

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
ANTI-DOPING CASE NO. 2 OF 2021

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

-VERSUS-

HENRY KIPROTICH SANG..... ATHLETE

**DECISION**

**Hearing:** Written Submissions

**Panel** : Mrs. Njeri Onyango - Panel Chair  
Mr. Gabriel Ouko - Member  
Mr. Allan Mola Owinyi - Member

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

Dr. Maurice Owuor Ajwang, of Agan & Associates, View Park Towers, 19<sup>th</sup> Floor, Monrovia Street, P. O. Box 5382 - 00100, Nairobi, Advocate for the Athlete.

**Abbreviations and Definitions**

The following abbreviation used herein have the indicated

- a. AAF - Adverse Analytical Finding
- b. ADAK - Anti-Doping Agency of Kenya
- c. ADR - Anti-doping Rule
- d. ADRV - Anti Doping Rule Violation
- e. AK - Athletics Kenya
- f. IAAF - International Association of Athletics Federation

- g. SD T - Sports Dispute Tribunal
- h. WADA - World Anti-Doping Agency

All the definitions and interpretations shall be construed as defined and interpreted in the constitutive document both local and international.

### **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, (hereinafter '**the Athlete**').

### **II. Jurisdiction**

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

### **III. Applicable Laws**

4. The Respondent is a Male athlete; therefore, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADC and the ADAK ADR apply.

### **IV. Background**

5. On 3<sup>rd</sup> December, 2017 the Applicant alleges that during the Men's 2017 Macao Galaxy Entertainment International Marathon, the CHINADA Doping Control Officers collected a urine sample from the Respondent. He was then assisted by the DCO to split the sample into two separate bottles. The bottles were given reference numbers A 62133112 ("*the A sample*") and the B ("*the B sample*"). Thereafter, both samples were transported to the National Anti-Doping Laboratory ("WADA") accredited laboratory in Beijing China (the Laboratory). In the Laboratory, "*the A sample*" was analyzed in accordance with the procedures set out in WADA'S International Standards for Laboratories. The analysis of the "*A sample*" returned an Adverse Analytical Finding ("**AAF**") for **NORANDROSTERONE**. which is listed as an endogenous AAS under S. 1. 1B of the 2018 WADA prohibited list.
6. An ADRV charge was instituted upon the Respondent at the Sports Disputes Tribunal in Nairobi, Kenya, whereby as part of the Respondent's defence against the charges, the Respondent provided medical records to be used as evidence.

7. ADAK upon seeking verification and authentication of the medical records from the concerned medical Institution, established in writing from the Institution that the medical records provided by the Respondent were fraudulent. **(see attached letter from the Medical Institution dated 22<sup>nd</sup> October, 2018 at page 12 of the Charge document)**
8. The findings were communicated to the Respondent athlete by a Letter from ADAK CEO Mr. Japhter K. Rugut, EBS by a Notice of the ADRV and mandatory provisional suspension dated 8<sup>th</sup> October, 2020. He was given an opportunity to provide a written explanation for the same by 22<sup>nd</sup> October, 2020. **(see attached Notice of Charge and provisional suspension dated 8<sup>th</sup> October, 2020 at page 7 of the Charge document)**
9. The Respondent failed to respond with a written explanation to ADAK within the timeline specified by ADAK.
10. ADAK determined that there was a violation of Article 2.5 ADAK ADR, *"Tampering or Attempted Tampering with any part of Doping Control"* and therefore, filed the current Charge. Notice to Charge was filed on 18<sup>th</sup> January, 2021.
11. On 21<sup>st</sup> January, 2021, the SDT Chairperson received the Notice to Charge and issued the following directions:
  - i) The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control form, Direction No. 1 and all relevant documents on the Respondent by Friday 5<sup>th</sup> February, 2021;
  - ii) The Panel Constituted to hear this matter shall be as follows:
    - a. Njeri Onyango
    - b. Gabriel Ouko
    - c. Allan Mola Owinyi
  - iii) The matter shall be mentioned on **Thursday 11<sup>th</sup> February, 2021** to confirm compliance and for further directions.
12. Due to unavoidable circumstances, the matter proceeded on 3<sup>rd</sup> March, 2021 for mention instead of 11<sup>th</sup> February, 2021 as per the directions issued by the Chairperson on 21<sup>st</sup> January, 2021.
13. On the said mention of 3<sup>rd</sup> March, 2021, Dr. Ajwang, Advocate stated that he had been retained pro Bono to act for the Respondent and he confirmed

that he had filed and served the Response to the Charge. The matter was set for physical hearing on 7<sup>th</sup> April, 2021.

**V. DOCUMENTS FILED BY PARTIES**

**a. ADAK- Applicant**

- i. Charge Document dated 21<sup>st</sup> January, 2021;
- ii. ADRV Notice dated 8<sup>th</sup> October, 2020;
- iii. Letter from Kericho County Referral Hospital dated 22/10/2018.

**b. Respondent**

- i. Response to the Charge dated 24<sup>th</sup> February, 2021;
- ii. Notice of charge and provisional suspension dated 8<sup>th</sup> October, 2020;
- iii. Judgement of the Sports Dispute Tribunal in Anti-Doping Appeal Case No. 36 of 2018.

14. At the mention on 7<sup>th</sup> April, 2021, counsel for both parties were present. The Tribunal directed that Mr. Ajwang to resend the Response to the charge as the same had not been received by the Tribunal. ADAK was granted leave to file its Response and supplementary documents by 9<sup>th</sup> April, 2021.

15. Further, Parties agreed to proceed by way of written submissions. ADAK was thereafter directed to file its submissions by 23<sup>rd</sup> April, 2021 and the Respondent by 7<sup>th</sup> May, 2021. The matter was therefore, set for mention (Virtual) on 12<sup>th</sup> May, 2021 to confirm compliance.

16. The mention scheduled for 12<sup>th</sup> May was adjourned to 20<sup>th</sup> May, 2021.

17. As at that day, only ADAK had filed its written submissions. Mr. Ajwang was granted leave of 14 days to file and serve the Respondent's written submissions. A mention date was issued for 3<sup>rd</sup> June, 2021 to allocate a date for delivery of the Decision. The Respondent's Written Submissions were filed on the same day( 3<sup>rd</sup> June,2021)

**VI. SUBMISSIONS**

**a. ADAK's Submissions**

18. ADAK filed written submissions on 19<sup>th</sup> May, 2021.

19. ADAK submits that under Article 22.1 the athlete has a duty to;

- a. To be knowledgeable of and comply with anti-doping rules,
- b. To be available for sample collection always,
- c. To take responsibility, in the context of anti-doping, for what they ingest and use,
- d. To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take

responsibility to make sure that any medical treatment received does not violate these Anti-doping rules.

- e. To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years.
- f. To co-operate with Anti-Doping organizations investigating Anti-Doping rule violations.

20. It is ADAK's submissions that the Respondent herein as an athlete is under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides:

*'The Spirit of sport is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including:*

- *Ethics*
- *Health*
- *Excellence in performance*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity*

21. In its submissions ADAK states that the Respondent is charged with **Tampering or attempted with any part of Doping Control** contrary to article 10.2.1 and 10.3.1. of the ADAK ADR. Further, that Tampering or attempted Tampering with any part of Doping Control constitutes to a 4-year period of ineligibility.

22. ADAK also submits that under 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. It therefore, urged this hearing panel to find that an ADRV has been committed by the Respondent.

23. It is ADAK's submission that for an ADRV to be committed non-intentionally, the Athlete must prove that by a balance of probability, **she/he did not know that his conduct constituted an ADRV** or that there was no significant risk of an ADRV. It relied on an established case law of **CAS 2014/A/3820, par 77<sup>1</sup>** that the proof by a balance of probability requires that **one explanation is more probable than the other possible explanation** and

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<sup>1</sup> <https://jurisprudence.tas-cas.org/shared> Documents/3820.pdf

for that purpose, an athlete must provide actual evidence as opposed to mere speculation.

24. ADAK further submitted that 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 rule 22.1.1 and 22.1.3 of ADAK ADR.

25. ADAK argues in its submissions that the Respondent as an athlete has a personal duty to ensure that they disclose to their International Federation and to the Agency any decision by a non-signatory finding that the Athlete committed an Anti-Doping rule violation within the previous ten years.

*22.1.2 To disclose to their International Federation and to the Agency any decision by a non-signatory finding that the Athlete committed an anti-doping rule violation within the previous ten years.*

*22.1.6 To cooperate with Anti-Doping Organizations investigating anti-doping rule violations.*

26. Therefore, on fault and negligence, ADAK concludes that the Respondent ought to have known better the responsibilities bestowed upon him before tampering or attempted to tamper with any part of Doping Control and he was thus grossly negligent.

27. On knowledge, ADAK submits that the principle of strict liability is applied in situations where Tampering or attempted Tampering with any part of Doping Control by an athlete has constituted an ADRV. It means that each athlete is strictly liable for his or her own knowledge on Anti-Doping Rules Violations whether or not the athlete intentionally or unintentionally committed an ADRV or was negligent or otherwise at fault.

28. ADAK also contends in its submissions that the Respondent has had a long career in athletics, and it is only questionable that he has had no exposure to the crusade against ADAK Rules. Further, that the Respondent is under a continuing personal duty to ensure that his Tampering or attempted Tampering with any part of Doping Control in events will not be in violation of the Code for ignorance is no excuse.

29. On Sanctions, ADAK proposes a period of ineligibility of 4 years on the basis that no plausible explanation or evidence in support of the intention to tamper or attempted to tamper with any part of the Doping control has been provided or adduced.

### b. Respondent's Submissions

30. The Respondent's submissions were filed with the SDT on 3<sup>rd</sup> June, 2021.
31. In his submissions, the Respondent strongly argued that the matter is *res judicata* as there have been previous proceedings heard and determined by the SDT in Anti-Doping Appeal Case No. 36 of 2018 between the ADAK and the Respondent over the same matter.
32. The Respondent also submitted that ADAK had filed a similar matter before the Chief Magistrate's Court in Kericho vide court file number 2255 of 2019 and the matter is "*lis pendens* in relation to Anti-Doping Case No. 2 of 2021."

## VII. ISSUES

33. Flowing from the above, the following issues fall for consideration.
  - i. Whether this matter is *res judicata*?
  - ii. Whether the requirements of *lis pendens* have been met?
  - iii. Whether an ADRV was committed?

## VIII. DETERMINATION

### Whether this matter is *res judicata*?

34. *Res judicata* is provided for in section 7 of the Civil Procedure Act, Cap 21 rules of Kenya<sup>2</sup> as follows:
  - S. 7. *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*
35. The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 are in the following terms:
  - i. "*Explanation. (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*
  - ii. *Explanation. (2)- For purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

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<sup>2</sup> The Civil Procedure Act, Chapter 21 Laws of Kenya.

- iii. *Explanation. (3)- The matter above referred to must have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*
- iv. *Explanation. (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*
- v. *Explanation. (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation.*
- vi. *(6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”<sup>3</sup>*

36. In essence therefore, this doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of Competent jurisdiction. This Panel places reliance in the English case of **HENDERSON VS HENDERSON (1843-60) ALL E.R.378**, where the court observed that;

*“...Where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the Parties to that litigation to bring forward their whole case, and will (except under special circumstances) permit the same parties to open the same subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time<sup>4</sup>.”*

37. It therefore, follows that SDT will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein

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<sup>3</sup> Supra note 2

<sup>4</sup> Henderson vs. Henderson (1843 -60) ALL E.R. 378

he/she ought to have raised the issues in the previous suit as between the same parties.

38. Applying the foregoing to the present case, this hearing Panel notes that the gist of Anti-Doping Case No. 2 of 2021 revolves around the Charge of **Tampering or attempted Tampering with any part of Doping Control**. Can it then be said that the Charge in the present case has been heard and determined by SDT particularly in ADAK case No 15 of 2018 or ADAK case No 36 of 2018 or any other juridical body of a competent jurisdiction?
39. SDT rendered a decision on ADAK case No 15 of 2018 as well as in Anti-Doping Appeal Case No. 36 of 2018 filed by the Applicant, ADAK and the ADRV Charge instituted against the Respondent was with regard to the presence of a Prohibited Substance "*Norandrosterone*" in the Respondent's Sample collected on 3<sup>rd</sup> December, 2017 during the men's 2017 Macao Galaxy Entertainment International Marathon in China.
40. Clearly, the current Charges against the Respondent, **Tampering or attempted Tampering with any part of Doping Control** and the Charges in the previous cases in ADAK case No 15 of 2018 and Anti-Doping Appeal Case No. 36 of 2018 involved different issues. In the former cases, the Respondent was charged with committing an ADRV under Article 2.1 of ADAK ADR where Analysis of his "*Sample A*" returned an Adverse Analytical Finding (AAF) for presence of a prohibited substance NORANDROSTERONE which is listed as an endogenous AAS under S. 1. 1B of the 2018 WADA prohibited list. The current charge arises from actions stated to have been committed by the Respondent while setting up his defence in the former charges, which facts did not exist as at the time ADAK framed the charges in the former cases.
41. Therefore, this Panel finds that the instant case as filed by ADAK is not *Res judicata* as argued by the Respondent because:
- i. The issue of Tampering or attempted Tampering with any part of Doping Control was not raised, addressed by the parties and determined in Anti-Doping Case No. 15 of 2018 or Appeal No 36 of 2018 as SDT only determined the issue

of Adverse Analytical Finding (AAF) for presence of a prohibited substance NORANDROSTERONE which is listed as an endogenous AAS under S. 1. 1B of the 2018 WADA prohibited list.

- ii. ) the activities complained of by ADAK in the current charge are matters that arose while the Respondent was responding to the claims set out in the charge in the previous Proceedings, which facts were not within the knowledge or custody of ADAK and as such ADAK could not have been expected to have taken action on them within those previous proceedings. They are not circumstances that arose in the same transaction as the circumstances in SDT ADAK case No 15 of 2018 or Appeal case No 36 of 2018, such as to be said to have formed part of the same transaction

42. In the case of Jemimah Jelagat Sumgong<sup>5</sup>, the Athlete a Kenya Marathon runner was Charged for an ADRV when a sample collected from her in 2017 tested positive for EPO. In the cause of giving explanations for the presence of the adverse Analytical finding and defending herself in the initial hearing, she informed ADAK officials that she received treatment at KNH, Nairobi, which included an injection that she did not question, she also related other alleged treatment that she had received from that Hospital. It was later established that those documents and stories had been fabricated. The AIU brought fresh charges against the athlete on the basis of the false documents for Tempering and attempted Tempering with any Anti-Doping control. The hearing panel allowed the charges and imposed a further 4-year ban on the Athlete. See [SR/Adhocsport/140 /2018]

43. For the reasons stated above, this panel is of the view that the charges and determination of the SDT in SDT ADAK case no 15 of 2018 ( and Appeal no 36 of 2018 ) did not and could not have determined the issues raised in the present charge.

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<sup>5</sup> <https://www.athleticsintegrity.org/downloads/pdfs/disciplinary-process/en/180117-Decision-IAAF-v-Jemimah-Sumgong.pdf>

### **Whether the requirements of *lis pendens* have been met?**

44. *Black's Law Dictionary 9<sup>th</sup> edition*, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending<sup>6</sup>.
45. *Lis pendens* is a common law principle that was enacted into statute by *section 52 Indian Transfer of Property Act (ITPA)*-now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy vs Sabine [1857]* 1 De J 566 held as follows: -

*"It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings<sup>7</sup>."*

46. In the case of *Mawji vs US International University & another [1976]* KLR 185, Madan, J.A. stated thus: -

*"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation*

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<sup>6</sup> Black's Law Dictionary, 9<sup>th</sup> Edition, (2014)

<sup>7</sup> Bellamy vs Salbine [1857]1 De J 566

*rights to the property in dispute so as to prejudice the other..."*

47. The Respondent submitted that the Applicant herein has filed a similar matter in the Chief Magistrate's Court in Kericho against the Respondent vide Court file number 2255 of 2019.
48. This hearing panel notes that no particulars of the aforementioned case have been submitted before it to warrant an examination as to whether the proceedings in that claimed court case are similar, relate to the same parties and are arising out of a similar cause of action. It is not enough to allege that same parties have another ongoing matter before another juridical body as this may not be arising from a similar cause of action.
49. In any event, the jurisdiction to hear and determine matters related to Anti-doping under the Anti-Doping Act 2016 is placed with the SDT, the Magistrate's Court would therefore deal with matters of a Criminal or Civil Nature and would not oust the specialized jurisdiction of the SDT to hear matters related to breaches of the Anti-Doping Act. Further, acts of Forging and uttering documents as alleged, constitute criminal elements recognized under the Penal Code, which can be tried in the Criminal court but cannot be dealt with before the SDT. The charge as presented before the SD deals with the elements that affect the Anti-Doping Control process.
50. Therefore, this Panel finds and holds that there is no proof as to whether the instant case concerns contested issues in the Claimed case before the Chief Magistrate's Court in Kericho. Accordingly, this hearing Panel cannot find support for the Respondent's reliance on the doctrine of *lis pendens* in this matter.

### **Whether an ADRV was committed?**

#### **IX. ANALYSIS AND DECISION**

51. ADAK provided a letter from Kericho County Referral Hospital dated 22/10/2018. (See attachment in page 12 of the Charge document).
52. The Contents of the letter reads as follows:

**"COUNTY GOVERNMENT OF KERICHO'**

**KERICHO COUNTY REFERRAL HOSPITAL**

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Telegram 'MEDICAL,' Kericho  
Telephone: Kericho (0722) 951 490  
Email: [kerichodistricthospital@yahoo.com](mailto:kerichodistricthospital@yahoo.com)  
When replying please quote

Medical Superitendant  
Kericho County Referral Hospital  
P.O. Box 11  
KERICHO.

**Ref:** ADAK/KCO/2018

**Date:** 22/10/2018

Ms. Damaris Ogama  
Assistant Manager  
Corporation Secretarial and Legal Services Department  
Anti-Doping Agency of Kenya  
P.O. Box 66458 – 00800  
**NAIROBI**

Dear Madam,

**REF: VERIFICATION OF DOCUMENTS: - HENRY KIPROTICH SANG**

*The above subject matter refers.*

*This is to notify you that the above named person was not seen at our Hospital per the attached list and records of the patients seen on that day of the October 2017.*

Yours Sincerely,

Dr. Japhet Cheruiyot  
Medical Superitendant  
**KERICHO COUNTY REFERRAL HOSPITAL**  
**Cc:**

*Dr. David Ekuwam  
Chief Officer Medical Services"*

53. The Respondent was notified of the ADRV through the letter of 8<sup>th</sup> October, 2020. He was also granted an opportunity to provide an explanation for the same by 22<sup>nd</sup> October, 2020.
54. The Respondent failed to respond as per the above notice and had not done so even at the time of the Applicant filing these Charges with SDT.
55. The Panel in making its determination will consider
  - a) Whether the ADRV has been proved to the Required Standard of proof

- b) Whether or not there was intention to violate the applicable anti-doping regulations
- c) What degree of fault and/ or negligence to be assigned to the athlete's conduct;
- d) What period of ineligibility to be imposed.

56. This Panel from the response filed notes that the Respondent has not provided any explanation either to the Notice send to him by ADAK, nor by way of evidence before this Panel to counter the letter from the Kericho Hospital Administration set out above. The Panel therefore finds that the facts of the ADRV have not been contested, there being no contest, this Panel finds that the Charge in regard to **Tampering or attempted Tampering with any part of Doping Control** has been proved to the required standard under both the ADAK ADR and WADC article 3.2.

*"The facts relating to the anti-doping rule violation may be established by any reliable Means including admissions and methods of establishing facts and set out the presumptions which include, results obtained by*

- a) *Analytical methods or decision limits....*
- b) *WADA accredited 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 and 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.*
- e) *The hearing panel in a hearing.... "*

57. Article 2.5 ADAK ADR provides that the following conduct shall constitute an ADRV:

**Tampering or attempted Tampering with any part of Doping Control**

*“Conduct which subverts the Doping control process but which could not otherwise be included in the definition of prohibited methods. **Tampering shall, include without limitation, intentionally interfering or attempting to interfere with a doping control official, providing fraudulent information to an Anti-Doping organization** or intimidating or attempting to intimidate a potential witness. “*

58. Tampering is also defined therein, as follows:

***Tampering:*** *Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or to prevail normal procedures from occurrence.*

59. Doping Control is also defined as follows:

***Doping Control:*** *All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, sample collection and handling, laboratory analysis, TUEs, result management and hearings.*

60. Following investigations, ADAK charged the Respondent with a second ADRV of Attempted Tampering pursuant to Article 2.5 ADAK ADR as defined above.

61. In *IAAF v Jeptoo, CAS 2015/A/3979* the CAS Panel held:

- i. As a general principle, that “Tampering can also cover an Athlete’s behavior in the course of a first instance or appeal hearing”, noting that the non-exhaustive list of examples of Tampering in the IAAF Anti-Doping Rules included “intentionally interfering with the Doping-Control official, providing fraudulent information... or intimidating or attempting to intimidate a potential witness” (CAS 2015/O/4128, paragraph 146).
- ii. An athlete has a right to defend himself or herself and make submissions in support of any defence, and that the mere exercise of this right would not, in itself, amount to Tampering i.e to be found guilty of tampering, the athlete must do more than simply put the prosecuting authority to proof of its case (ditto paragraphs 147 and 150).
- iii. That “any behaviour of the athlete in the judicial proceeding before a first instance tribunal must meet a high threshold in order to be qualified as tampering” (ditto para 148(ii)).

- iv. “the threshold of legitimate defence is trespassed and, a “further element of deception” is present where the administration of justice is put fundamentally in danger by the behaviour of the athlete. This is the case where a party to the proceedings commits a criminal offence designed to influence the proceedings in his or her favour.” (ditto paragraph 151).
- v. “forging a document for the use of a judicial proceeding is a criminal offence not only in Monegasque law... but also under Swiss law... This surely exceeds the above threshold of legitimate defence.”
- vi. Accordingly, on the facts, Ms. Jeptoo had committed the offence of Tampering by submitting the forged document<sup>8</sup> (paragraph 153).

62. Based on the above, this panel finds that in this instance commission of an ADRV which has not been challenged has been established through a reliable means. The applicant has also provided a letter (contents as above) from a medical institution confirming that the Respondent was not seen at the institution on the day he alleged to have been a patient there. All that the Respondent does is to file a very short Affidavit denying the charge, but does not deal with the letter’s contents. That letter is therefore unchallenged.

63. The provisions of Article 10.2.3 of the WADC and ADAK rules provide that in order for a violation under the code to be deemed “intentional” the athlete should have known that the conduct constitutes an anti-doping rule violation and that there was a significant risk that the conduct could constitute or result in an anti-doping rule violation and that he or she manifestly disregarded that risk.

64. It is this panel's position that a failure by the Respondent to render any evidence to explain on a balance of probability as required by Article 3.1 of the WADC, the circumstances under which the alleged medical records were procured or that he did not know that such acquisition constituted an ADRV would mean that the Respondent cannot prove lack of intent.

65. Rule 40.3 of the IAAF Rules, the term ‘*intentional*’ is meant to;

***“Identify those athletes who cheat. The term therefore, requires that the athlete or other person engaged in conduct which he or she***

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<sup>8</sup> CAS 2015/A/3979 International Association of Athletics Federations (IAAF) v. Athletics Kenya & Rita Jeptoo.

**knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk”**

66. In reliance on CAS 2014/ A/3820, par 77<sup>9</sup> – as submitted by ADAK, to prove lack of intention, the Respondent must clearly prove on a balance of probability that one explanation is more probable than the other possible explanation. In the case of **Kurt Foggo -vs- National Rugby League (NRL) CAS A2/2011**, where 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<sup>10</sup>.”*

67. Therefore, it is this Panel’s position that the Respondent bears the burden of establishing that the violation was not intentional. In this instance the Respondent has failed to prove lack of intention to adduce fraudulent medical records. That the Respondent also demonstrated concealment as he totally evaded to provide any explanation on the Charges. Instead, he dwelt on misconceived arguments on doctrines of *res judicata* and *lis pendens* which ought to have been raised as preliminary points of law.

68. The panel having considered the circumstances and the evidence brought forth by the Applicant, is of the view that the Respondent intended to produce fraudulent medical records in order to circumvent the consequences of breach of the ADRV thus Tampering or attempted Tampering with any part of Doping Control in contravention of Article 2.5 ADAK ADR.

69. Under Article 22.1, the Respondent has a responsibility to be knowledgeable of and comply with the Anti-Doping rules. Further, the Respondent under duty to uphold the spirit of sport as stated herein.

70. Based on the foregoing this Panel is of the view that the Respondent failed to discharge his obligations.

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<sup>9</sup> Supra note 1 above

<sup>10</sup> Kurt Foggo v. National Rugby League (NRL), CAS A2/2011

71. The Respondent is held strictly liable for his own knowledge on Anti-Doping Rules Violations whether or not he intentionally or unintentionally committed the ADRV or was negligent or otherwise at fault.
72. The standard of proof is to the comfortable satisfaction of the panel and calls for the Respondent to demonstrate that he made an effort not to tamper or attempt to tamper with the doping control process.
73. In **CAS 2018/A/4643 Maria Sharapova -vs- International Tennis Federation**, the panel therein set out factors for consideration in assessment of degree of fault on the part of the athlete as follows;

- i) Professional Experience
- ii) Age
- iii) Perceived and actual degree of risk
- iv) Any impairment
- v) Disclosure of Medication on the Doping Control form
- vi) Admission of the ADRV in a timely manner
- vii) Any other relevant factors and specific circumstances that can explain the Athlete's conduct.

74. Article 2 of the WADC states that:

**“Athletes or other persons** shall be responsible for knowing what constitutes ADRV .....

75. In this instance and bearing in mind the Respondent's level of education and exposure, we find that the Respondent was fully aware of his responsibilities, duties and spirit of sport.

76. This panel finds that:

- a. The ADRV has been committed.
- b. The Respondent did intended to cheat
- c. The Respondent was at fault and negligent in his conduct.
- d. The Respondent Tampered or attempted to Tamper with the Doping Control Process.

77. The Panel notes that the Respondent has known previous Charges or ADRV prior to the charge in ADAK case No 36 of 2018.

**Period of Ineligibility**

78. Article 10.3 ADAK ADR provides that the sanction to be imposed on an ADRV under Article 2.5 ADAK ADR is as follows:

**10.3 Ineligibility of other Anti-Doping Rule Violations**

*The period of Ineligibility imposed for Anti-Doping Rule Violations under provisions other than Article 2.1, 2.2 or 2.6 shall be as follows, unless Article 10.5 or 10.6 is applicable*

79. The Respondent is charged with **Tampering or attempted with any part of Doping Control**. Further, Tampering or attempted Tampering with any part of Doping Control constitutes to a 4-year period of ineligibility.

**Sanction**

80. Having reviewed the circumstances of this matter, the panel imposes the following sanctions:

- a. The period of ineligibility for the Respondent shall be for four (4) years from 22nd October, 2020 the date of the provisional suspension pursuant to Article 10.2.2 of the WADC;
- b. The disqualification of the results and prizes of any event with effect from 3<sup>rd</sup> December, 2017 ( as set out in ADAK case No 15 of 2018 ) pursuant to Article 9 and 10 of the WADA code and ADAK ADR.
- c. Each party shall bear its own costs.
- d. Parties have a right of Appeal pursuant to Articles 13 of the WADC and ADAK ADR.
- e. Any other prayers and motions are dismissed.

Dated at Nairobi this 15th day of July 2021



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**J Njeri Onyango, Panel Chairperson**



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**Allan Mola Owinyi, Member**



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**Gabriel Ouko, Member**