burden rested with the Applicant to establish that the Athlete's ADRV was intentional? This Panel points parties to **CAS 2016/A/4676 Arjan Ademi v. UEFA** Para. 69 which raised a legal question regarding the often used proof of source of proscribed substance argument: '*69.* ***A legal question which arises is whether a proof of source of the prohibited substance is mandated under Article 9.01 in order to allow a player to establish lack of intent, in the same way that it is mandated for the purposes of Articles 10.01 or 10.02 UEFA ADR under the definitions of No Fault or Negligence and No Significant Fault or Negligence which require that "the player must also establish how the prohibited substance entered his system".***'

98. Further, the Panel sets out ADAK ADR 10.2 which closely follows the wording in the 2015 Code's Article 10.2.1 and specifically stipulates as follows:

Anti-Doping Act of 2016 (Subsidiary)

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

The period of Intelligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

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

10.2.1.2 the anti-doping rule violation <u>involves</u> <u>a Specified Substance</u> <u>and the Agency can</u> <u>establish that the anti-doping rule violation was</u> <u>intentional</u>.

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

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited

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

99. Additionally at definitions, the relevant ADAK ADR specified as follows in regard to the definitions of *No Fault or No Negligence* and *No Significant Fault or Negligence*:

No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

&

'No Significant Fault or Negligence. The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relationship to the anti- doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athletic must also establish how the Prohibited Substance entered his or her system.'

It can be seen that even ADAK ADR 10.2 does not require a respondent athlete to prove origin of the prohibited substance in order to establish lack of intent and such requirement only rests at ADAK ADR definitions of *No Fault or No Negligence* & *No Significant Fault or Negligence* as used together with Article 10.5, (which we shall set out later).

100. Various jurisprudence have analyzed the proof of origin question including **CAS 2016/A/4534 Maurico Fiol Villanueva v. FINA** paras.35, 36. 37 & **CAS 2016/A/4676 Arjan Ademi v. UEFA** paras. 70, 71, 72.

101. This Panel is of the opinion that Article 10.2 in general and Article 10.2.3 in particular is tailored to enable the goal of distinguishing/drawing out those athletes/other persons who cheat and if perchance the respondent athletes/persons accomplished their burden in Article 10.2.1.1, (or even in defence under Article 10.2.1.2) via proving origin, that too is very welcome, but on the whole, ADAK ADR 10.2 does not mandate proof of origin and therefore the Panel aligns itself with **CAS 2016/A/4676 Arjan Ademi v. UEFA** para.72. '***The Panel finds the factors supporting the proposition that establishment of the source of the prohibited substance in a Player's sample is not mandated in order to prove an absence of intent (para. 70) more compelling. In particular, the Panel is impressed by the fact that the UEFA ADR, based on WADC, represents a new version of an anti-doping Code whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. The relevant provisions (Article 9.01(a) and (c) UEFA ADR) do not refer to any need to establish source, in direct contrast to Articles 10.01 and 10.02 UEFA ADR combined with the definitions of No Fault or Negligence and No Significant Fault or Negligence, which expressly and specifically require to establish source. Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare.***'

102. Hence, the thrust of the Applicant's pleading in this particular case, which is already faulty by reliance on a misplaced burden trajectory, is further blunted by lack of the Code's need to prove origin, at least in the ADAK ADR 10.2 which is focal in its pleadings in relation to intention.

103. Further, the Athlete, as soon as he received the letter of Provisional Suspension speedily provided the Applicant with copies of details of the supplements he said he had used, see Pg.

16-19 of the Charge Document. Another tablet he had ingested identified in his DCF during his physical hearing, he also sourced a sealed bottle and duly handed in through his Counsel. During the same physical hearing when asked why he used supplements he stated that he had been using these supplements for a while for the amino acids and energy they bestowed and that he did not use them in order to cheat. Counsel for the Athlete in his No.17 submitted: *"17. An internet search of the supplements contained in pages 16 to 19 of the Applicant's bundle shown that the supplements in page 16 and 19 contain an ingredient called Dimethylbutylamine. Dimethylbutylamine is also known as 2-amino-4-methylpentane."*

104. This was a claim by the Athlete the Panel found it interesting that the Applicant did not find it prudent to disprove and/or address the Panel on further and instead steadily drummed on its requirement for the Athlete to state the origin of the prohibited substance. It is true that the identification of the origin of the prohibited substance would help negate intention yet, while observing the Athlete's demeanor during the hearing, this Panel held the opinion that the Athlete was not obstructive regarding his doping information, even in cross examination by Applicant's Counsel but that the Athlete did seem genuinely puzzled over the origin of prohibited substance in his A Sample. We think that the probabilities propagated by the Athlete's explanation regarding his dietary supplements should have elicited ample rebuff by the Applicant in an attempt to discharge its burden. In this regard we reject the Applicants argument, "*34. […] that the Respondent has failed to prove a lack of intention to cheat based on his evasive behavior in providing the specific supplement that contained the prohibited substance*."

105. CAS 2016/A/4534 Mauricio Fiol Villanueva v. FINA

para. 47 summarizes the Panel's take on parties' submissions regarding the matter of establishing that the Athlete's ADRV was intentional: '***47. The Panel emphasises that it does not need to be satisfied that the Athlete did cheat. The choice before it was not binary. As Lord Brandon, an English Law Lord, said in The Popi M I 985 I WLR 984 "a judge (or arbitrator) can always say that 'the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden' [p. 955]".***' In this regard we declare that the Applicant on whom the burden

squarely fell, in relation to his pleadings, failed to discharge that burden.

C. *Reduction based on No Fault/No Negligence/Knowledge;*

106. It having not been established that the Athlete's ADRV was committed intentionally, the Athlete was eligible for consideration of reduction of period of ineligibility and the burden shifted to the Athlete to prove he deserved the reduction under ADAK ADR
10.4 and 10.5 set hereunder:

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

And

> 10.5 ***Reduction of the Period of Ineligibility based on No Significant Fault or Negligence***
>
> ***10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.***
>
> ***10.5.1.1 Specified Substances***
>
> ***Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.***
>
> ***10.5.1.2 Contaminated Products***
>
> ***In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.***
>
> *[Comment to Article 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.]*

107. Regarding *No Significant Fault or Negligence* it was the Athlete's Counsel's argument that, "*21. The athlete honestly filled and submitted the doping forms and cooperated with ADAK. The fact that he declared the supplements ingested indicate no significant fault and knowledge if of the ADRV. If the athlete knew of the ADRV, then why would he voluntarily state as such in the*

doping forms and hand over all the supplements ingested by him to ADAK?" The Panel cautions as did the panel in ADAK vs. Muriuki 7 of 2020 para. '***87. […] that it could be equally easy for the opposite to pertain, so that athletes could file Prohibited Substances/Methods, then plead they acted honestly, (not to prejudice the Athlete in this case)***.'

108. Meanwhile the Applicant countered that, "*to benefit from the institute of no fault or negligence, the Respondent must establish how the prohibited substance entered his system. The Respondent did not give any explanation how* ***Dimethylbutylamine*** *entered his system*."

109. ***No Fault or Negligence & No Significant Fault or Negligence*** as the Panel earlier noted are the points at which it is not only just desirable, but also a mandatory requirement by the Code that the Athlete must establish the origin of the prohibited substance in order to qualify for the reductions contained therein.

110. The Athlete leaned toward Contamination therefore we shall examine ADAK ADR 10.5.1.2. Studying the Athlete's explanations and his Counsel's submission, the most the Athlete could figure out was that the prohibited substance might have originated from one or all of the supplements the Athlete submitted in Pg.16-19 of the Charge Document and/or the tablet he declared in his DCF. This Panel repeats that the Athlete was not able to pinpoint exactly which supplement heralded the proscribed substance into his body. Perhaps the Athlete should have tested the supplements if he suspected the prohibited substance originated from them but again if he had already used up the original stockpile that might have caused his AAF then it was still going to be difficult to prove that any new batches – if that returned a negative report – was the culprit. That is not to mention that such tests come at a cost.

111. Suffice it to say that the Athlete could not discharge his burden as required under 10.5.1.2 ***'In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.'***

112. Likewise the Athlete was not able to establish if what he had declared in his DCF was the source of the prohibited substance thus Comment to Article 10.5.1.2 would not favor him either:

'[Comment to Article 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.]'

113. Submitting in regard to Knowledge, the Applicant held in its No. 40 that "*an athlete competing at international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances.*

41. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product." In response the Athlete's Counsel submitted that, *"19. While the Applicant has questioned the Athlete's knowledge of the doping program and emphasized his continuing personal duty to the ADR Rules, no evidence has been offered by the Applicant to support its allegation that the Respondent intended to cheat."*

114. From the answers given by the Athlete during the physical hearing it begs the question the contents of the anti-doping 'sharing' workshop the Athlete attended on 16th September 2018 at Kellu in Iten. It was this Panel's opinion that the Athlete's major experience, right up to his present ongoing interaction with anti- doping was and still is through Doping Control rather than through any strategic formal Doping Education and that could explain his struggle to explain origin even as he held onto his initial stand that, *"[...] I have participated in many races and I been tested severally and never be found with (AAF) I ask adak to forgive me as I have always participated in clean athletics [...]"* This Panel's comment to this kind of scenario is that no athlete should be racing for several years without being given some appropriate formal anti-doping education sooner rather than later, as minus such strategic/ appropriate doping education what athletes are left to glean out on their own might be insufficient to

guide their safe passage through the minefields. The copies of a plethora of supplements he dutifully handed in to the Applicant, the Athlete seeming quite oblivious to the dangers of contamination such may hold left the Athlete a sitting duck.

115. That said, a plea of lack of knowledge cannot free the Athlete from the strict liability stricture; once the Athlete voluntarily chose a career in athletics he signed up for what joys or pains that career might deliver. Just as he studiously trained for his events, including learning the rules that needed to be observed during his races, likewise he needed to acquaint himself with all the other rules/matters that were closely associated with his career and doping was one such imperative.

116. It is noted that athletes have often been warned of the risks associated with use of dietary supplements as these could lead to inadvertent doping both in the Code/ADAK ADR Comments to

10.4 (a) and jurisprudence, for example **CAS 2012/A/2747 WADA v. JBN, Dennis de Goede & NADO**, para. 7.19 '***It is the Sole Arbitrator's view that the Appellant showed considerable fault in the case at hand. The Second Respondent did not make any inquiries on the product and trusted his brother who had only told him that the product "could do no harm". This, however, is not a statement upon which a responsible athlete could rely. The Second Respondent could have easily obtained information on the Supplement by doing some basic internet research. According to the Second Respondent's submissions, he had used up the Jack3d package only a couple of days before being asked by his coach to compete in the final round of the National Judo League. At this point he should have been aware that he had used a food supplement during his training period. Considering that food supplements may contain prohibited substances, that sports organisations continuously warn athletes about the danger related to food supplements and considering that the Athlete is an experienced competitor, the lack of diligence of the Second Respondent is hardly comprehensible***,' and our Panel couldn't stress this view more firmly.

D. ***The Standard Sanction and what sanction to impose in the circumstance.***

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

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

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

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

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

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

E. Summary:

120. The Respondent Athlete was cited by the Applicant as an Elite International Level Athlete in the Charge Document and also when the Applicant filed the first submissions in regard to the Preliminary Objection. That citation changed to a National Level Athlete in the submissions regarding the ADRV. As no reasons were given for the change, neither was leave of the Tribunal requested to amend the Charge Document to reflect the change of status by the Applicant and also for avoidance of doubt, the Panel will continue to treat the Respondent Athlete as an International Level Athlete in this decision.

121. It is noted that it is not a contested fact that this was the Athlete's first ADRV after several years of racing.

122. Additionally, it is noted that the panel in the Preliminary Objection ruling stated at para 75 (v) that, '***The impact of the Applicant's omission shall be determined after hearing of the ADRV suit***.' In particular the Applicant had pleaded that, *"14. In the unlikely event that the Tribunal may wish to consider the omission as having any impact on these proceedings we urge that the same be limited to the computation of the period of ineligibility. The athlete may benefit from a favorable reduction of the period of ineligibility thereof.*"

123. The Athlete on the other hand submitted that, "*[...] the Respondent has been provisionally suspended since April 2019, which is close to two years now. The Respondent is nearly the end of his athletics career and at best he has one or two years left to compete. Consequently, any additionally sanctions imposed upon him would be tantamount to a lifetime ban and would occasion a great injustice upon him. Fairness requires that if any period of ineligibility is imposed, the same be imposed for not more than a period of two years commencing the 23rd April 2019.*"

124. As a matter of fact, the proceedings in this case were greatly impacted by the gross omission by the Applicant. Primarily as a consequence of this omission, the Athlete, in defending his Code-given rights opted to prosecute his case against the claim by the Applicant that he had waived his right to his Sample B analysis and that came at the cost of the precious time expended during that preliminary proceeding. Such plea would have been unnecessary if the Applicant had been keen in formulating and/or duly notifying the Athlete as succinctly mandated in Article 7.3 (c). By the time of the final assessment, the Applicant's plea for '*the same be limited to the computation of the period of ineligibility'* was no longer a viable option for the

Panel as the Athlete could no longer '*benefit from a favorable reduction of the period of ineligibility thereof*', despite proving his case against the Applicant – of the departure from other anti- doping rule or policy (7.3 (c)) set forth in the Code and ADAK ADR.

125. In regard to the mistake riddled notification document served by the Applicant to the Respondent Athlete this Panel shall repeat '***[…] the hallowed statement in* CAS 94/129: *"The fight against doping is arduous and it may require strict rules. <u>But the rule makers and the rule appliers</u> <u>must begin by being strict with themselves.</u> Regulations that may affect the careers of dedicated athletes must be predictable" (para. 34)***'.

VIII.<u>DECISION</u>

126. Consequent to the discussions of the merits as above,

i. WADC's Article 10.2.1 does not apply hence the period of Ineligibility shall be two (2)years;
ii. The period of Ineligibility shall be from 23rd April 2019 the date on which the Athlete was Provisionally Suspended up until 22nd April 2021;
iii. All Competitive results obtained by the Respondent Athlete from and including 31st December 2018 are disqualified including prizes, medals and points;
iv. In view of the Applicant's role in undermining the Athlete's position, by omitting to notify the Athlete about his Sample B, the Panel directs that the costs attendant to that part of the proceedings relating to the Preliminary Objection be borne by the Applicant. Those costs are assessed at Kshs. 20,000.00 which are to be paid by ADAK to the Athlete within thirty (30) days of today's date. The parties shall otherwise bear their other own costs;
v. The right of appeal is provided for under Article 13 of WADA Code, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this _7th —day of _____April, _____2021

Mrs. Elynah Sifuna-Shiveka, Panel Chairperson

Mrs. Njeri Onyango, Member

Ms. Mary Kimani, Member