

REPUBLIC OF KENYA



THE JUDICIARY  
THE SPORTS DISPUTES TRIBUNAL  
IN THE MATTER OF ANTI-DOPING ACT NO. 5 OF 2016 LAWS OF KENYA  
IN THE MATTER OF ADAK ANTI-DOPING RULES  
WORLD ANTI DOPING RULES 2015  
IN THE MATTER OF INTERNATIONAL ATHLETICS FEDERATION RULES  
AND  
IN THE MATTER OF ARBITRATION OF SPORTS DISPUTES  
ANTI-DOPING CASE NO. 12/13 OF 2020

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

-versus-

ALPHAS LEKEN KISHOYIAN..... ATHLETE

DECISION

APPEARANCE: Mr. Bildad Rogoncho for the Applicant  
Dr. Maurice Ajwang Owuor for the Respondent.

PANEL: Njeri Onyango – Member  
Mary Kimani - Member  
Allan Owinyi - Member

HEARING: 21<sup>st</sup> January 2021

## 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, a National Level Athlete, on Passport Number ..... (hereinafter 'the Athlete').

## II. Fact and Background

3. The Athlete is an International Athlete hence the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to him.
4. On 6<sup>th</sup> March 2020, ADAK Doping Control Officers (DCOS) during the Athletics Kenya Track and Field Build-up competition held in Nairobi, Kenya, collected a urine Sample from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given numbers A 4510136 (the "A" Sample) and B 4510136 (the "B" Sample) respectively.
5. Both Samples were transported to South Africa, to a WADA accredited laboratory in Bloemfotein, Free State South Africa (hereinafter "the laboratory") for doping analysis. The laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding (AAF) presence of a prohibited substance **19-Norandrosterone**.
6. **19-Norandrosterone** is listed as an endogenous under S.1.1B of the 2020 WADA Prohibited List
7. The finding was communicated to the Respondent Athlete by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 14<sup>th</sup> July 2020. In the said communication the Athlete was offered an opportunity to provide a written explanation for the AAF by 28<sup>th</sup> July 2020.
8. The same letter also informed the Athlete of his right to request for the analysis of B Sample and/or to accept or deny the charges and/or request for a hearing and gave a deadline of 28<sup>th</sup> July 2020 for his detailed response.
9. The Athlete responded vide a letter dated 21<sup>st</sup> July 2020 and acknowledged the receipt of the ADRV Notice
10. A Notice to Charge dated 5<sup>th</sup> August 2020 was filed by ADAK on similar date.
11. On 19<sup>th</sup> August 2020 upon reading the Notice to Charge, the Tribunal ordered the Applicant to serve the Mention Notice, the Notice to Charge, the Notice of ADRV, Doping Control

Form and all other relevant documents to the Counsel for the Respondent/Athlete by Wednesday of 15<sup>th</sup> September 2020. Consequently, a Panel was constituted as follows to hear the matter:

Njeri Onyango –Member  
Mary Kimani- Member  
Allan Owinyi – Member

12. On 23<sup>rd</sup> September the Panel convened and directed that the Pro-bono advocate defending the Athlete in SDT ADC No. 13 of 2020 to also act in this matter on behalf of the Athlete. Counsel for the Applicant was further directed to file and serve the Charge Document on or before 1<sup>st</sup> October 2020.
13. The matter was scheduled for mention before the Tribunal on Thursday the 1<sup>st</sup> October 2020 via Microsoft Teams.
14. At the mention held via Zoom on 1<sup>st</sup> October 2020, both Mr. Bildad Rogoncho the Applicant's Counsel and Dr. Maurice Ajwang Owuor the Pro-bono lawyer for the Athlete were present. The Panel directed the Advocate for the Applicant to serve the Advocate for the Athlete with the charge document by close of business of Monday the 5<sup>th</sup> October 2020. The Athlete's Counsel was given 3 weeks to respond to the charge documents.
15. File No. 12 of 2020 and 13 of 2020 were consolidated and it was decided that file No. 12 shall be the lead file in this matter and the panel in No. 12 of 2020 was to deal with this matter while the panel in No. 13 of 2020 was discharged.
16. The matter was slated for mention on 22<sup>nd</sup> October 2020 to confirm the filing of response.
17. On the 5<sup>th</sup> November 2020, both the Counsel for Applicant and the Athlete were present and the Panel directed and ordered that the hearing shall take place on 19<sup>th</sup> November 2020 at the Tribunal's hearing room on 24<sup>th</sup> Floor, NSSF Building, Nairobi.
18. On 3<sup>rd</sup> December 2020, both the Counsel for the Applicant and the Athlete were present. The Athlete Mr. Kishoiyan was virtually in attendance, but went off signal at around 3:30pm and was not available towards the end of the hearing. The matter was scheduled for hearing on 14<sup>th</sup> January 2021 and the Counsel for the Respondent/Athlete was ordered to ensure that the Athlete had the correct link and proper internet connection before the hearing.
19. On 21<sup>st</sup> January 2020, both counsels for the Applicant and the Respondent, and the Athlete were present for the hearing. The matter was fully heard at a physical hearing.
20. Dr. Maurice Ajwang for the Athlete was ordered to file written submissions in 14 days after which Mr. Rongocho for the Applicant was to respond in 7 days. The next mention date was scheduled for 11<sup>th</sup> February 2021 to confirm filing of the submissions.

21. On 10<sup>th</sup> February 2021 the Applicant's submissions were filed at the Tribunal while those of the Athlete were filed on 1<sup>st</sup> April 2021.
22. On 3<sup>rd</sup> March 2021, the matter come up for mention via Microsoft Teams and both Mr. Rongocho for the Applicant and Dr. Ajwang for the Respondent were present. The Panel directed that the parties shall have leave to agree on the weight of the Supplementary Witness Statement within 14 days. The matter was slated for mention on 18<sup>th</sup> March 2021 to record parties' agreement or to issue further directions.
23. On 18<sup>th</sup> March 2020, the Respondent was given 2 weeks to file submissions which Dr. Maurice Ajwang for the Athlete filed on 1<sup>st</sup> April 2021.

### III. Parties' Submissions

#### Applicant's Submissions

24. The Applicant stated that it wished to adopt and own the Charge Documents dated 28<sup>th</sup> September 2020 and the annexures thereto as an integral part of its submission.
25. Regarding their legal position the Applicant submitted that, "under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel."
26. The Applicant also listed the various presumptions and roles/responsibilities of the Athlete as stipulated under WADC/ADAK ADR's Articles 3 & 22.1 respectively. The Applicant also stressed the Athlete's duty to uphold the spirit of sports as laid down the WADC's Preface.
27. The Applicant submitted that the Athlete, "In his defense ... made the following admissions.
  - a. That he ingested cold drug named FLUCOLDEX but he did not indicate in the Doping Control Form
  - b. He also had been ingesting supplements such as CON-CRET CREATIN HCL, SUPER ALMINO and XPEDIETE PERFORMANCE ENERGY but he did not disclose the same in the Doping Control Form
  - c. During the period of testing, he avers to have been eating pork meat and hence his diet could have caused the AAF
  - d. The Respondent admitted to being aware of sample collection rules.
  - e. The Respondent denied that he negligently or intentionally consumed any prohibited substance with the intentions of enhancing his performance.
28. Regarding proof of an ADRV, the Applicant said that "[...] a violation of Article 2.1 of the ADAK ADR. **19-Norandrosterone** is a Non-Specified Substance and attracts a period of ineligibility of 4 years," and "Where use and presence of a prohibited substance has been

demonstrated it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an ADRV."

29. It was the Applicant's contention that "[...] Article 10.2.1 the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction." urging "the Tribunal to find that an ADRV has been committed by the Respondent herein."
30. Laying down its arguments regarding 'intention', the Applicant relied on the established case-law of CAS 2017/A/4962 WADA V. Comitato Permanente Anti-doping San Marino Nado (CPA) & Karim Gharbi that stated, "For an ADRV to be committed non-intentionally, the Athlete bears the burden of proof of establishing that the anti-doping rule violation was unintentional and thus to establish how the relevant forbidden substance entered his body". Par.56 of the same case stated that the Athlete bears the burden of establishing that the violation was not intentional and therefore must establish how the substance entered his or her body on the "balance of probability", a standard long established in CAS jurisprudence.
31. It is the Applicant's submission that the Athlete must prove that, he did not know that his conduct constituted an ADRV or that there was no significant risk of an ADRV and that the Athlete has failed to prove a lack of intention to cheat based on his inability to prove that the supplements he took contained no prohibited substance and therefore, under the ADAK ADR, an offence has been committed as soon as it is established that a prohibited substance was present in the Athletes fluid or tissue. There is a legal presumption that the Athlete is responsible for the presence of the prohibited substance present in his system.
32. The Applicant conceded that the origin of the proscribed substance had not been established by the Athlete. The Applicant relied in the case of CAS 2016/A/4534 Maurico Fiol Villanueva V. Federation Internationale de Natation (FINA) under par.36 (i) that stated..."it is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of that substance."
33. The Athlete is charged with the responsibility of being knowledgeable, to comply with anti-doping rules and to take responsibility in the context of anti-doping for what he ingests and uses to rule out fault/negligence. The Athlete failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR. Relying on CAS 2012/A/5317 Alkesei Medvedev V. Russian Anti-Doping Agency (RUSADA) the Applicant observed that 'to have acted with no fault the athlete must have exercised "utmost caution" in avoiding doping as the athlete's fault is measured against the fundamental duty which he/she owes under the WADC to avoid ingesting any prohibited substance.' The Applicant contends that the Athlete fell short of this requirement as he failed to carefully consider the various supplements and cross check them.

34. On knowledge, the Applicant contends that the Athlete has had a long career in athletics both in national and international competition and must therefore be aware of crusades against doping in sports and he cannot simply assume as a general rule products he ingests are free of prohibited substances. In Arbitration CAS 2006/A/1025 Mariano Puerta V. International Tennis Federation (ITF) the Applicant observed that athletes are responsible for what they ingest.
35. On sanction, the Applicant submitted, "For an ADRV under Article 2.1, Article 10.2.1 of the ADAK ADR provides for a regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance "and the agency ... can establish that the (ADRV) was intentional". If Article 10.2.1 does not apply, the period of ineligibility shall be two years."
36. The Applicant in summing up stated that, "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 rules and the WADC to warrant sanction reduction."
37. The Applicant concluded by praying that "The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

#### Athlete's Submissions

38. In his submissions through the supplementary witness statement dated 10<sup>th</sup> February 2021, the Athlete admits use of Deca Duraboli.
39. The Athlete denies use prohibited substances namely Deca Duraboli for purposes of enhancing his performance *vide* his witness statement
40. The Athlete *vide* the supplementary witness statement admits to the use of Deca Duraboli in a quest to deal with his light body weight.
41. The Athlete avers separately that the said use was out of competition and during the COVID – 19 lockdown and therefore could not be for the purpose of acquiring an unfair advantage in any competition and consequently enhancing his performance and winning.
42. Further on the significance of the Athlete's transparency the Athlete's Counsel submitted that, "[...]. An Athlete can usually qualify for a reduced sanction if they are able to determine the source of their 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. *Frequently where the Athlete has declared medication and supplements which later turns out to be the source of their positive result the Athlete's declaration is considered a powerful evidence of the Athletes intent to comply with rules and leads to a finding that the athlete had not intended to cheat.* More specifically the inclusion of a prohibited substance or a product containing substance in the doping control form prior to a positive

test can lead to a more advantageous adjudication outcome for the athlete, as opposed to a situation in which the athlete neglected to properly complete their declaration.

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

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

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

44. On cooperation by the Athlete, the Respondent’s Counsel avers that admission of use of the relevant drug by the Athlete and its possible source has so far not been matched by reciprocal gesture through the signing of a Without Prejudice Agreement by the Applicant, and thus is a possible interpretation of a lack of *bona fides*. He contended that there was an inherent risk of having athletes left deterred and avoiding cooperation with anti-doping agencies, through failure of utilizing an effective tool and mechanism in expediting anti-doping cases and potentially dealing fatal blows to sources of prohibited drug substances.

He mentioned *CAS 2008/A/1462 IAAF v USATF & Gatlin* wherein Gatlin even after substantial cooperation was deemed not to have “substantially assisted”.

In the Ashley Johnson case, Counsel notes that the Wasp’s RFC player was given a six month ban backdated to the date of sample collection as opposed to the four year ban for intentional doping. The explanation given by Johnson was that he mistakenly took his wife’s weight loss pills which were contaminated with hydrochlorothiazide instead of his own supplement which was in a similar bottle. The Panel accepted Johnson’s evidence and were satisfied that it was the truth. The Panel explained that the ‘No Significant Fault or Negligence’ (NSF) provisions are designed to provide flexibility of sanction depending on the degree of fault in a particular case, as seen in the cases of Marin Cilic and Maria Sharapova. It stressed the need to avoid a literal interpretation of NSF, instead taking a purposive approach, in line with CAS jurisprudence. The Panel explained that NSF does not mean that any fault must be de minimum rather that a panel must weigh up degrees of fault and negligence and decide the sanction accordingly. Finally, the Panel considered that, under Regulation 21.10.11.2,

Johnson's ban should be backdated to the date of the sample collection owing to his "prompt admission".

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

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

The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred.

In view of the above, the World Anti-Doping Code 2015 *vide* article 3 on proof of doping and specifically article 3.1 on Burdens of Proof provides that:

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

The Counsel relied on *Republic V. Subordinate Court of the first Class Magistrate at City Hall, Nairobi and another, exparte Yougindar Pall Sennik and another Retrend Limited [2006] 1 EA 330 (Nyamu J)* that stated "when a person is bound to prove the existence of any fact it is the law that the burden of proof lies on that person"

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

47. While in regard to the standard of proof he submitted: "*Nota bene*, even in cases of substantial assistance, if the petitioner insists on making allegations against the respondent, the standard of proof does not change and in the view of the Without Prejudice Agreement

they are estopped from relying on the admission of the respondent and the threshold of proof remains above a balance of probability and beyond reasonable doubt.

whereas in relation to *Standards of Proof vide article 32 subsection (2)* of IAAF COMPETITION RULES 2016-2017 *it states as follows:*

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

Whereas the Standard of proof *vide* the World Anti-Doping Code 2015 in article 3 (1) provides that in all cases the standard is greater than a mere balance of probability but less than proof beyond a reasonable doubt. The standard of proof where the burden of proof is on the accused is on a balance of probability.” He relied on the following case law in regard to standard of proof: “It was stated in *Mwakima and three others v. Republic [1989] KLR 530 (Bosire J)*, that where the law places the burden of proof on the accused person, the standard of proof is never, unless the law clearly says so, as high as that on the prosecution to prove a charge beyond reasonable doubt. In that case, the trial court had erroneously held that the duty on the accused to explain the circumstances of possession of the item in question was beyond reasonable doubt.”

48. The Athlete’s Counsel referred to Article 10.4 that states that ineligibility period is eliminated if the athlete can show that he/she bears no fault or negligence for ADVR. The Counsel stated “.....the Respondent has demonstrated that he bears no fault / significant fault, no negligence/significant negligence by disclosing the possible source of the prohibited substance and substantially cooperating with the Tribunal....”
49. On implication of substance ingestion/ use occurred out of competition, the Counsel relied on Article 10.2.4.1 that provides “If the Athlete can establish that any ingestion or use occurred Out-of competition and was unrelated to sport performance, then the period of ineligibility shall be 3 months”. The Counsel avers that the Athlete fits this category as the ingestion was out of competition and was not with the intention of enhancing performance.
50. On substantial assistance, Article 10.7.1.1 provides “ An Anti-doping Organization with result management responsibility for an anti-doping rule violation may prior to an appellant decision under Article 13 or expiration of the time to appeal, suspend a part of the consequences (other than Disqualification and mandatory Public Disclosure ) imposed in an individual case where the athlete or other person has provided Substantial Assistance to an

Anti-doping Organization, Criminal Authority or professional disciplinary body which results in:

- a. The Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another person
- b. Which results in a criminal or disciplinary body discovering or bringing forward a criminal offence or a breach of professional rules committed by another person and the information provided by the person providing Substantial Assistance is made available to the Anti-Doping Organization with result management responsibility...”

The extent of the ineligibility shall be based on the seriousness of the anti-doping violation committed and the significance of the Substantial Assistance provided by the athlete. According to WADA Code Article 10.7.1 Substantial Assistance is discovering or establishing Code violation.

51. It was the Counsel’s submission that, “In criminal law, presumptions can either be rebuttable or irrebuttable. In case of rebuttable presumptions, such cannot be the basis of determining culpability. The prosecution must discharge its burden and standard of proof beyond a balance of probability. It is not enough to make mere allegations. The proof must be tangible, cogent and substantial. The presumption made by the Petitioner in this matter is that the presence of prohibited substances, and specifically norandrosterone has been occasioned by the ingestion of the said substance into the body for purposes of enhancing performance and thus giving the Athlete an unfair competitive advantage over other competitors is rebuttable. Presumptions cannot substitute the requirement of the prosecution to discharge its burden of proof and its standard of proof.”
52. The Athlete’s Counsel had the following to say in regard to the role of the Athlete: *“The role of the athlete is not disputed in terms of being responsible for all that finds its way into their bodies, however, the athlete should not be punished where they have demonstrated that they bear no fault/ significant fault or negligence/significant negligence for the ADVR.* The Athlete like any other person must enjoy presumption of innocence as provided in the Kenyan Constitution 2010 vide Article 50 (2) MUST be adhered to and not derogated from on account of statutory provisions inter alia strict liability.
53. Addressing the issue of remedy, Counsel for the Athlete submitted, “in view of the Athlete’s plausible explanation, and forthrightness as demonstrated in his disclosure in the supplementary witness statement, where he voluntarily without coercion indicated his use of Deca Durabolin as medication, for purposes of gaining weight which corroborates his plea of no fault/no negligence, the above charge be dismissed and the suspension be lifted considering that the athlete has already been suspended for the last six (6) months or so and

has learnt his lesson painfully and to allow the athlete pursue his athletics career which is his source of livelihood and gainful employment.

#### IV. The Charge

The Anti-Doping Agency of Kenya preferred the following charge against the Athlete:- Presence of 19-Norandrosterone a Non-Specified substance in the Athlete's Sample contrary to Article 2.1 of ADAK ADR, Article 2.1 of the WADC and Rule 32.2 (a) and Rule 32.2 (b) of the IAAF rules.

*19-Norandrosterone* is a Non-Specified substance and is listed as an endogenous AAS under S.1.1B of the 2020 WADA Prohibited List.

#### V. Jurisdiction of the Tribunal

54. The Tribunal has jurisdiction under Section 55, 58 and 59 of the Sports Act No. 25 of 2013 and Sections 31 and 32 of the Anti-Doping Act, No. 5 of 2016 and hear and determine the case.
55. The Athlete also admitted the jurisdiction of this Tribunal to determine the case.

#### VI. Applicable Law

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

The following constitute anti-doping rule violations:

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

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

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

## VII. Merits

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

58. The Tribunal will address the issues as follows:

- (i) *Whether there was an occurrence of an ADVR, the Burden and Standard of proof;*
- (ii) *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;*
- (iii) *Reduction based on No Fault/No Negligence*
- (iv) *Implications of Substantial Assistance*
- (v) *Sanction*

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

59. As used in WADC's Article 3.1:

*The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*

*Where the Code places the burden upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*

*[Comment to Article 3.1: This standard of proof required to be met by the Anti- Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]*

## VIII. Burden and Standard of Proof

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

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

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

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

*The Code*

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

*The World Anti-Doping Program*

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

*The main elements are:*

*Level 1: The Code*

*Level 2: International Standards*

*Level 3: Models of Best Practice and guidelines'*

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

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

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

#### INTRODUCTION:

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

Additionally,

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

*of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.'*

#### Occurrence of ADRV

64. Going back to the issue of the ADRV this Panel observes that, the 'presence' of the prohibited substance in the Athlete's body was not a contested fact in this case. In actual fact, the Athlete's Counsel submitted that the Athlete himself admitted to using Deca Durabolin in his supplementary witness statement.

65. Further, the Panel notes that WADC's Article 3.2 provides that *'[...] Facts related to anti-doping rule violations may be established by any reliable means, including admissions. [...]*. Having looked at and satisfied itself that although the Athlete declared use of the prohibited substance in his supplementary witness statement, the Athlete was not willing to be upfront with this information, he did not disclose the use of any medication during urine sample taking, a fact he is aware, and being aware of his duty to provide information at that stage and vide his letter to the Agency dated 21<sup>st</sup> July 2020, the Athlete concealed facts that were well known to him and misled the Agency as to the possible origin of the prohibited substance. In spite of that, the Panel rules that via his own admission coupled by the reliable analytical results from the accredited laboratory (another uncontested issue), the fact of his commission of the ADRV had been established to its comfortable satisfaction.

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

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

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

*Substance or its Metabolites or Markers found in the athlete's A Sample; or, where the athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.'*

B. Was the Athlete's ADRV intentional?

68. Under Article 10.2.1 on the *period of ineligibility*, it states that subject to further reductions in Article 10.4 and 10.5 or 10.6, the period of ineligibility shall be four years where:

- The anti-doping rule violation does not involve a specified substance or a specified method, *unless* the athlete or other person can establish that the anti-doping rule violation was not intentional.

The prohibited substance in question in this case being a Non-Specified Substance, the burden is firmly upon the Athlete to establish that the anti-doping rule violation was not intentional.

69. From the onset, the Athlete had denied the 'intention to cheat' and "use" and in his own words vide a letter he had written on 21<sup>st</sup> July 2020, "[...]I used a cold drug which is FLUCOLDEX.....during the period of testing I also consumed pork meat which might be the cause.....during the period I also used supplements like CON-CRET CREATIN HCL, SUPER ALMINO and XPEDIETE PERFORMANCE ENERGY....", (see copy of Athlete's letter dated 21.7.2020). All this information changed and eventually the Athlete through his supplementary witness statement dated 10<sup>th</sup> February 2021, agreed to using Deca Durabolin to allegedly enhance his body weight.

70. In absence of any professional records and/or doctor's prescription, it is difficult for the panel to fathom the reasoning behind the Athlete's decision to consciously ingest Deca Durabolin.

71. The Applicant contends that, "*it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional*", this Panel observes that it must be borne in mind that the default sanction for such an offender is four years. According to the wording of the Code, the term "intentional" is meant to establish those athletes who **cheat**. The athlete **MUST** prove that he did not engage in conduct which he knew constituted an ADRV or that he did not know that there was a significant risk that the conduct, which he without a doubt engaged in, must constitute or result in an ADRV and **MUST** show that he did not manifestly disregard that risk.

72. Jurisprudence such as “CAS A2/2011 Kurt Foggo v. National Rugby League (NRL) the panel observed that *“The athlete must demonstrate that the substance was not intended to enhance the athlete’s performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent”*. This Panel has not been presented with any evidence indicating that the Athlete did not know what/where the prohibited substance originated but rather the opposite was established, by the Athlete himself eventually agreeing to use of Deca Duraboli

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

74. It is the panel’s view that on the totality of the evidence provided by the parties, the Athlete has not proven, even on a balance of probabilities that he did not break the rules and/or cheat. The Athlete has not discharged the onus of showing that the ADRV was not intentional.

75. We reiterate on the reading of WADC’s Article 10.2.3:

*‘10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those athletes who 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. An anti-doping rule violation resulting from an adverse analytical ~~finding~~ 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. [...]*

We point out that the prohibited substance found in the Athlete's system was a **Non-Specified Substance** therefore his argument that he used it **Out-of-completion** takes a first tumble on account of this Article.

Further to this, the Athlete had stated that during the use of Deca Durabolin he was out of competition, however during the taking of his urine sample he states in his letter "...I did not indicate in the Anti-doping form" something he knew he ought to have, in addition, in trying to conceal the origin of the prohibited substance and probably the intention of use, the Athlete gives various probable sources of the prohibited substance from Flucoldex, pork meat to his wife's contraceptives before making his admission in his supplementary witness statement.

76. Flowing from the aforementioned, the panel is of the considered opinion that the Athlete failed to convince the Panel that the ADRV was unintentional. The Athlete did not take considerable steps to seek to identify or ascertain the origins of the prohibited substance which he came to ingest. The Athlete is required to do more to avoid the risk of ingestion of prohibited substances.

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

77. It was the Applicants assertion that, the Athlete has a personal duty to ensure no prohibited substance enters his body. In CAS 2012/A/5317 Aleksei Medvedev V. Russian Anti-Doping Agency, the panel observed to have acted with no fault, the athlete must have exercised "utmost caution" in avoiding doping. The Panel has observed that the Athlete has participated in national and international competition, also the contention of the Applicant that "[...] *Based on her experience, she ought to have taken measures to ensure that whatever she ingests does not contain any prohibited substance.*" This being his first time to have his sample returned an Adverse Analytical Finding (AAF) shows the Athlete has previously exercised "utmost caution".

78. In his letter and all through this hearing, the Athlete has mentioned different substances he has ingested, without any official doctor's prescription. The Athlete in this case fell short of his requirement to exercise "utmost caution" and the Panel finds his actions as grossly negligent.

*"The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules and to take responsibility in the context of anti-doping for what they ingest and use. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR."*

79. WADC's Article 21.1 *Roles and Responsibilities of Athletes* that by all means bound the Athlete in this case were: as follows:

'21.1.1. *To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code;*

21.1.3. *To take responsibility, in the context of anti-doping, for what they ingest and use;*

21.1.4. *To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code.*'

80. Ultimately, the WADA Code defines No fault or Negligence, such that the Athlete or other person's establishing that he or she did not know or suspect, and could not have reasonably 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. *The Athlete MUST also establish how the prohibited substance entered his or her system.* This similarly applies to No significant fault or Negligence when viewed in the totality of circumstances and taking into account that the criteria for No Fault or Negligence was not significant in relationship to the anti-doping rule violation.

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

#### **D. Implication of Substantial Assistance**

82. *The Athletes degree of the period of ineligibility can be affected by the substantial assistance offered by the Athlete.* Article 10.7..1.1 provides "An Anti-

doping Organization with result management responsibility for an anti-doping rule violation may prior to an appellate decision under Article 13 or expiration of the time to appeal, suspend a part of the consequences (other than Disqualification and mandatory Public Disclosure) imposed in an individual case where the athlete or other person has provided Substantial Assistance to an Anti-doping Organization, Criminal Authority or professional disciplinary body which results in:

- c. The Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another person
- d. Which results in a criminal or disciplinary body discovering or bringing forward a criminal offence or a breach of professional rules committed by another person and the information provided by the person providing Substantial Assistance is made available to the Anti-Doping Organization with result management responsibility...”

83. The Athlete filed a Supplementary witness statement signed on the 10<sup>th</sup> February 2021, on the possible sources of the prohibited substances that may have led to his positive test. He avers that he met a chemist in 2020 that advised him to take Deca Durabolin to help him add weight. He stated the location of the chemist and further averred that he had given the information in good faith and to his personal detriment and safety. He hoped that the good faith would invoke leniency and that the explanation explained how the drug entered into his body.

84. Article 10.6 on Elimination, Reduction or Suspension of period of *Ineligibility* or other consequences for reasons other than fault states under 10.6.1 covering substantial assistance in discovering or establishing anti-doping rule violations states that:-

An anti-doping organization with results management responsibility for an anti-doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the athlete or other Person has provided Substantial assistance to an anti-doping organization, criminal authority or professional disciplinary body which results in: (i) the anti-doping organization discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial assistance is made available to the anti-doping organization with results management responsibility.....The extent of the ineligibility shall be based on the seriousness of the anti-doping violation committed and the significance

of the Substantial Assistance provided by the athlete in the effort to eliminate doping in sport, non-compliance with the code and/or sports integrity violations.

85. It is on the basis of the above Article that this Panel urges the Applicant to undertake take all necessary investigative measures, and accordingly apply relevant strict rules of the Code and sport anti-doping policies in regard to Ineligibility and/or application of any possible benefits of substantial assistance. The benefits after all flow from the rules about substantial assistance in the World Anti-Doping Code.

#### *Commencement of Ineligibility Period*

86. This Panel recalls that the Athlete's ADRV was established via the urine sample test and thereby finds ADAK Rules Article 10.3.3 preferable to sanction the Athlete to a 4 years ineligibility. Article 10.2.1 also states clearly that the period of ineligibility shall be four years where 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.

87. 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. ...*

88. 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.*

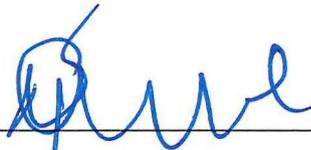
## IX. DECISION

Consequent to the discussions on merits of this case:

- (i) The applicable period of Ineligibility of 4 years is hereby upheld;

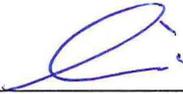
- (ii) The period of Ineligibility shall be from 28<sup>th</sup> July 2020 the date on which the Athlete was provisionally suspended up until 28<sup>th</sup> July 2024;
- (iii) All Competitive results obtained by the Respondent Athlete from and including 6<sup>th</sup> March 2020 are disqualified including prizes, medals and points;
- (iv) Each party shall bear its own costs;
- (v) The right of appeal is provided for under Article 13 of WADA Code, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this \_\_\_\_6<sup>TH</sup> \_\_\_\_day of \_\_\_\_\_*May*, \_\_\_\_\_2021



---

Madam Njeri Onyango - Panel Chairperson



---

Ms. Mary N. Kimani, Member



---

*for*

Mr. Allan Owinyi, Member