

**REPUBLIC OF KENYA**



**THE JUDICIARY**

**OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
APPEAL NO. ADAK 11 OF 2019**

**IN THE MATTER BETWEEN**

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

**-versus-**

**NAUM JEPKORIR..... ATHLETE**

**DECISION**

**Hearing** : 24<sup>th</sup> July 2019

**Panel** : Mrs. Elynah Shiveka - Chair Panel  
Mr. Gabriel Ouko- Member  
Mr. Gichuru Kiplagat - Member

**Appearances:** Mr. Bildad Rogoncho, Advocate for the Applicant;  
Naum Jepkorir, the Respondent Athlete represented herself.

**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 female adult of presumed sound mind, an Elite, International Level Athlete (hereinafter '**the Athlete**')

## **II. Background**

3. As an Elite and International Level Athlete, the IAAF Competition Rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping Rules (ADR) apply to her.
4. On 14<sup>th</sup> October, 2018, CHINADA Doping Control Officers in an in-competition testing at the Guang'an Marathon in Guang'an, China collected a urine sample code number 6357027 from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles which were given reference numbers A 6357027 and B 6357027
5. The analysis of sample number A 6357027 was performed at the WADA-accredited Laboratory in Seibersdorf, Austria. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("**AAF**") indicating the presence of a prohibited substance Norandrosterone.
6. The Doping Control Process is presumed to have been carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations.
7. The findings were communicated to the Athlete by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and Mandatory Provisional Suspension dated 30<sup>th</sup> January, 2019. In the said communication the Athlete was offered an opportunity to provide an explanation for the AAF by 13<sup>th</sup> February, 2019 and the option for Sample B analysis (see page 12 of the Charge Document).

8. The Athlete responded to the Notice from ADAK on 24 February 2019 stating that she had used prednisone tablets, deprovera for family planning and delovatadine tablets. She stated that she did not know where Norandrosterone came from.
9. The Athlete did not expressly request a Sample B analysis thus waiving her right to the same under IAAF Rule 37.5. However the Athlete's response in regard to a request for a hearing is debatable and shall be addressed later.
10. The response and conduct of the Athlete was evaluated by ADAK and it was deemed to constitute an Anti-Doping Rule violation for purposes of Results Management.
11. The Notice to Charge the Athlete was filed at the Tribunal on 14<sup>th</sup> March 2019 by Ms. Damaris Ogama acting for the Applicant in which she requested a panel be named for this matter.
12. On 28<sup>th</sup> March 2019 the matter was mentioned. ADAK was represented by Bildad Rogoncho and the athlete was present to represent herself. The athlete confirmed to have received the Notice to Charge, Notice of the ADRV, Doping Control Form and all relevant documents. A panel consisting of Mrs. Njeri Onyango, Mr Gabriel Ouko and Mr. Gichuru Kilpagat was appointed. The athlete requested for legal representation and the tribunal undertook to find her a pro-bono lawyer. Mention was fixed for 25 April 2019. Due to the expiry of the term of the tribunal was inevitably postponed until the sitting of 27<sup>th</sup> June 2019 when the term had been extended.
13. During the mention of 27<sup>th</sup> June, 2019 Mr. Rogoncho confirmed that he had spoken to the athlete who did not wish to be represented by an advocate anymore and he therefore requested for a hearing date. The Tribunal proceeded to give an order that the matter be heard on 25<sup>th</sup> July, 2019.

### **III. The Hearing**

14. The matter came up for hearing and the Counsel of the Applicant presented his submissions and laid before the Panel evidence and documents in support of his case for consideration.
15. ADAK has preferred the following charge against the Athlete: -  
**Presence of a prohibited substance Norandrosterone or its metabolites or markers in the Athlete's sample which constitutes as anti-doping rule violation under Article 2.1 of ADAK ADR, Article 2.1 of WADC and rule 32.2 (a) and rule 32.2(b) of the IAAF rules.**
16. The athlete confirmed that she lives in Kaptagat. She has been a professional athlete since 2014. She is 35 years old, she is single and has a 10 year old girl.
17. The athlete confirmed to have run in the Kisumu Marathon in December 2018 and that she was 11<sup>th</sup>. She stated that she was tested but never received the results of the test. She had also competed in the Eldoret Family bank and Kapenguria races in 2017 but did not finish the races.
18. She stated that she had competed overseas a number of times. In April 2018 won a marathon in China and was 3<sup>rd</sup> in the half marathon. She was tested in both races and was found clean.
19. 14<sup>th</sup> October 2018 she ran a marathon and was tested after winning. She ran a second race two weeks later and she also won the race. She states that she was not paid despite winning.
20. The athlete states that she does not know much about anti-doping. She has heard about it but she has not heard money to be able to attend the various training and conferences that have been to teach athletes on ant-doping issues. She also did not think they were compulsory.

21. She was asked by the doping control officers if she had used any medicine and she freely stated that she had not. She stated that in her letter of 24 February 2017 that the tablets she had used as shown were in the period she had been asked as per the Doping Control Form No.7.
22. The athlete categorically states that she does not where the substances that were found in her system came from unless it came from one of the three substances that she has stated as per her letter. She states that she had forgotten to state that she was taking the family planning tabs at the time she was asked.
23. The athlete stated that she finished her Form 4 level education in 2014. She does have a phone which is capable of getting into the internet.
24. She states that the doctor's letter from 10 September 2018 confirms the medication that she was given.
25. She further states that if she is unable to run, she will be unable to fend for herself and her child since it is the only way for her to earn a living.
26. At the end of the hearing Mr. Rogoncho stated that he would file his written submissions by 22 August 2019.

#### **IV. Submissions:**

##### **A. Applicant's Submissions**

27. May it please the panel,

28. The Anti-Doping Agency of Kenya wishes to adopt and own the charge documents dated 11<sup>th</sup> March 2019 and the annexures thereto as an integral part of its submissions.

29. The Athlete herein is charged with an Anti-Doping Rule Violation of Presence of a prohibited substance **Norandrosterone** in contravention of the ADAK ADR (herein referred to as ADAK Rules)
30. The athlete is an International Level Athlete and therefore the result management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No 5 of 2016 to constitute a hearing panel which the athlete was comfortable with.
31. The matter was set down for hearing and the athlete was unrepresented.
32. The matter came up for hearing, the athlete testified and was cross examined.

#### 1. **BACKGROUND/FACTS**

33. The respondent is a Female Athlete hence the IAAF competition rules, IAAF Anti-Doping Regulations, the WADC and the ADAK ADR apply to her.
34. On October 14<sup>th</sup>, 2018, CHINADA<sup>1</sup> Doping Control Officers in an in-competition testing during the Guang'an Marathon in Guang'an, China, collected four urine samples from the respondent. Assisted by the DCO, the respondent split the Sample into two separate bottles, which were given reference numbers A 6357027 (the "A Sample") and B 6357027 (the "B Sample") in accordance with the prescribed WADA procedures.
35. All the Samples were transported to the WADA accredited Laboratory in Seibersdorf, Austria. The Laboratory analyzed the A Samples in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for the presence of a prohibited substance **Norandrosterone**.
36. The Doping control process was carried out by competent personnel and using the right procedures in accordance with the WADA International Standards for Testing and Investigations<sup>2</sup>
37. The findings were 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 30<sup>th</sup> January 2019. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 13<sup>th</sup> February 2019.

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<sup>1</sup> China Anti-Doping Agency

<sup>2</sup> <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-ISTI-Final-EN.pdf>

38. The athlete responded vide a letter dated 24<sup>th</sup> February 2019. She denied the charges and stated that she used prednisone tablets and Depo-Provera medication for family planning but did not provide any medical records or prescriptions for the same. She further stated that she did not know how the prohibited substance, **Norandrosterone**, got into her system
39. The response was evaluated by ADAK and it was deemed to constitute an anti-doping rule violation and referred the matter to the Sports Disputes Tribunal for determination.
40. Charge documents were prepared and filed by ADAK's Advocates and the Athlete presented a response thereto.
41. The matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules and the matter is pending determination resulting to a request for submissions by both parties.

## **2. LEGAL POSITION**

42. The applicant submits 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.

### **A. PRESUMPTIONS**

43. It further provided at Article 3.2 that facts relating to 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) **Analytical methods or decision limits** ...
  - b) *WADA accredited Laboratories and other Laboratories approved by WADA are **presumed to have conducted sample analysis** and custodial procedures in accordance with the international standards for laboratories*
  - c) *Departures from any other International Standards or other anti-doping rule or policy set forth in the code or these Anti-Doping **Rules which did not cause an Adverse Analytical Finding** or other anti-doping rule violation shall **not invalidate** such evidence or results.*
  - d) *The facts established by a decision of a court or a professional disciplinary tribunal of competent jurisdiction which is not a subject of pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.*
  - e) *The hearing panel in a hearing ....*

## **B. ROLES AND RESPONSIBILITIES OF THE ATHLETE**

44. That under Article 22.1 the Athlete has the following Roles and responsibilities;

- 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 and Anti-Doping rule violation within the previous 10 years,
- f) **To cooperate with Anti-doping organizations investigating Anti-doping rule violations.**

45. The athlete herein is also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;

*“The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including;*

- *Ethics, fair play and honesty*
- *Health*
- *Excellence in performance*
- *Character and education*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity”*

### **3. ANTI-DOPING AGENCY OF KENYA POSITION**

46. The burden of proof expected to be discharged by the Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by the prosecution.

47. In her **evidence in chief** and subsequent **cross-examination** the respondent stated as follows;

- a) She denied ever doping,
- b) She confirmed that she was an experienced athlete who had been tested severally in the past,
- c) She was aware of the Doping Control Process,
- d) She understood her rights and obligations as an athlete,
- e) She had participated in numerous local and international races,
- f) She was not illiterate,
- g) She owns a smart phone with access to the internet,

#### **4. PROOF OF ANTI-DOPING RULE VIOLATION**

48. The Athlete is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. **Norandrosterone** is a Non-Specified Substance and attracts a 4-year sanction
49. 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.
50. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him to a reduction of sanction.
51. We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent herein.

##### **A. ORIGIN**

52. In the instant case, the athlete has failed to establish the origin of the substance found in her system. She alluded to have used prednisone tablets, Depo-Provera for family planning and desloratadine but NONE of those three drugs contain Norandrosterone. It is the Applicant's contention that the athlete herein has failed on a balance of probability to establish origin.
53. To establish the origin of a prohibited substance, it is not sufficient for an athlete merely to protest his or her innocence and suggest that the substance must have entered his or her body inadvertently. He or she must adduce concrete evidence on the source of the prohibited substance and not mere speculations.
54. Under Article 22.1, an athlete has the obligation to ensure that they take responsibility for what they ingest and also note to inform any 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 these Anti-doping rules.

55. Based on the above considerations regarding the evidence presented by the Respondent in this matter, the Applicant urges the Panel to conclude that the Athlete, based on a balance of probability standard, has not fulfilled her burden of proof to establish the origin of the prohibited substance being, **Norandrosterone** in her system.

56. Accordingly, the Applicant urges the Panel to find that the Athlete has not met her burden of proof and that the anti-doping rule violation therefore must be deemed to have been intentional since the inability of her, on a balance of probability to establish the origin of the prohibited substance, automatically leads to the conclusion that she is guilty of an anti-doping rule violation. This was the finding in **CAS 2016/A/4563 World Anti-Doping Agency (WADA) v. Egyptian Anti-Doping Organisation (EGY-NADO) & Radwa Arafa Abd Elsalam**, award of 16 January 2017

#### **B. INTENTION**

57. On the outset, it is important to state that in the case of **CAS 2016/A/4716 Cole Henning v. South African Institute for Drug-Free Sport (SAIDS)**, the Court held that;

***“Identification of the origin of the prohibited substance is a prerequisite to negate intention”***

58. It is worthy to note that in the instant case; the Respondent has adamantly refused, declined and failed to disclose the origin of the prohibited substance and as such intention cannot be negated.

59. 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.

60. The Applicant calls upon the Tribunal to find that the Respondent herein intended to cheat and therefore the reason why she injected herself with the substance. The Applicant submits that the narrations by the Respondent are meant to mislead, hoodwink and divert the attention of the Tribunal.

61. It is the Applicant's submission that the Respondent has failed to prove a lack of intention to cheat based on her inability to prove origin.

#### **C. FAULT/NEGLIGENCE**

62. 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 her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.

63. The Applicant submits that the athlete has a personal duty to ensure that no prohibited substance enters their body. In the instant case the athlete did not take any tangible precautions to ensure that whatever they injected themselves with did not contain any prohibited substance. She acted negligently and she is at fault.

64. In **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF - Page 26** the panel observed that;

***‘the athlete’s fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.’<sup>3</sup>***

The applicant contends that the athlete in this case fell short of this requirement as she failed to carefully consider the consequences of whatever was injected into her. This implicates that the athlete is not keen on upholding her duties under the rules and regulations.<sup>4</sup>

65. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon her as an international level athlete. She was thus grossly negligent.

#### **D. KNOWLEDGE**

66. The applicant contends that the principle of strict liability is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. It means that each athlete is strictly liable for the substances found in his or her bodily specimen, and that an anti-doping rule violation occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimen, whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

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<sup>3</sup> CAS 2012/A/2804 <> <http://jurisprudence.tas-cas.org/layouts/15/osssearchresults.aspx?u=http%3A%2F%2Fjurisprudence%2Ecas%2Eorg&k=CAS%202012%2FA%2F2804#k=CAS%202012%2FA%2F2804>

<sup>4</sup> <https://jurisprudence.tas-cas.org/Shared Documents/2804.pdf>

67. Further, the Applicant contends that the Athlete has had a long career in athletics, and it is questionable that she feigns ignorance in the herein circumstances. She did not take interest to find out how Norandrosterone found its way into her system. The Applicant submits that the Respondent is being economical with the truth and is hellbent in ensuring that the hearing panel buys into her twisted tale.

68. The Applicant holds that an international level athlete of her repute cannot take casually concerns of her health and more so when she is not sure of what has been injected into her body. In her Evidence in Chief, she admitted having participated in several national and international competitions and was well aware of the doping control processes. It therefore beats logic that she does not know where the **Norandrosterone** came from.

## **5. SANCTIONS**

69. For an ADRV under Article 2.1, Article 10.2.1.2 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”.

70. On its face Article 10.5.1.1 on the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must establish no significant fault or negligence.

71. In the circumstances, the RESPONDENT HAS FAILED TO ESTABLISH THE ORIGIN of the prohibited substance and as thus cannot and should not benefit from any reduction.

## **6. CONCLUSION**

72. Article (WADA 2.1.1) emphasizes that it is an athlete’s personal duty to ensure that no prohibited substance enters his or her body and that 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 by the analysis of the athlete’s sample which confirms the presence of the prohibited substance.

73. We find that ideal considerations while sanctioning the athlete are:

- A. The ADRV has been established as against the athlete.
- B. FAILURE BY THE ATHLETE TO PROVE ORIGIN.

C. The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint themselves with anti-doping policies

74. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.

75. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.2.1.2 of the ADAK Rules and sanction the athlete to 4 years ineligibility.

76. It is our submission that ADAK has made out a case against the Athlete and that there was indeed an Anti-Doping Rule Violation by the Athlete and a sanction should ensue.

#### **B. Athlete's Submissions**

77. The athlete did not wish to submit any further written submissions in addition to her evidence and letter.

#### **V. Jurisdiction**

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

#### **VI. Applicable Law**

79. 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**

80. The Panel will address the issues as follows:

- a. *Whether there was an occurrence of an ADRV and the Burden and Standard of proof;***
- b. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADRV was intentional;***
- c. *The Standard Sanction and what sanction to impose in the circumstance.***

### **A. The Occurrence of an ADRV and the Burden and Standard of Proof**

81. With regard to the Athlete's ADRV, the Panel notes that it is undisputed that the Athlete's A Sample revealed the presence of the prohibited substance Norandrosterone.

82. In addition to the positive analytical lab results proof of the Athlete's admission is attached by the Applicant in its Charge Documents on page 13 of the Charge Document which is a copy of the 'Admission of Anti-Doping Rule Violation' from the Athletics Integrity Unit signed on 28/04/2017 by the Athlete.
83. In the present case, the Athlete bears the burden of proof that the ADRV was not intentional (Article 10.2.1 of the ADAK ADR) and it naturally follows that the Athlete must also establish how the substance entered his body.
84. Pursuant to Article 3.1 of the ADAK ADR, the standard of proof is on a balance of probability. The Article provides 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 rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability.*
85. The Panel notes that this standard requires the Athlete to convince the Panel that the occurrence of the circumstances on which the Athlete relies is more probable than their non-occurrence, cf. CAS 2016/A/4377, at para.51.

#### **A. Was the Athlete's ADRV intentional?**

86. The main relevant rule in question in the present case is Article 10.2.3 of the ADAK ADR, which reads as follows:  
*As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might*

***constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was unrelated to sport performance.***

87. The WADA 2015 World Anti-Doping Code, Anti-Doping Organizations Reference Guide (section 10.1 "What does 'intentional' mean?", p. 24) provides the following guidance:

*'Intentional' means the athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk the conduct might constitute an ADRV, and manifestly disregard that risk.*

*Article 10.2 is clear that it is four years of ineligibility for presence, use or possession of a non-specified substance, unless an athlete can establish that the violation was not intentional, for specified substances, it is also four years if an ADO can prove the violation was intentional.*

*Note: Specified substances are more susceptible to a credible, non-doping explanation; non-specified substances do not have any non-doping explanation for being in an athlete's system.*

87. In the Athlete's explanation in page 15 of the Charge Document the Athlete corresponded as follows: " I have received IDR V notice dated 30<sup>th</sup>

*Jan 2019. I received it today and read it and understand it's true that on 14<sup>th</sup> Oct 2018 I was in China for the race and I was tested., I have been running since 2016. Moreover, I have been tested twice in China and Kisumu marathon on December 2018.*

*I didn't doped or rather used the doping chemicals I had used the following medication prednisone tablets, depoprovera for family planning and Deslovatadine tabs and I don't know where NARANDROSTERONE came from and that's all."*

88. Being an international-level athlete to whom the issue of doping is not a foreign term, having ben tested twice and at 35 years of age the Athlete would have been expected to have been more alert and aware. At the very least she should have applied for a TUE if indeed she required the prescribed medication.
89. Further, the athlete confirms that she has a smart phone and the fact that she reached Form 4 level of education she was intelligent enough to surf through the websites and access the WADA Prohibited List against which to countercheck her medication. From the aforementioned we infer that the Athlete was not only manifestly careless about the risk she put herself and her career in but also grossly negligent.
90. The Panel in the present case aligns with the Panel in CAS 2016/A/4377 that the athlete must establish how the substance entered her body and that to establish the origin of the prohibited substance it is not sufficient for an athlete "*merely to protest their innocence...*", which is what the Athlete resorts to when pressed by the relevant ADO to reveal the full details that caused his ADRV.
91. Further, the treatment card that has been produced by the Athlete from Uasin Gishu County Hospital and the medicines so prescribed do not in way have the substance which was found in her system.

92. In CAS 2014/A/3820, the Panel made the following comments: *In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation. In CAS 2010/A/2230, the Panel held that: to permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules... more must sensibly be required by way of proof given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body.* Therefore the Athlete fails to prove to the comfortable satisfaction of the Panel the source/ how the prohibited substance got into his body.
93. Accordingly, the Tribunal finds that the Athlete has not met his burden of proof.

#### **B. Reduction Based on the Athlete's Prompt Admission?**

94. Article 10.6.3 of the RADO ADR, that reads as follows:
- 10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1*
- An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 f .4, by promptly admitting the asserted anti-doping rule violation after being confronted by the RADO-Member Signatory or its Delegate Organization, and also upon approval and at the discretion of both WADA and the RADO-member Signatory or its Delegate Organization, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault.*

95. The Panel notes that the Athlete did not contest the provisional suspension and has not been engaged in any activity related to athletics since the finding was communicated to her. However, she has never admitted and therefore cannot be a beneficiary of reduction based on prompt admission.

## VIII. SANCTIONS

96. We find Article 10.2 of the ADAK Rules relevant in determining the sentence to be imposed. It stipulates the sanction of Ineligibility where there is Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method. It provides as follows:

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

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

**10.2.1 The period of *Ineligibility* shall be four years where:**

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

**10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and ADAK can establish that the anti-doping rule violation was intentional.**

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

97. The Panel notes that the standard sanction for an ADRV involving a non-specified substance is four (4) years, unless the Athlete can establish that the ADRV was not intentional.

## **Disqualification**

98. 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.*

99. The Tribunal notes that even though the athlete has not taken part in any competitions since her sample tested positive, hers was an in-competition test therefore disqualification of results must be inclusive of the competition which produced the positive sample.

## **Period of Ineligibility Start and End Date**

100. With respect to the sanction start date, the Tribunal is guided by Article 10.11 of WADC and ADAK ADR which provides as follows:

*Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*

101. 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. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.*

102. In this case, the sample collection was made on 14<sup>th</sup> October 2018, and the Athlete was provisional suspended on 30<sup>th</sup> January 2019. It follows, therefore, that the Athlete should receive "credit" for the period of ineligibility already served. In this regard, the Tribunal determines that the Athlete's period of ineligibility, if imposed, shall commence as from the date of her provisional suspension (that is 30<sup>th</sup> January 2019) thus giving her full credit for time already served in accordance with Article 10.1.3 of ADAK ADR.

#### **IX. ON THESE GROUNDS**

103. In these circumstances, the following orders commend themselves to the Tribunal:
- a. The ADRV has sufficiently been proven;
  - b. The applicable sanction is set at Article 10.2.1.1 of the WADC;
  - c. The Athlete's period of Ineligibility shall be for a period of 4 years with effect from 30<sup>th</sup> January 2019 being the date the Athlete was provisionally suspended;
  - d. All results obtained by the Athlete from 14<sup>th</sup> October, 2018 inclusive of points and prizes are disqualified;
  - e. The parties shall bear their own costs of these proceedings.

104. The right of appeal is provided for under Article 13.2.1 of the WADA Code, Rule 42 of the IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this 02<sup>nd</sup> day of October, 2019

Signed:

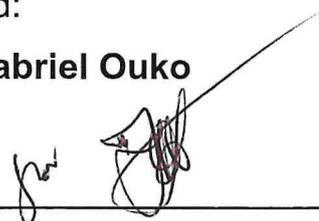
*for* Mrs. Elynah Sifuna- Shiveka



**Deputy Chairperson, Sports Disputes Tribunal**

Signed:

**Mr. Gabriel Ouko**



**Member, Sports Disputes Tribunal**

Signed:

**Mr. Gichuru Kiplagat**



**Member, Sports Disputes Tribunal**