

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
CAUSE NO. 9 & 11 OF 2020

IN THE MATTER BETWEEN

ANTI-DOPING AGENCY OF KENYA (ADAK).....APPLICANT

-Versus-

HENRY CHERUIYOT KOSGEY.....RESPONDENT

DECISION

Hearing: Written Submissions

Panel:	Elynah Sifuna Shiveka	-	Chairperson
	Gabriel Ouko	-	Member
	Allan Owinyi	-	Member

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

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, tasked with the responsibility of carrying out anti-doping activities in the Country in order to ensure and safeguard the right of athletes to participate in a doping free sport.
2. The Respondent is an adult male of sound mind and an international Level Athlete (hereinafter 'the Athlete').

II. Facts & Background

3. The respondent is a Male Athlete hence the WA competition rules, WA Anti-Doping Regulations, the WADC and the ADAK ADR apply to him.
4. On December 7th, 2019, OCALUDS Doping Control Officers during the Mini Marathon De Yaoundé held in Yaoundé, collected a urine sample from the respondent. Assisted by the DCO, the respondent split the Sample into two separate bottles. Which were given the reference numbers A441370 (the "A Sample") and B 4413750 (the "B Sample") in accordance with the Prescribed WADA procedures.
5. Both Samples were transported to Agence Francaise de Lutte Contre le Dopage (AFLD), Doping Control Laboratory ("WADA") accredited Laboratory in Paris France (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Both analysis of the A Sample returned an Adverse Analytical Finding ("AAF") presence of a prohibited substance Methylprednisolone.
6. **Methylprednisolone** is Specified substance listed as Glucocorticosteroid under S.9 of WADA's 2019 Prohibited List.
7. 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.¹
8. The position of the matter was communicated to the respondent athlete by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 3rd March 2020. In the said

¹ <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-ISTI-Final-EN.pdf>

communication the athlete was offered an opportunity to provide an explanation for the same by 16th March 2020.

9. The response of the respondent was evaluated by ADAK and it was deemed to constitute an anti-doping rule violation and referred to the Sports Disputes Tribunal for determination.
10. Charge documents were prepared and filed by ADAK's Advocate.
11. The athlete has since that date refused, declined, and failed to attend before the Tribunal despite numerous notifications through phone calls and text messages.
12. Consequently, directions were issued on 29th June 2020 and a Panel constituted as follows to hear the matter:

(a) Elynah Shiveka, Panel Chair

(b) Gabriel Ouko, Member

(c) Allan Owinyi, Member

The matter scheduled for mention before the Tribunal on 23rd July 2020.

13. On 1st September 2020 the Applicant filed the Charge Document at the Tribunal.
14. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of a prohibited substances *Methylprednisolone* in the athlete's sample;

And

Violation of the Prohibition of Participation During Ineligibility

15. The Applicant further stated that the Respondent had no TUE recorded at the IAAF for substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International standards or laboratories which may have caused the adverse analytical finding. Furthermore, the Applicant stated that there is no plausible explanation by the Respondent to explain the adverse analytical finding.

16. The Applicant contends that this Tribunal has jurisdiction to entertain the matter under Sections 55,58 and 59 of the Sports Act and sections 31 and 32 of the Anti-Doping Act.
17. The Applicant prays that:
 - (a)The disqualification of all competitive results obtained by the Respondent from and including 07/12/2019 and including forfeiture of medals, points and prizes as per **Article 10.1 of the ADAK ADR**.
 - (b)Sanction to a four-year period of ineligibility as provided for by **Article 10 OF ADAK AND WADC Rules**.
 - (c)Costs, as per WADA Article 10.10

III. Parties' Submissions

Applicant's Submissions on Presence of prohibited substance

18. The 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.

PROOF OF ANTI-DOPING RULE VIOLATION

19. The Athlete is charged with presence of Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. **Methylprednisolone** is a Specified Substance and attracts a period of Ineligibility of 4 years.
20. 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.
21. We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent herein.

ORIGIN

22. In the instant case, the athlete failed to establish the origin of the substance found in his system. He failed to respond to the charges within the specified timeline as stated. It is the Applicant's contention that the athlete herein has failed to establish origin.
23. In **Arbitration CAS 2014/A/3615 World Karate Federation (WKF) v. George Yerolimpos** states the person charged cannot discharge that burden of proof merely by showing that he made reasonable efforts to establish the source

but that they were without success...mere assertion as to what the source is, without supporting evidence, is sufficient².

24. It is clear from the above-mentioned case that it is not sufficient for an athlete merely protestations of innocence and suggest that the prohibited substance may have entered his body inadvertently from some supplements, medicine, or other product. Rather, the athlete must adduce concrete evidence to demonstrate that the supplement, medicine or other product, that he took contained the substance in question. The mere fact that the athlete took the substance, he used at the time of the alleged offense does not prove on the balance of probability that violation was not intentional.
25. Further in **CAS 2017/A/5260 World Anti- Doping Agency (WADA) v South Africa Institute for Drug- Free Sports (SAIDS) & Demarte Pena** states that an athlete has a stringent requirement to offer persuasive evidence that the explanation he offers for an Adverse Analytical Finding (AAF) is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions³.
26. In that regard, we do submit that the origin of the prohibited substance has not been established.

B. INTENTION

27. In **CAS 2016/A/ 4626, par. 45**⁴ states For an ADRV to be committed non-intentionally, the Athlete must prove that, by a balance of probability, he did not know that his 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**⁵ 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 in **CAS 2014/A/3820, par.79**.
28. A failure to explain the concrete origin of the prohibited substance only means that an athlete cannot prove the lack of intent. In the matter of **International Association of Athletics Federation (IAAF) v Russian Athletic Federation (RUSAF) & Vasily Kopeykin** in order to meet such burden of proving lack of intent without establishing source cannot merely

²<https://jurisprudence.tas-cas.org/Shared Documents/3615.pdf>

³<https://jurisprudence.tas-cas.org/Shared Documents/5260.pdf>

⁴ <https://jurisprudence.tas-cas.org/Shared Documents/4626.pdf>

⁵ <https://jurisprudence.tas-cas.org/Shared Documents/3820.pdf>

- rely on protestation of innocence, lack of a demonstrable sporting incentive to dope, diligent attempts to discover the origin of the prohibited substance or the athlete's clean record. Supporting lack of intent without establishing the origin of the prohibited substance requires truly exceptional circumstances⁶.
29. From the above, to prove lack of intention, the Athlete must demonstrate how the prohibited substance entered his body. We submit further that the athlete must clearly demonstrate that the substance "was not intended to enhance" his performance. It does not suffice to say that one did not know that the supplement, medication or product used contained a banned substance. In Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL) the panel observed that "The athlete must demonstrate that the substance was not intended to enhance the athlete's performance. The mere fact that the athlete did not know that the substance contained a prohibited ingredient does not establish absence of intent⁷.
30. 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. It follows then that he must necessarily establish how the substance entered his body.
31. The Applicant urges the Panel to disregard the Respondent's assertions as it has been rendered unable to weight the likelihood based on absence of evidence.

FAULT/NEGLIGENCE

32. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-doping rules. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.
33. The Respondent must not only demonstrate that she did not and could not reasonably know or suspect that she was ingesting a prohibited substance, but she must satisfy the threshold requirement of establishing how the prohibited substance entered her system by a balance of probability in Article 3.1 of ADR states " *No Fault or No Negligence: The Athlete's or other Person's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule. Except in the case of a minor, for any violation of*

⁶<https://jurisprudence.tas-cas.org/Shared Documents/5218.pdf>

⁷ <https://jurisprudence.tas-cas.org/Shared Documents/A2-2011.pdf>

Article 2.1, the Athlete must establish how the prohibited substance entered his system.

34. The Applicant argues to benefit from the institute of no fault or negligence, the Respondent must establish how the prohibited substance entered her system. The Respondent did not give any explanation how *Androsterone* and *Eticholanone* entered her system. In the **Arbitration CAS 2011/A/2414 Zivile Balciunaite v Lithuanian Athletics Federation (LAF) & International Association of Athletics Federations (IAAF) Par 12.5⁸** states the athlete is responsible for the presence of a prohibited substance in her body system. The Appellant is an experienced athlete and even if it would be true-what was never proven in this case- that the prohibited substance suddenly appeared in her body by taking Duphaston, it already is negligent by the Appellant willing to compete in a continental or world championship, to use a medical product "*not leaving no reasonable stone unturned*" in researching whether such a substance might cause effects prohibited by anti-doping rules.
35. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him as an international level athlete. He was thus grossly negligent.

KNOWLEDGE

36. 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.
37. The Applicant holds that an athlete competing at international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of prohibited/specified substances.
38. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance

⁸ <https://jurisprudence.tas-cas.org/Shared Documents/2414.pdf>

will not be in violation of the Code. Ignorance is no excuse. To guard against unwitting or unintended consumption of a prohibited substance, it would always be prudent for the athlete to make reasonable inquiries on an ongoing basis whenever the athlete uses the product.

39. In Arbitration CAS A2/2011 Kurt Foggo v. National Rugby League (NRL) the panel observed that an athlete's lack of knowledge that a product contains a prohibited substance is not enough to demonstrate the absence of athlete's intention to enhance sport performance⁹.

SANCTIONS

40. 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".
41. On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension.
42. In the circumstances, the Respondent has not adduced evidence in support of the origin of the prohibited substance. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK ADR rules and the WADA code to warrant sanction reduction.
43. 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.

CONCLUSION

44. 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

⁹ <https://jurisprudence.tas-cas.org/Shared Documents/A2-2011.pdf>

- analysis of the athlete's sample which confirms the presence of the prohibited substance.
45. 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 ESTABLISH THE ORIGIN OF THE PROHIBITED DRUG.
 - C. The knowledge and exposure of the athlete to anti-doping procedures and programs.
 - D. The Respondent herein has failed to give any explanation for his failure to exercise due care in observing the products ingested and used and as such the ADRV was as a result of his negligent acts.
 - E. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding.
 46. 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.
 47. 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.

Applicant's Submissions on violation of the Prohibition of Participation During Ineligibility

48. May it please the panel,
49. The Anti-Doping Agency of Kenya wishes to adopt and own the charge documents dated 1st September 2020 and the annexures thereto as an integral part of its submissions.
50. The Athlete herein is charged with an Anti-Doping Rule Violation for the **Violation of the Prohibition of Participation During Ineligibility** in contravention of the ADAK ADR (herein referred to as ADAK Rules)
51. The athlete is an Elite 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 2015 to constitute a hearing panel which the athlete was comfortable with.
52. The matter was set down for hearing and the athlete failed to appear.

BACKGROUND/FACTS

53. The respondent is a Male Athlete hence the WA competition rules, WA Anti-Doping Regulations, the WADC and the ADAK ADR apply to him.
54. On December 7th, 2019, the athlete knowingly participated in the Mini Marathon De Yaoundé in Yaoundé, Cameroon despite being aware that he was under provisional suspension, imposed on him on 6th February 2019.
55. 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 22nd June 2020. In the said communication the athlete was offered an opportunity to provide an explanation by 6th July 2020.
56. The response of the respondent was evaluated by ADAK and it was deemed to constitute an Anti-Doping rule violation and referred to the Sports Disputes Tribunal for determination.
57. Charge documents were prepared and filed by ADAK's Advocate.
58. The athlete has since that date refused, declined, and failed to attend before the Tribunal despite numerous notifications through phone calls and text messages.
59. We submit that the athlete though aware of the pendency of this matter has been deliberately decided to ignore, disregard, and dissociate himself with proceedings.
60. We therefore invoke **Rule 3.2.5 as read with Rule 7.10.2** of the ADAK Anti-Doping Rules and urge this Panel to render a Decision in this matter which has been adjourned too many times.

LEGAL POSITION

61. 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.

PRESUMPTIONS

62. 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

ROLES AND RESPONSIBILITIES OF THE ATHLETE

63. 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,

© 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.

64. 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*

ANTI-DOPING AGENCY OF KENYA POSITION

65. 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.

PROOF OF ANTI-DOPING RULE VIOLATION

66. 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 to 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
67. 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.
68. We therefore urge the Tribunal to find that an ADRV has been committed by the Respondent herein.

A. INTENTION

69. 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. 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.¹⁰

70. From the above, to prove lack of intention, the Athlete must demonstrate that he did not participate in the event during his period of ineligibility.
71. The Applicant contends that it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional. It follows then that he must necessarily that he did not participate in the event.
72. It is the Applicant's submission that the Respondent has proved intention to participate in the event during his period of ineligibility.

B. FAULT/NEGLIGENCE

73. The Respondent is charged with the responsibility to be knowledgeable of and comply with the Anti-Doping rules. The respondent hence failed to discharge his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.
74. The Applicant submits that the athlete has a personal duty to ensure that they disclose to their International Federation and to the Agency any decision by 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.

75. It is clear from the foregoing that the athlete ought to have known better the responsibilities bestowed upon him before participating in the event. He was thus grossly negligent.

C. KNOWLEDGE

76. The applicant contends that the principle of strict liability is applied in situations where participation during period of ineligibility 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.

¹⁰ <https://jurisprudence.tas-cas.org/Shared Documents/3820.pdf>

77. Further, the Applicant contends that the Athlete has had a long career in athletics, and it is only questionable that he has had no exposure to the crusade against ADAK Rules.
78. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that his participation in events will not be in violation of the Code. Ignorance is no excuse

SANCTIONS

79. For an ADRV under Article 10.12, Article 10.12.3 of the ADAK ADR provides for 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.
80. In the circumstances, the Respondent has not adduced evidence in support of the intention to evade sample collection. Bearing this in mind, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADAC to warrant sanction reduction.

CONCLUSION

81. We find that ideal considerations while sanctioning the athlete are:
 - A. The ADRV has been established as against the athlete.
 - B. The failure by the athlete to establish no intention to commit an ADRV.
 - C. Failure by the athlete to take caution by not participating in events while serving a period of ineligibility.
 - D. 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
 - E. The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Anti-Doping Rule Violation of prohibition of participation during period of ineligibility.
82. From the foregoing, we urge 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

83. 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.

Athlete's Submissions

84. The Respondent failed to provide a response to the above charges and failed to appear before the tribunal despite adjournments to enable their participation.

E. The Charges

85. The Anti-Doping Agency of Kenya preferred the following charges against the Athlete:-

Presence of a prohibited substance Methylprednisone in the Athlete's Sample contrary to Article 2.1 of ADAK ADR, Article 2.1 of the WADC and Rule 32.2 (a) and Rule 32.2 (b) of the IAAF rules.

And;

Violation of the Prohibition of Participation During Ineligibility

86. *Prednisone* is listed as a Glucocorticoids under S.9 of the 2018 WADA Prohibited List.

F. Jurisdiction of the Tribunal

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

G. Applicable Law

88. 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 ...

And

10.12.3 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.

H. MERITS

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

90. The Tribunal will address the issues as follows:

- a. *Whether there was an occurrence of ADVRs, the Burden and Standard of proof;*
- b. *Whether, if the finding in (a) is in the affirmative, the Athlete's ADVRs were intentional;*
- c. *Reduction based on No Fault/No Negligence/Knowledge;*
- d. *The Standard Sanction and what sanction to impose in the circumstance.*

A. The Occurrence of the ADVRs, the Burden and Standard of proof.

91. As used in WADC's Article 3.1:

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

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

Burden and Standard of Proof

92. First in regard to the **Standard of proof**, the Panel would refer to WADA Code's applicable standards introductory comments on Purpose, Scope and Organization of the World Anti-Doping Program and the Code:

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

- *To protect the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide, and*

- *To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.*

The Code

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

The World Anti-Doping Program

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

The main elements are:

Level 1: The Code

Level 2: International Standards

Level 3: Models of Best Practice and guidelines'

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

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

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

'All provisions of the Code are mandatory in substance and must be followed as applicable by each anti-doping organization and athlete or other Person. The Code does not, however, replace or eliminate the need for comprehensive

anti-doping rules to be adopted by each anti-doping organization. While some provisions of the Code must be incorporated without substantive change by each anti-doping organization in its own anti-doping rules, other provisions of the Code establish mandatory guiding principles that allow flexibility in the formulation of rules by each anti-doping organization or establish requirements that must be followed by each anti-doping organization but need not be repeated in its own anti-doping rules.'

Additionally,

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

95. The Athlete in this matter, exercising his right to compete in the sport of athletics, without any coercion submitted himself to WADC's jurisdiction by registering to participate in the Mini Marathon De Yaounde – needless to say, IAAF is a Code Signatory and so is OCALUDS (whose Doping Control Officers undertook the initial Results Management). Furthermore, on 7th December 2019, he signed the DCF binding himself to the WADC whose rules are considered sports rules and which are an essential prerequisite for participation in his chosen sport, see Code INTRODUCTION:

'Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. Athletes or other Persons

accept these rules as a condition of participation and shall be bound by these rules. Each Signatory shall establish rules and procedures to ensure that all athletes or other Persons under the authority of the Signatory and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant anti-doping organizations.'

96. Suffice it to say that the aforementioned irrevocable factors required parties appearing before this Tribunal to pursue Code compliant rules, procedures/processes. Likewise, the said factors informed the Tribunal's adherence to the Code, including its recognized burden/standards of proof.

Occurrence of an ADRV

97. On the issue of the ADRV this Panel observes that, the 'presence' of the prohibited substance in the Athlete's body was not a contested fact in this case. The athlete submitted himself for the doping test and signed the Doping Control Form (DCF) on 7st December 2019 on the occasion of the Mini Marathon De Yaounde, during his Urine Sample taking process, as the same Sample was packaged for subsequent testing at the WADA Accredited Lab.
98. The athlete submitted himself to testing and the DCF which he signed was availed to the Panel by the Applicant as evidence. The sample was subsequently tested by Agence Francaise De Lutte Contre le Dopage (AFLD), a WADA accredited Doping control laboratory. The analysis of the A Sample returned an Adverse Analytical Finding for the presence of Methylprednisolone, the report of which was attached.
99. It is worth bringing to attention that, under WADC's Article 2.1 '*Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*' constitutes an ADRV. Following therefrom, WADC's Article 2.1.1 stipulated, '*It is each Athlete's personal duty to ensure that that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault,*

negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.'

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

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

101. On the charge for prohibition of participation during ineligibility the panel is satisfied that the athlete did indeed participate in the race. Proof of this is provided by copies of his travel documents that have been provided by the Immigration Department showing that indeed he was in Cameroon on the shown dates. This is also supported by the fact he signed off on the DCF confirming his participation in the said race at a time that he was still under Provisional Suspension which he has acknowledged and signed off on the Notice to Charge and Provisional Suspension dated 23rd January 2019.

B. Were the Athlete's ADRVs intentional?

102. In first ADRV, the prohibited substance in question being a Specified Substance, the burden remains with the Applicant to prove the Athlete's ADRV was committed intentionally pursuant to Article 10.2 of the WADC: '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 Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.2 The anti-doping rule violation involves a Specified Substance, and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

103. The clear wording of WADC's Article 10.2.1.2 therefore cancelled out the Applicant's contention that "[...] Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no [...] intention to entitle him to a reduction of sanction."

104. The applicant has placed the burden of proof on intentionality on the athlete. In the case of a specified substance like in this case that remains with the applicant. Further it is this Panel's opinion that having misconstrued which party's burden it was to establish that the ADRV was intentional, it appears the Applicant concentrated its efforts on arguments which did not lend much weight to its duty to prove that the Athlete committed the ADRV with the intention to enhance his performance i.e. intentionally. For example, whereas the Applicant contends that, "*it is an established standard in the CAS jurisprudence that the athlete bears the burden of establishing that the violation was not intentional.*", this Panel observes that while that is true under WADC's Article 10.2.1.1, it is also self-evident that, as under WADC's Article 10.2.1.2 which is operational in this case, that burden clearly abides at the door of the ADO, which is in this case the Applicant.

105. It is our general view that when a specified substance is involved as herein, the Applicant is laden with what we could refer to as a double burden of proof responsibility, (a) first for establishing the occurrence of the ADRV via comfortable satisfaction, (see WADC's Article 3.1), and (b) second for establishing that the ADRV was intentional via a balance of probability, (see WADC's Article. 10.2.1.2.). The substance involved in this particular case was **Methylprednisone** which is obviously a Specified Substance

therefore the Applicant's arguments which in our opinion prematurely shifted the burden to the Athlete does not assist it.

106. Nevertheless this Panel is cognizant of the fact that despite numerous attempts to postpone the hearings to enable the athlete to attend the hearings to give his evidence and rebut the charges he (Athlete) has refused to do so – without a reasonable justification. Hence this Panel is inclined toward WADC's Article 3.2.5

3.2.5 The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the *athlete* or other *Person* who is asserted to have committed an anti-doping rule violation based on the *athlete's* or other *Person's* refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the *anti-doping organization* asserting the anti-doping rule violation.

107. Flowing from the aforementioned, we are of the considered opinion that despite the failure by the Applicant to convince this Panel on a balance of probability that the Athlete's ADRV for the prohibited substance was intentional, nevertheless the Athlete's unbothered and extremely reckless behavior as adjudged by this Panel points to an intentional commission of the ADRV. In the absence of the athlete's unexplained participation in the hearing process this Panel therefore invokes Article 3.2.5 and drawing a negative inference rules the Athlete's ADRV Intentional.

108. For the second charge **Prohibition of Participation During Ineligibility** contrary to article 10.11 and 10.22 of the ADAK ADR the athlete must prove that, by a balance of probability, he did not know that his conduct constituted an ADRV or that there was no significant risk of an ADRV. The proof by a balance of probability requires one explanation to be more probable than the other possible explanation. An athlete must provide actual evidence as opposed to mere speculation.

109. The athlete must therefore demonstrate that he did not participate in the event during his period of ineligibility. Again, like in the previous ADRV, despite numerous attempts to postpone the hearings to give the Athlete a chance to attend and give his evidence and rebut the charges he flatly refused to do so.

110. The panel is inclined to agree with the Applicant that the ADRV was intentional given the evidence provided showing that the respondent had indeed signed off on a previous Notice to Charge and Provisional

Suspension for evading, refusing or failing to submit to sample collection during the Kisumu Marathon on 16th December 2018.

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

111. It was the Applicants assertion that, "On its face Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete who is in breach of Article 2.1. the athlete must: (i) establish how the specified substance entered his/her body (ii) that the athlete did not intend to take the specified substance to enhance his/her performance. If, but only if, those two conditions are satisfied can the athlete Adduce evidence as to his/her degree of culpability with a view of Eliminating or reducing his/her period of suspension."

The failure by the athlete to participate in the proceedings did not provide us with any opportunity of interrogating this issue with a view to any elimination or reduction.

No Fault/Negligence

112. The Applicant submitted that, "*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.*"

113. As stated by the Applicant, the Athlete's roles/duties under the Code included strictly avoiding ingesting proscribed substances and if, or when that was completely unavoidable, he was duty bound to follow the ADR prescribed process of going about usage of the same. In the Athlete's case it would have been an ADR legitimate expectation that he acquired a TUE if necessary. However, there was none.

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

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

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

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

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

116. Consequent to the afore-stated discussions, this Panel is of the opinion that the Athlete did not act with No Significant Fault.

117. On the charge for **Participation during the Period of Ineligibility** it is clear that the athlete ought to have known better the responsibilities that are bestowed on him as an international athlete before participating in the event, which can only be described as grossly negligent.

Knowledge

118. In regards to knowledge, the Panel formed the opinion that the Athlete had some experience given that he is 37 years old and the report from the Immigration Department that shows his travelling history shows

that he is well travelled. That said, WADC's Article 21.1.1 placed responsibility of being knowledgeable hence ignorance of sports doping Program by adherents of the Code would be not be an adequate shield; as averred by **CAS 2008/A/1488 P. v. International Tennis Federation (ITF)**: *To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules. A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.*

D. Sanctions

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

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

10.2.1 The period of ineligibility shall be four years where:

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

....

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

120. 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. ...

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

Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

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

I. DECISION

122. Consequent to the discussions on merits of this case; it should be noted that the athlete is faced with the rare and unique position of facing prosecution of three cases within the same ten-year period; two are wedged against him at the same time, while the third one has already been ruled against him. Pursuant to WADC's Article 10.7.5:

10.7.5 Multiple Anti-Doping Rule Violations during Ten-year Period

For purposes of Article 10.7, each anti-doping rule violation must take place within the same ten-year period in order to be considered multiple violations.

(i) In the first instance the athlete under SDT Case No.10 of 2019 has been sanctioned to a 4 year ban for failing to submit to sample collection in the Kisumu Marathon and hence in his case WADC's Article 3.2.4 is applicable:

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.

(ii) Consequently, while still under suspension the athlete has knowingly participated in the Yaounde Mini marathon which carries a sanction of 4 years;

- (iii) Further, while illegally participating in the Yaounde Mini Marathon the athlete tested positive for Methylprednisone and for which based on the merits of the case the sanction due according to the panel is four (4) years (Art 10.2.1 applicable).

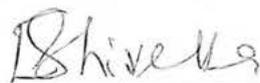
However, the Panel's reading of the WADA Code 2015, at Para 10.7 on "MULTIPLE VIOLATIONS", at 10.7.2 it states as follows:

"A third anti-doping rule violation will always result in a lifetime period of Ineligibility, except if the third violation fulfills the condition for elimination or reduction of the period of Ineligibility under Article 10.4 or 10.5, or involves a violation of Article 2.4. In these particular cases, the period of Ineligibility shall be from 8 years to Lifetime Ineligibility."

The panel is of the view that the multiple violations by the respondent lend themselves cumulatively to the "harshest sentence" and therefore;

- (iv) The period of Ineligibility shall be a **Lifetime period of Ineligibility**;
- (v) All Competitive results obtained by the Respondent Athlete from and including 7th December 2019 are disqualified including prizes, medals and points;
- (vi) Each party shall bear its own costs;
- (vii) The right of appeal is provided for under Article 13 of WADA Code, IAAF Competition Rules and Article 13 of ADAK ADR.

Dated at Nairobi this 4th ___ day of ___ February___ ,2021



Elynah Shiveka,
Panel Chairperson



Gabriel Ouko, Member



Allan Owinyi, Member