

REPUBLIC OF KENYA



**THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI DOPING CASE NO 3 OF 2021**

IN THE MATTER BETWEEN

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

-versus-

SELLY JEPKEMOI KORIR..... RESPONDENT

DECISION

Hearing: Written Submissions

Panel: Mr. John Ohaga SC - Chairperson
Mrs. Njeri Onyango - Member
Mr. Peter Ochieng - Member

Appearances: Mr. Bildad Rogoncho, Advocate for the Applicant;
Dr. Owuor Ajwang', Advocate for the Respondent.

I. THE PARTIES

1. The Applicant is the Anti-Doping Agency of Kenya, a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016. (hereinafter '**ADAK**' or '**The Applicant**').
2. The Respondent is a female adult of presumed sound mind, an International Level Athlete, (hereinafter '**the Athlete**' or "**The Respondent**").

II.ABBREVIATIONS AND DEFINITIONS

3. The following abbreviation used herein have the indicated

ADAK- Anti-doping Agency of Kenya

ADR- Anti-Doping Rule

ADRV- Anti-Doping Rule Violation

AK- Athletics Kenya

WA- World Athletics

S.D.T-Sports Disputes Tribunal

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.

III.APPLICABLE LAW

4. The Respondent, Selly Jepkemboi Korir, is an international level Female Athlete hence the ADAK Anti-Doping Regulations, the WADC and the ADAK Anti-Doping Rules (ADR) apply to her.

IV.BACKGROUND

5. On 30th April 2018, the Applicant alleges that the Athlete knowingly participated in the Vanke Cup International Half Marathon of Meishan Dongpo that was held in Meishan City in China where the Respondent emerged top three in the Women's race despite being aware that she was under a provisional suspension imposed upon her by ADAK effective 15th September, 2017. An Investigation Report, (SJK 1) dated 27th October, 2020 was attached by the Application. (See page 10 of the Charge document).

6. The Applicant stated that on 21st May,2017, the Chinese Anti-Doping Organization (CHINADA) during the Juantan International Half Marathon in China, collected a urine sample from the Respondent. The urine sample (A6266883) was sent to a WADA accredited laboratory for analysis. It returned a positive result for the prohibited substance Oxycodone. On 15th September, the Respondent was served with a Notice of Charge (exhibit 1) which notice placed the Respondent under a provisional suspension. The Respondent is presumed to have received the Notice as she wrote 2 letters to the Applicant in response thereto (exhibit 2 and 3). The Applicant being dissatisfied with the explanations presented by the Athlete filed a Notice of charge at the SDT on 15th September, 2017. The SDT rendered a final decision on the matter 23rd October,2019 by which decision the Respondent was held to be ineligible to participate in any competition for a period of 2 years effective 15th September,2017 (exhibit 4).
7. The Applicant stated that it got a whistle blower information that the Respondent had in violation of the period of ineligibility, participated in other competitions. The Applicant then launched investigations whose findings are contained in the Investigation Report found at page 10 of the document of charge.
8. The findings of the investigations were communicated to the Respondent Athlete by Mr. Japhter Rugut, ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 16th November 2020. In the said communication the Athlete was offered an opportunity to provide an explanation for the same by 30th November 2020. (See page 7 of the Charge Document).
9. The Respondent failed to respond to the charges after being served with the Notice of Charge. The Applicant therefore, preferred the following charge against the Athlete Respondent:

'Violation of the Prohibition of Participation During Ineligibility.'

- 10.The Notice to Charge dated 7th January, 2021 was filed at the Tribunal on 18th January, 2021.

11. Upon considering the Notice to Charge dated 7th January, 2021 presented by Mr. Bildad Rogoncho on behalf of the Applicant, the Tribunal directed and ordered as follows on 21st January, 2021:
- (i) Applicant shall serve the Mention Notice, the Notice to Charge, Notice of ADRV, the Doping Control Form, this Direction No. 1 and all relevant documents on the Respondent Athlete by Friday, 5th February, 2021;
 - (ii) The Panel constituted to hear this matter shall be as follows; Mr. John Ohaga, SDT Chair, Mrs. Njeri Onyango, Member and Mr. Peter Ochieng, Member.
 - (iii) The matter to be mentioned on Thursday 11th February, 2021 to confirm compliance and for further directions.
12. The mention on 11th February, 2021 did not proceed as directed and was adjourned to 3rd March, 2021.
13. At the Mention on 3rd March, 2021 only Mr. Rogoncho attended for ADAK and he informed the Tribunal that the Applicant was not able to locate the Respondent and prayed for a minimum of 21 days to try and effect service. The matter was scheduled for mention on 25th March, 2021.
14. On 25th March, 2021, there was no attendance for Parties. The matter was therefore slated for mention on 15th April, 2021.
15. On 15th April, 2021, when the matter was mentioned via Microsoft Teams, Mr. Rogoncho was present for the Applicant and Dr. Owuor Ajwang was present for the Respondent having placed himself on record by filing a Notice of Appointment of Advocate.
16. The matter was eventually mentioned on 20th May, 2021 as on 13th May, 2021 the Tribunal was not sitting.
17. At mention on 20th May, 2021, Mr. Rogoncho was present for the Applicant. There was no appearance for the Respondent. Mr. Rogoncho informed the Tribunal that the Respondent had been evasive as the Cell phone number believed to belong to the Respondent as provided by Athletics Kenya remained switched off. Mr. Rogoncho also confirmed that the Respondent had been charged with the presence of ***Oxycodone*** in ADAK Case No. 31 of

2017. Mr. Rogoncho argued that the matter had been adjourned numerous times and requested for 14 days to file the Applicant's submissions in relation to the charge. The matter was slated for mention on 3rd June, 2021.

18. At the mention on 3rd June, 2021, ADAK had filed its submissions which this Panel will consider to render a decision. No Submission or any form of response was received from the Respondent.

V. SUMMARY OF SUBMISSIONS BY ADAK

19. Below is a summary of the relevant facts based on ADAK's written submissions.

A. Applicant's Submissions

20. The Applicant reiterated the facts as already set out above.

21. Regarding its legal position, the Applicant acknowledged that under Article 3 the ADAK ADR and WADC, it had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

22. It further submitted that at Article 3.2 the facts relating to an anti-Doping rule violation may be established by **any reliable means** including **admissions** and the methods of establishing facts and sets out the presumptions which include;

a) ...

b) ...

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.

e) ---

23. ADAK also listed the Athlete's roles and responsibilities as spelt out in ADAK ADR/WADC Article 22.1 as follows:

- a) To be knowledgeable of and comply with the 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 cooperate with Anti-Doping organizations investigating Anti-Doping rule violations.

24. With respect to the specific charge, the Applicant asserts that the Athlete is charged with Prohibition of Participation During Ineligibility Contrary to Article 10.11 and 10.22 of the ADAK ADR. Prohibition of participation during ineligibility constitutes a new period of ineligibility equal in length to the original period of ineligibility and shall be added to the end of the original period of Ineligibility.

25. Similarly, under Article 10.2.1 the burden of proof shifts to the athlete to demonstrate No fault, negligence or intention to entitle her to a reduction of sanction.

26. Regarding intention the Applicant submitted that for an ADRV to be committed non-intentionally, the Athlete must prove that, on a balance of probability, she did not know that her conduct constituted an ADRV or that there was no significant risk of an ADRV. According to established case-law of CAS 2014/A/3820, par. 77 the proof by a balance of probability requires that one explanation is more probable than the other possible explanation. For that purpose, an athlete must provide actual evidence as opposed to mere speculation.

27. Under rules 22.1.1 and ADAK further submits that the that the Athlete had certain other personal duties imposed upon her which include:

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.

28. With respect to sanction, the Applicant stressed that under Article 10.12, Article 10.12.3 of the ADAK ADR the new period of ineligibility should be equal in length to the original period of ineligibility shall be added to the end of the original period of Ineligibility. However, the new period of ineligibility may be adjusted based on the Athlete or other Person's degree of Fault and other circumstances of the case.

29. However, as the Respondent has not adduced evidence in support of her case, there are no factors which would warrant a reduction in the sanction.

30. Therefore, the Applicant urged the Panel to consider the sanction provided for in Article 10.12.3 of the ADAK Rules and sanction the athlete to 4 years period of ineligibility.

31. The Respondent did not adduce any evidence or file any arguments in support of her case.

VI. JURISDICTION

32. 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.

VII. APPLICABLE LAW

33. Article 10.12 **Status during Ineligibility** 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:

10.12.1. Prohibition against Participation during Ineligibility

No athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level event organization or any elite or national-level sporting activity funded by a governmental agency.

An athlete or other Person subject to a period of Ineligibility longer than four years may, after completing four years of the period of Ineligibility, participate as an athlete in local sport events not sanctioned or otherwise under the jurisdiction of a Code Signatory or member of a Code Signatory, but only so long as the local sport event is not at a level that could otherwise qualify such athlete or other Person directly or indirectly to compete in (or accumulate points toward) a national championship or International event, and does not involve the athlete or other Person working in any capacity with Minors.

An athlete or other Person subject to a period of Ineligibility shall remain subject to testing.¹

¹[Comment to Article 10.12.1: For example, subject to Article 10.12.2 below, an Ineligible Athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level event organization without triggering the Consequences set forth in Article 10.12.3. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Mutual Recognition.)]

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

[...] 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.

35. 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:

3.2.3 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.

VIII.MERITS

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

37. Arising from the pleadings by the Applicant this Panel will address the issues as follows:

- a. Whether the Athlete's ADRV was intentional;*
- b. Reduction based on No Fault/No Negligence/Knowledge;*
- c. The Standard Sanction and what sanction to impose in the circumstance.*

Uncontested issues:

38. Following were the uncontested issues:

- o The procedural and factual enumeration of events by ADAK;
- o Occurrence of an ADVR; and
- o The Tribunal's jurisdiction on this matter as a first instance court.

- a. Whether the Athlete's ADRV was intentional*

39. The Athlete was offered an opportunity to provide an explanation but failed to respond to the charges within the specified timelines.

40. The Respondent also filed no submissions or any evidence in support of the intention to participate during the period of ineligibility. It is therefore, the opinion of this Panel that the Applicant has been able to prove to the comfortable satisfaction of the Panel that the Athlete was aware that she was strictly required to abstain from engagement in any sanctioned athletic endeavors but she nevertheless knowingly contravened her Mandatory Provisional Suspension and along the reckless road also contravened the final ban imposed upon her for her first ADRV.

41. WADC's Articles 7.10, 8.4, 13.5 and 14.2 all relate to notification of decisions regarding ADRVs which are relevant to this particular case;

WADC Article 7.10 *Notification of Results Management Decisions*
in all cases where an anti-doping organization has asserted the
commission of an anti-doping rule violation, withdrawn the assertion of

an anti-doping rule violation, imposed a Provisional Suspension, or agreed with an athlete or other Person to the imposition of a sanction without a hearing, that anti-doping organization shall give notice thereof as set forth in Article 14.2.1 to other anti-doping organizations with a right to appeal under Article 13.2.3.

WADC Article 8.4 *Notice of Decisions*

The reasoned hearing decision, or in cases where the hearing has been waived, a reasoned decision explaining the action taken, shall be provided by the anti-doping organization with results management responsibility to the athlete and to other anti-doping organizations with a right to appeal under Article 13.2.3 as provided in Article 14.2.1.

WADC Article 13.5 *Notification of Appeal Decisions*

Any anti-doping organization that is a party to an appeal shall promptly provide the appeal decision to the athlete or other Person and to the other anti-doping organizations that would have been entitled to appeal under Article 13.2.3 as provided under Article 14.2.

WADC Article 14.2 *Notice of Anti-Doping Rule Violation Decisions and Request for Files*

14.2.1 Anti-doping rule violation decisions rendered pursuant to Article 7.10.8.4, 10.4, 10.5, 10.6, 10.12.3 or 13.5 shall include the full reasons for the decision, including, if applicable, a justification for why the maximum potential sanction was not imposed. Where the decision is not in English or French, the anti-doping organization shall provide a short English or French summary of the decision and the supporting reasons.

42. The Athlete's first ADRV decision on her period of ineligibility for 2 years (non-participation in both local and international events) is yet to be appealed and therefore remains irrefutable evidence against her. It is also on record that the Athlete was present when the decision on her ineligibility (non-participation in both local and international events) was arrived at by the Tribunal.

43. Thus overall, it was fairly self-evident that the final ‘ban’ decision was safely encapsulated in the Mandatory Provisional Suspension already in the Athlete’s knowledge.

44. WADC’s Article 3.2.4 states:

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.

45. Further, on the issue of intent this Panel aligns itself with *SDT’s ADAK v. Bislake Kipkorir Kiplagat No. 53 of 2016* para. ‘59.

46. Additionally, the CAS has considerably stated that intent can also be indirect intent or what is termed as “*dolus eventualis*”. In **CAS 2011/A/2677 Dmitry Lapikov vs. International Weightlifting Federation (IWF)**, para. 64 the CAS pronounced itself as follows:

“[...] the term “intent” should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete’s behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete’s behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a “minefield” ignoring all stop signs along his way, he may well have the primary intention of getting through the “minefield” unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent” (CAS 2012/A/2822, para. 8.14).

“[...] the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per “dolus eventualis”, the Panel finds that the

Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance.

47. Therefore, the Applicant has succeeded in establishing that the anti-doping rule violation was committed intentionally, the Panel deems it necessary to conclude that the Respondent was at fault and negligent in committing the anti-doping rule violation.

48. The rationale being that the threshold of establishing that an anti-doping rule violation was not committed intentionally is lower than proving that an athlete had No fault or negligence in committing an anti-doping rule violation.

49. Additionally, the Tribunal finds that the above reasoning also applies to "No significant fault or negligence" (Article 10.5 of the ADAC Rules). The Tribunal observes that the comment to Article 10.5.2 of the ADAC Rules takes away any possible doubt in this respect:

"Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation [...] or an element of a particular sanction (e.g., Article 10.2.1) [...]".

The Standard Sanction and what sanction to impose in the circumstances;

50. With respect to the appropriate period of ineligibility, Article 10.12.3 of the WADC/ADAC ADR provides:

Violation of the Prohibition of Participation during Ineligibility

Where an athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 10.12.1, the results of such participation shall be disqualified and a new period of Ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of Ineligibility may be adjusted based on the athlete or other Person's degree of fault and other circumstances of the case. The determination of whether an athlete or other Person has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the anti-doping organization whose

results management led to the imposition of the initial period of Ineligibility. This decision may be appealed under Article 13

IX. SUMMARY

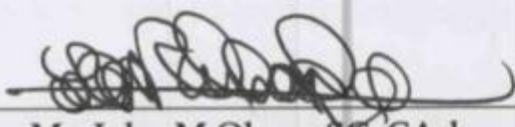
51. It is being noted that this was the Athlete's second ADRV. The original period of Ineligibility for the Athlete's first ADRV was two (2) years.

X. DECISION

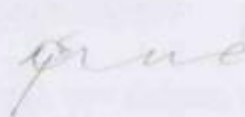
52. Consequent to the discussions of the merits as above,

- i. As per WADC's Article 10.12.3 the new period of Ineligibility shall be four (4) years;
- ii. The period of Ineligibility shall be from **15th September, 2020** the date on which the original period of Ineligibility shall end until **14th September, 2024**.
- iii. All Competitive results obtained by the Respondent Athlete from and including **30th April, 2018** 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, Anti-Doping Regulations and Article 13 of ADAK ADR.

Dated at Nairobi this 15th day of July 2021



Mr. John M Ohaga SC, CARb
Chairperson



Mrs. Njeri Onyango, Member



Mr. Peter Ochieng, Member