REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 02 OF 2022

ANTI-DOPING AGENCY OF KENYA……. APPLICANT

VERSUS

JACKLINE WAMBUI……..……...……. ATHLETE

DECISION

Panel:

J. Njeri Onyango FCIArb – Chairperson
Peter Ochieng – Member
Mary N. Kimani – Member

Appearances:

Mr. Bildad Rongocho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant
Mr. Victor Omwebu/ Mr. Muhuyu, Advocate instructed by Litoro & Omwebu for the Athlete

Abbreviations:

ADAK – Anti Doping Agency of Kenya
ADAK ADR- Anti-Doping Rules 2016
WADA Code- World Anti-Doping Agency Code
DCO- Doping Control Officer
ADAMS- Anti-Doping Administration and Management System. ISRM- International Standard for Results Management
ISTI- International Standard for Testing and Investigations

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A. Introduction

i. Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter referred to as **ADAK**), a state corporation established under section 5 of the Anti-Doping Act, No. 5 of 2016.

2. The Athlete is a female adult of presumed sound mind, a National Level Athlete, more specifically, a short distance runner, who is also a Prison Warden at Kenya Prisons Services at the level of Constable currently based in Jamhuri Station (hereinafter referred to as **the Athlete**).

ii. Factual Background

3. Upon reading the Notice to Charge dated 31st January 2022 presented to the Tribunal on 31st January 2022 by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in order dated 2nd February 2022 as follows:

i. The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, this direction No. 1 and all relevant documents on the Athlete by Monday 28th February 2022;

ii. The panel constituted to hear this matter shall be:

a. J. Njeri Onyango;

b. Peter Ochieng;

c. Mary N Kimani.

iii. The matter shall be mentioned on Thursday 3rd March, 2022 to confirm compliance and for further directions

4. The matter came up for mention on 3rd March 2022 when the Athlete appeared in person and Mr. Rogoncho for the Applicant. The Athlete's particulars were as follows:

Name: Jackline Wambui

Passport Number:CK34275 issued on 26th June 2019

The Athlete requested for pro bono legal counsel and the Tribunal agreed to facilitate the same, consequently the Tribunal directed the Sports Disputes Tribunal Secretariat organize for pro bono counsel for the Athlete and the matter was set for mention on 24th March 2022 for further directions.

5. On 13th April 2022 Mr. Rogoncho and Mr. Muhuyu who was appointed as pro bono Counsel for the Athlete were in appearance. Mr. Rogoncho said was not successful in serving the Athlete. It was agreed he serve through her appointed Counsel. Mr. Muhuyu said he had been in contact with the Athlete that he'd require seven (7) days to serve his response. The matter was set for mention on 28th April 2022 to confirm compliance.

6. At the mention on 12th May 2022 there was no appearance for the Athlete. Mr. Rogoncho for the Applicant who was present stated that he had not been served with a response. The Tribunal ordered that the matter be listed for mention on 19th May 2022 and Mr. Muhuyu be notified of mention date to enable him attend and advise the Tribunal on the status of his response.

7. On 19th May 2022 Mr. Rogoncho appeared for the Applicant while Mr. Olala held brief for Mr. Muhuyu for the Athlete. Both parties confirmed they had filed their pleadings and sought a date for a physical hearing. The Tribunal directed that the matter be listed for a physical hearing on 8th June 2022 at 2.30 pm the Sports Disputes Tribunal courtroom.

8. Upon hearing of this matter on 9th June 2022, the Tribunal directed in its order dated 9th June 2022 that Mr. Muhuyu file his submissions on or before 23rd June 2022 and Mr. Rogoncho was to file his on or before 30th June 2022. Mr. Rogoncho was to also file response from Ololua Hospital and the matter was set for mention on 14th July 2022 to confirm compliance.
9. Both Counsels were present at mention on 28th July 2022. Mr. Muhuyu stated that he had filed and served his submissions to Counsel for the Applicant. The Tribunal ordered Mr. Rogoncho to file and serve his submissions and the matter was listed for mention on 18th August 2022 to confirm receipt of Applicant's submissions and the response from Ololua Hospital.
10. On 18th August 2022 Mr. Rogoncho for the Applicant and Mr. Olala holding brief for Mr. Muhuyu for the Athlete were in appearance. Mr. Olala confirmed that he had received Mr. Rogoncho's submissions. Mr. Rogoncho stated that the Tribunal had requested for response from Ololua hospital before giving a judgement date and since he was yet to receive said report, he requested for a mention date on 1st September 2022 to confirm compliance. The Tribunal listed the matter for mention on 1st September 2022.
11. At the mention on 1st September 2022 Mr. Rogoncho and Mr. Olala holding brief for Mr. Muhuyu were in appearance for the Applicant and the Athlete respectively. Mr. Rogoncho stated that he was in receipt of report from Ololua Hospital which

authenticated the Athlete's medical documents which he had shared with the panelists via email. Madam Njeri Onyango confirmed receipt email indicated by Mr. Rogoncho. The Tribunal directed the decision will be rendered on 29th September 2022

B. Hearing

12. The hearing was done *inter-partes*.
13. Mr. Muhuyu for the Athlete called one (1) witness who was the Athlete herself.

C. Parties' Submissions

i. The Applicant's Submissions

14. The Applicant's case is premised on the Charge document dated 1st March 2022 according to records held in our file (though Counsel in his written submissions refers to charge documents dated 19th October), which the Applicant wished to adopt and own, together with the annexures thereto, as an integral part of its submissions.
15. The Applicant submitted that the Athlete was a National Level Athlete and therefore was under the auspices of the Applicant's results management authority.
16. The Applicant stated that on 21st September 2021, an ADAK Doping Control Officer (hereinafter referred to as **DCO**) collected a urine Sample from the Athlete. Assisted by the DCO, the Athlete split the Sample into two separate bottles

which were given reference numbers A 4588876 (the 'A' Sample) and B 4588876 (the B Sample) in accordance with the prescribed WADA procedures (Doping Control Form dated
21st September 2021, **JW1**).

17. Both Samples were transported to the South African Doping Control Laboratory Bloemfontein a WADA accredited Anti- Doping Laboratory in South Africa (hereafter the Laboratory). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding (AAF) for the presence of a prohibited substance 19-Norandestrone (the Test Report dated 22nd November 2021, **JW2**).
18. The findings were communicated to the Athlete by Japhter K.
Rugut EBS, ADAK's Chief Executive Officer through Notice of Charge and Mandatory Provisional Suspension dated 30th November 2021 in which communication, the Athlete was offered an opportunity to provide an explanation for the same by 20th December 2021, (the Notice of Charge dated 30th November 2021, **JW3**).
19. The same letter also informed the Athlete of her right to
request for analysis of her B Sample; and other avenues for sanction reduction including Elimination of the Period of Ineligibility where there is No Fault or Negligence, Reduction of the Period of Ineligibility based on No Significant Fault or Negligence, Substantial Assistance in Discovering or

Establishing Code Violations, Results Management Agreements and Case Resolution Agreements. The Athlete was given until 20th December 2021 to respond and request for a hearing if she so desired.

20. The Applicant averred that the Athlete denied the charges and responded to the ADRV Notice vide a letter dated 4th January 2022 wherein she stated that on 25th August 2021 and subsequently on 30th August 2021, she visited a local hospital nursing severe pain to her ankle and knee which were also swollen. The Athlete asserted that she was treated and prescribed medication by a doctor and insisted no performance enhancing substances were used in the course of her treatment.
21. The Applicant stated that the Athlete's AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at the WA for the substance in question and there was no apparent departure from the WA Anti-Doping Regulations or from WADA International Standard for Laboratories which may have caused the Adverse Analytical Finding (AAF).
22. The Athlete did not request a Sample B analysis thus waiving her right to the same under WA Rule 37.5 and confirmed that the results would be the same with those of Sample A in any event, the Applicant contended.
23. After evaluating the response and conduct of the Athlete, the Applicant stated no plausible explanation has been advanced

for the AAF. Therefore, it was deemed to constitute an ADRV. The Applicant subsequently preferred the charge of Presence of a prohibited substance 19-Norandrosterone in the Athlete's Sample and referred it to the Tribunal for determination.

24. The burden of proving the ADRV to the comfortable satisfaction of the hearing panel under Article 3 of ADAK ADR/ WADC Rules fell on the Applicant, Counsel submitted.

25. The Applicant relied on various ADAK ADR/WADC articles namely the presumptions under Article 3.2, he quoted the role and responsibilities under Article 22.1 and stated the Athlete was under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping rules.

26. It was the Applicant's position that the Athlete in her evidence in chief made the following admissions:

a) Admitted to having been tested severally since 2017.

b) Admitted to not confirming and crosschecking the ingredients of the medication before ingesting them.

c) Admitted to not indicating any medication she had been using in the DCF.

d) Admitted to never attending any Anti-Doping workshop or education program.

e) Admitted to never taking time to do any research on the fight against doping.

f) Finally, Applicant stated that the Athlete denied that she negligently or intentionally consumed any prohibited

substance with the intention of enhancing her performance.

27. Applicant reiterated that the ADRV involved a non-Specified substance which attracted a period of ineligibility of four (4) years. Stating that where use/presence of the prohibited substance had been demonstrated it was not necessary that intent, fault, negligence or knowing on the Athlete's part be demonstrated to establish an ADRV, shifting as under Article 10.2.1 the burden to the Athlete to demonstrate no fault, negligence or intention to entitle her to a reduction of sanction.

28. The Applicant flagged out Rule 40.3 of the WA Rules in regard to the term intentional and CAS 2017/A/4962 WADA v. Comitao Permannente Anti-Doping San Marino NADO (CPA) & Karim Gharbi regarding Athlete's burden of establishing how the substance entered her body to demonstrate unintentionality. He referred the panel to strict liability rule in various CAS Awards. In regard to origin the Applicant relied on CAS 2016/A/4534 Maurico Fiol Villanueva v. Federation Internationale de Natation (FINA) Par.36 (i).

29. The Applicant submitted that the Athlete had a personal duty to ensure that no prohibited substance entered her body quoting Article 2.1.1 ADAK ADR/WADC and CAS 2012/A/5317 Aleksei Medvedev v. Russian Anti-Doping Agency (RUSADA) in regard to 'utmost caution'. CAS 2016/A/4676 Arijan Ademi v.

Union of European Football Associations (UEFA) referred the panel to issue of No Significant Fault/Negligence.

30. The onus was on the Athlete to ensure that she did not ingest medication or supplements in a careless manner the Applicant stressed; that based on her vast experience and engaging in numerous doping control processes she ought to have taken measures to ensure that whatever she ingested did not contain and prohibited substances. On knowledge the Applicant submitted that ignorance was no excuse.

31. Regarding sanctions the Applicant submitted that an ADRV under Article 2.1 & Article 10.2.1 ADAK ADR/WADC provided for a regular sanction of four-year period of ineligibility where the ADRV involved a specified substance "*and the agency … can establish that the ADRV was intentional*", adding 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 was 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 and 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* concluding that the maximum sanction of four (4) years ought to be imposed as no plausible explanation was advanced for the AAF.

ii. Athlete's Submissions

32. The Athlete, represented by Mr. Muhuyu, filed the Athlete's Response to the charge, Statement and Written Submissions all dated 10th May 2022, which she intended to rely on in her defence against the charge.
33. On burdens of proof the Athlete relied on Article 3.1 of ADAK ADR 2020.
34. The Athlete submitted that by time she received the letter on 31st December 2021, the time limit given vide Par. 5.2 of the Applicant's ADRV Notice dated 30th November 2021 to give an explanation, had already lapsed on 20th December 2021.
35. Further, the Athlete claimed that she was denied the opportunity to request for analysis of B Sample which may have altered the outcome of the AAF from the analyzed A Sample.
36. It was the Athlete's assertion that she was denied the benefit of the Applicant's internal dispute resolution mechanism and/ or review which, inevitably led her to being condemned to suffer Mandatory Provisional Suspension and the charge which could have been averted had she been given adequate notice.
37. In her submissions the Athlete stated that she did not deny the AAF as alleged by the Applicant but rather that on or about 25th August 2021 she visited Ololua Dispensary, Ngong to see a doctor as her knee and ankle were swollen and she

was experiencing excruciating pain to a point where she could not train.

38. Indicating to the doctor that she was an athlete, he examined her and then prescribed COX-B 200mg injection, Pregabalin 300mg tablets and Volini gel for application on affected areas. The doctor advised her that she showed symptoms common with patients afflicted by arthritis and cautioned her to reduce strenuous exercises to enable proper healing.

39. It was subsequent to service by the Applicant with the charge that she was informed the constitution of the drugs prescribed to her, namely COX-B, contained nondralene (19- norandrosterone) a prohibited substance the Athlete asserted.

40. Queried at cross examination whether she had read about the drugs prescribed to her the Athlete testified that she relied on the doctor. She also testified that education- wise she attended up to Secondary school attaining a mean E grade in the Kenya Certificate of Secondary Education.

41. It was the Athlete's submission that there was no reason for her, a secondary school graduate, to interrogate the prescription by the doctor having notified him she was an athlete. She argued further that had she interrogated the doctor she would have been handicapped and out of her depth considering her level of education and attainment in KCSE, granted medicine and pharmacy are specialized

professions that only those who have studied and passed well are suited to interrogate a drug's composition.

42. Accordingly, the Athlete stated that she was then and is still disadvantaged by the fact that to date she has never received education by ADAK or any organization on anti-doping. She testified that other than being tested from 2017/18/19/20 and 2021, she was in high school where they were given water bottles by ADAK. During cross examination she said she was not aware that ADAK website existed.

43. Consequently, the Athlete submitted that she could not have known what the drug's composition was and could only rely on the doctor's skill and expertise, therefore she insisted that she had discharged her duty to ensure that no prohibited substance entered her body within the limits of her abilities.

44. Further, during cross examination when asked if she had informed the ADAK officials if she'd recently taken medication, she answered in the negative as she was not aware that she ought to have disclosed the fact adding that she was not asked about the same. It was her argument that if she had been educated, she would have automatically divulged the information.

45. The Athlete also asserted that when she visited the hospital she was not in competition and that the drugs were not meant to enhance her performance. Further she submitted that, when she was taking the impugned medication her last race was in January 2021 and she had no upcoming races in

2022; the fact of no races coupled with doctor's notes dated 28th December 2021 proved her medical condition at the time and was proof that the medication was not meant for performance enhancement.

46. On issue of intentionality and origin the Athlete referred the panel to Article 10.2.3 of ADAK ADR and also CAS 2016/A/4377 at paras51-52.

47. The Athlete asserted that she did not engage in conduct which she knew constituted an ADRV since she outrightly informed the doctor of her profession and depended on the knowledge and skill of the doctor as the professional well- versed in matters medicine.

48. Regarding period of ineligibility the Athlete submitted that she had established the doping was not intentional hence Article 10.2.2 should apply.

49. The Athlete further submitted that it was notable that the reliefs sought by Applicant, *prayer (a) was as per Article 10.2.2 though* the Applicant *erroneously stated that the sanction is four (4) years of ineligibility and in prayer (b) had sought that in the alternative to prayer (a) if ADAK can demonstrate intention, then the athlete should be slapped with 4- year period of ineligibility as per Article 10.2.1.2, we submit that the foregoing, particularly prayer (a) shows that even ADAK is convinced of the lack of intention.*

50. On No Fault or No Negligence and No Significant Fault or Negligence the Athlete relied on their definition in ADAK ADR

submitting that she subjected herself to the doctor after giving sufficient information including her being an athlete and she could not have known or suspected that the doctor would prescribe drugs that were in the prohibited list. The Athlete averred that she exercised caution by informing the doctor of her profession and she reasonably expected him to utilize his knowledge as a doctor trained to treat different types of patients to give her the appropriate treatment in the circumstances.

51. Further, regarding Elimination of Period of Ineligibility the Athlete relied on ADAK ADR 2020 Article10.5 and CAS 2008/A/1515 at para.116; she submitted that she had produced documentary evidence which was not challenged by ADAK and which evidence corroborated her defence showing that more likely the AAF was a result of the prescribed drugs and not by any other means

52. It was the Athlete's assertion that a four (4) year suspension or two (2) year suspension was not proportional, fair or just in regard to her violation; she pointed the panel to Ferdinand Omanyala v Athletics Kenya [2019] eKLR at para. 84 & 87 submitting that the doping violation being unintentional and the Athlete having shown that she bears No Fault or Negligence in the circumstances of her case, then sanctions meted against her should be reduced or eliminated altogether in order that the said sanctions are within the ambit of proportionality, fairness and justice.

53. Furthermore, the Athlete reiterated that her charge *would have been avoided had the Applicant served her with the ADRV dated 30th November 2021 and thus affected her right to enjoy the benefit of application of law to her prejudice. There was a chance that the matter would have been resolved internally by ADAK had they considered her response vide the letter dated 4th January 2022 and the documentary evidence showing proof of the medical treatment*.

54. Additionally, the Athlete submitted that she had been tested since 2017 without any AAF and that the only AAF against her which is the subject of matter at hand was unintentional hence she deserved a reduction or elimination of suspension period.

55. Conclusively, the Athlete prayed if the Tribunal is constrained to sanction, it considers the period served under period of suspension since 20th December 2021 and the same be credited against the sanction.

D. JURISDICTION

56. The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following laws:

a. Sports Act, No. 25 of 2013 under section 58.

b. Anti-Doping Act, No. 5 of 2016 under section 31(a) and (b). c. Anti-Doping Rules under Article 8.

57. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

E. APPLICABLE RULES

58. Section 31 (2) of the Anti-Doping Act provides that:

> **the tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations 2021, the Sports Act, the WADA Code 2021, and International Standards established under it, the UNESCO Convention Against Doping in Sports amongst other legal resources, when making its determination.**

F. MERITS

i. Did the Athlete commit the charged anti-doping rule violation?

59. The Applicant's prosecution is based on the charge of **Presence of a prohibited substance *19— Norandoresterone* in the athlete's sample** as outline at paragraph 10 of its charge.

60. Article 2.1 of the ADAK ADR and, similarly Article 2.1 of the Code provide the charge to be determined as follows:

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

61. The Tribunal notes that the Athlete stated that by time she received the letter on 31st December 2021, the time limit

given vide Par. 5.2 of the Applicant's ADRV Notice dated 30th November 2021 to give an explanation had already lapsed on 20th December 2021.

62. As submitted for the Athlete and confirmed at the hearing, the Athlete was a member of staff at a national corrections body. She also carried out her athletics career under Athletics Kenya (AK) and trained at Ngong area known to host many AK athletes. The Applicant offered no explanation why its notice may have not reached the Athlete timeously.

63. Further, perusal of the relevant Test Report attached by the Applicant indicates that the type of test was Out-Competition which information is not set out in the charge document. The 21-Sep-2021 Out-of- competition test was carried out by the Applicant's Agency. An out-of-competition tests presupposes that the test agency knows who and where to locate an intended athlete in order to achieve the test(s).

64. Considering the Athlete was tested each year (from 2017), though we were not told how many different Result Management Authorities she had been tested by thus far, we duly note that in the specific circumstances of this matter, it was uncharacteristic that the Applicant's notification to the Athlete required by Article 7.2 which, moreover, it effected via WhatsApp was served to the Athlete late.

65. Further, the Athlete claimed that she was denied the opportunity to request for analysis of B Sample which may

have altered the outcome of the AAF from the analyzed A Sample.

66. The Tribunal shall conduct its analysis of the merits on the premise that the B Sample was waived by the Athlete as perusing her first hand rendered response, we note that she did not insist on the B Sample analysis and proceeded to formulate her explanation and subsequent defence responses based on the A Sample.

67. It was also the Athlete's assertion that she was denied the benefit of the Applicant's internal dispute resolution mechanism and/or review which, inevitably, led her to being condemned to suffer Mandatory Provisional Suspension and the charge which could have been averted had she been given adequate notice. Again, the Tribunal will restrict itself to the matter of the ADRV, the Athlete's explanation for AAF predicated in para 5.2.1 of the Applicant's Notice being apparently late and the Mandatory Provisional Suspension having commenced. In any case it is noted under Code Article 7.4.1 that;

> '*[…] when an Adverse Analytical Finding or Adverse Passport Finding (upon completion of the Adverse Passport Finding review process) is received for a Prohibited Substance or a Prohibited Method, other than a Specified Substance or Specified Method, a Provisional Suspension shall be imposed promptly upon*

or after the review and notification required by Article 7.2'

Additionally, the Athlete did not canvass matter of the Mandatory Provisional Suspension further.

68. To that extent, the Tribunal notes that there is no dispute between the Athlete and the Applicant about the following matters:

(a) A urine Sample was collected on 21st September 2021 by Applicant;

(b) The Athlete received the ADRV Notice dated 30th November 2021 from the Applicant on 31st December 2021 via WhatsApp;

(c) That the Athlete visited Ololua Hospital and filed medical evidence together with her explanation;

(d) That a prohibited substance 19-norandrosterone was present in the Athlete's body/ there was an AAF;

(e) The Athlete had been tested severally since 2017.

69. The Tribunal further notes that the following facts are in dispute:

(a) The Athlete denied negligently or intentionally consuming the prohibited substance;

(b) That she did not educate herself on anti-doping programs and policies;

(c) Athlete failed to concretely establish origin of prohibited substance in her urine.

70. Article 3 of the ADAK ADR provides that the Applicant shall have the burden of establishing the anti-doping rule violation. The standard of proof employed by the Applicant herein shall be to the comfortable satisfaction of the panel.

71. If it is determined that the Applicant has satisfactorily proved the charge as against the Applicant, the burden of proof shall shift to the Athlete to satisfy the Tribunal on a balance of probabilities that the violation did not occur because of her intention, fault, or negligence.

72. Article 3.2 of the ADAK ADR and the Code provides that facts related to the anti-doping rule violations may be established by any reliable means, including admissions, the credible testimony of third persons, and reliable documentary evidence.

73. Article 3.2.3 of the ADAK ADR and the Code provides that the departures from any other International Standard or other anti-doping rule or policy shall not invalidate analytical findings or other evidence of an anti-doping rule violation and shall not constitute a defense to an anti-doping rule violation.

> No. *22 [Comment to Article 3.2.3: Departures from an International Standard or other rule unrelated to Sample collection or handling, Adverse Passport Finding, or Athlete notification relating to whereabouts failure or B Sample opening – e.g., the International Standard for Education, International Standard for the Protection of Privacy and Personal Information or*

International Standard for Therapeutic Use Exemptions – may result in compliance proceedings by WADA but are not a defense in an anti-doping rule violation proceeding and are not relevant on the issue of whether the Athlete committed an anti-doping rule violation. Similarly, an Anti-Doping Organization's violation of the document referenced in Article 20.7.7 shall not constitute a defense to an anti-doping rule violation.]

74. It is therefore clear from the rules provided that where there is a departure from the rules or international standards by the Applicant herein regarding Athlete's ADRV Notice, such a departure cannot form part of the Athlete's defense nor is it relevant to the determination of whether the Athlete committed the violation.

75. Further, the Athlete admitted that subsequent to being served by the Applicant the charge, she was informed of the constitution of the drugs prescribed to her and got to know that COX-B contained nandrolone also known as 19- norandrosterone which is a prohibited substance. Therefore, by her own admission the Athlete admitted that she had ingested the prohibited substance hence the Applicant has to the comfortable satisfaction of the panel established occurrence of an ADRV by the Athlete.

ii. Was the violation committed by the Athlete intentional?

76. Article 3.1 of the ADAK ADR and the Code shifts the burden to the Athlete to prove, on a balance of probabilities that the violation committed was not intentional.

77. Article 10.2.3 of the Code provides that 'intentional' should be construed as to:

> *Identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*

78. In a similar vein, the WADA Anti-Doping Organizations Reference Guide under section 10.1 provides that:

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

79. Consequently, in determining whether there was intention to commit the violation, there are two aspects to be reviewed:

    a. Whether the Athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV; and
    b. Whether she manifestly disregarded the risk.

80. Apparently about four days after being confronted by the Applicant's ADRV Notice, the Athlete penned down her denial/ explanation and we shall set down her letter dated 4.1.2022 verbatim:

'To C.E.O ADAK

REF: ANTI-DOPIN RULE VIOLATION NOTICE

"*I write to confirm that I received the letter from ADAK on 12.31.2021. I want to state as follows, I denie the charges because on 8/25/2021 I went to hospital with severe pains on my ankle and knee and much swollen. After a long period of staying in house with this problem I decided to go for short long run very easy to see whether or feel the response of this problem after periods of seeing physical how it response. I falled down after I was getting of the path I was going to where cased me extreeim pains and extrem swollen and decided to go to hospital from that point where I took b— (illegible)- from a friend and went to hospital. I explain everthing to the doctor and told doctor am an athlete. Therefore he treated me according and level of his knowledge with the medication, where I have attached the doctors report and medication.*

I did not used this substance to enhance performance but for medication porposes. I am clean athlete and have been tested since 2017, 2018, 2019 so many times and haved been tested all negative

Please assist me in this matter please.

Jackline Wambui

Signed"

81. The Athlete has throughout this case consistently relied on her hand written explanation above and medical documents she adduced alongside it.
82. Further, relying on CAS 2016/A/4377 the Athlete submitted that *'51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning (*Article 10.2.3*), and it naturally follows that the athlete must also establish how the substance entered her body. The Athlete is required to prove the allegations on the "balance of probability". This standard, long established in CAS jurisprudence, 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."*
83. Regarding the issue of origin, the Applicant submitted that the Athlete had indeed provided medical prescription notes which it was in the process of authenticating hence the origin of the prohibited substance was yet to be established.
84. Subsequently, the Tribunal was on 1st September, 2022 furnished by the Applicant correspondence from the medical facility (Ololua Hospital), confirming the authenticity of the medical records and treatment notes presented before the Tribunal by the Athlete which, the panel herein adjudged brought the contestation over the matter of origin to rest.

85. The Athlete in her explanation said after staying long off competition, (since her last race in January 2021) because of severe pains in her ankle and knee she decided to do an easy run during which she fell and apparently aggravated her injuries requiring medical intervention. As stated by the Applicant, no Therapeutic Use Exemption (TUE) was recorded with her IF/WA (and the Applicant's Agency) which the panel adjudged was yet another omission by the Athlete.

86. According to WADA 2021 Prohibited List, 19-Norandrostenediol /19-Norandrostenedione is non-Specified substance prohibited at all times, (in and out of competition). Therefore, the Athlete should not have utilized the substance even out of competition, or at least not without a valid TUE.

87. It may be argued that the Athlete telling the medical person in the 'recognized' or bona fide hospital that she was an athlete acted as an alert/notice against being treated with prohibited substances, however, let it not be in contention that it is not; WADC'/ADAK ADR's Article 2.1.1 clearly states that *'It is the **Athletes'** personal duty to ensure that no **Prohibited Substance** enters their bodies. **Athletes** are responsible for any **Prohibited Substance** or its **Metabolites** or **Markers** found to be present in their **Samples**.*' In other words, even if the Athlete delegated her responsibility to the doctor, she would still be held totally responsible for any resultant ADRV by the Policy.

88. Yet in the entirety of the Athlete's written explanation, it is clear the issuer of treatment still injected her with a proscribed substance and in subsequent medical notes advised the Athlete to avoid strenuous exercises, the latter part being indication the said doctor understood the Athlete's pre-treatment information that she was an athlete. Why the doctor prescribed and/or administered the proscribed medication to an athlete who explained to him that she was one remains a mystery for now.

89. In highlighting the behavior of aforementioned doctor, it is not the panel's intention to excuse the Athlete for not being fully versed with her anti-doping knowledge despite having been tested from 2017-2021 or even excusing her obviously lower educational attainments in formal school but to gauge her intent to deliberately engage in the misconduct as defined in Article 10.2.3; in advocating for herself with the doctor, we gauge that she knew there was medication he should not use to treat her. Exactly which was the proscribed medication she said 'she could only rely on the doctor's skill and expertise'.

90. Consequently, on the totality of the evidence and all the circumstances outlined in this case we do not clearly identify that the manifest disregard of the ADRV risk by the Athlete was present. On the contrary the now authenticated medical documents corroborated her medical wellness objective explanation and also, she established origin of the prohibited substance hence disproved intention and/or proved on a

balance of probabilities that she did not, or did not attempt to cheat; the Panel in Iannone ***(CAS 2020/A/6978)*** reasoned as follows*: "134. […] it is clear that the athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent (…)*

G. SANCTIONS

91. The Applicant prays in his charge, under paragraph F, that the Athlete, should be found to have committed a violation and be sanctioned to the maximum period provided of 4 years as provided by ADAK ADR Article 10.2.2. Applicant adds that in the alternative, if ADAK can prove the ADRV was intentional then the athlete be sanctioned to a four-year Ineligibility under ADAK ADR Article 10.2.1.2; this panel hereby reiterates that the burden for proving lack of intention was on the Athlete for violation of Article 2.1 since her case involved a non-Specified substance.
92. Further, in their written submissions the Applicant urges the panel to consider the sanction provided for in Article 10.3.3 of ADAK ADR and sanction the athlete to 4 years ineligibility. Note: we have crossed-checked with the Applicant's ADR

Rules 2020 and noted that Article 10.3.3 provided for violations of Article 2.7 or 2.8. Resultantly, we are in agreement with the Athlete's observation that the Applicant's prayers have been erroneously stated in both their charge document and written submissions.

93. The ADAK ADR provides under Article 10.2 that the period of *Ineligibility* for a violation of Article **2.1**, 2.2 or 2.6 shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

> *Article 10.2.1: The period of Ineligibility*, subject to Article 10.2.4 *shall be four (4) years where:*
>
> *Article 10.2.1.1 The Anti-Doping rule violation does not involve a* ***Specified Substance*** *or a Specified Method, unless the* ***Athlete*** *or other Person can establish that the Anti-Doping rule violation was not intentional.*
>
> ....
>
> *Article 10.2.2: If Article 10.2.1 does not apply,* subject to Article 10.2.4.1, *the period of* ***Ineligibility*** *shall be two (2) years.*

94. Article 10.5 provides that:

> *If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*

95. Article 10.6.2 further provides:

If an Athlete or other Person establishes in an individual case where Article 10.6.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.7, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable.

96. Consequently, it is incumbent on the Tribunal to analyze whether the Athlete has met any of the provisions essential for mitigating the available sanction.

97. By the time the Athlete wrote her explanation to the Applicant, she seemed to have diligently tracked down where the prohibited substance could have arisen from and supplied the information to the Applicant. At the hospital during treatment the same kind of diligence, this time in the form of

'utmost caution' was expected of her by the Policy. Merely subjecting herself to the doctor after giving sufficient information about her being an athlete as she argued in her submissions, would be to barely scratch the surface in terms of what was expected of her by the Policy.

98. The Tribunal already flagged out one major omission by the Athlete which was her failure to shield herself from this ADRV by seeking a TUE if it was absolutely necessary for her to use a prohibited substance. Her painful limb(s) had pained her

from her last race which she testified was around January 2021 and she finally sought medical attention around August 2021 which in our opinion was sufficient period to process her TUE with the Applicant's Agency. Therefore, No Fault, No Negligence cannot accrue to the Athlete for overlooking such a vital aspect of the Policy which is put in place to enable athletes benefit from medical support when their health requirements so demand.

99. Regarding any mitigation on No Significant Fault/Negligence, ADAK ADR 2020 Article 20 under the following sub articles provides that the Athlete has a responsibility to be:

> *20.1 To be knowledgeable of and comply with these Anti-Doping Rules.*
> *20.2 To be available for Sample collection at all times.*
> *20.3 To take responsibility, in the context of Anti- Doping, for what they ingest and Use.*
> *20.4 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.*
> *20.5 To disclose to ADAK and their International Federation any decision by a non-Signatory finding that the Athlete committed an Anti-Doping rule violation within the previous ten (10) years.*
> *20.6 To cooperate with Anti-Doping Organizations investigating Anti-Doping rule violations.*

100. In a decision of this Tribunal *SDTADK Appeal No. 10 of 2019 ADAK v Henry Kosgei*, the Tribunal noted that '*the Athlete's ignorance of the anti-doping rules was not an adequate*

shield, despite him being notified of the doping program for the very first time'.

101. It was further indicated in *CAS 2008/A/1488 P v International Tennis Federation* that:

> *'…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.'*

102. From the foregoing, the panel is not persuaded by the Athlete's pleadings that her lack of doping education mitigates her significant negligent handling of circumstance that led to her occasioning the ADRV.

i. Credit for time served under the provisional suspension

103. This finding notwithstanding, Article 10.13.2 provides that credit may be awarded for a provisional period of suspension served by the Athlete as against the period of ineligibility they are sanctioned for.

104. Consequently, from the Applicant's notice of ADRV issued on 1st March 2021, the Athlete was to be provisionally suspended from 20th December 2021 from all competitions, events or other activities authorized, convened or organized by any other WADA compliant body. The Athlete's claim to have attended her last competition in January 2021 was not

controverted by Applicant therefore no results arose that required to be disqualified.

105. In *CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Comission (JADCO),* the Tribunal intimated that an athlete can only receive credit for the period of the provisional suspension insofar as that provisional suspension was 'respected'.

106. It was the Athlete's submission which was not challenged by the Applicant that in the event the Tribunal was constrained to sanction, she prayed that the Tribunal consider the period she had served under suspension since 20th December 2021. With no evidence to the contrary, that the Athlete has respected the provisional suspension that began on 20th December 2021 at 5.00 pm she shall, thereby be eligible for a credit on the sanction ultimately issued by the Tribunal.

107. The Tribunal also noted that this was the Athlete's first ADRV.

H. DECISION

108. Consequent to the discussion on merits of this case, the Tribunal finds:

a. The applicable period of ineligibility of two (2) years is hereby upheld;

b. The credit for provisional suspension served since 20th December 2021 from 5.00 pm is upheld;

c. The period of ineligibility shall be from the date of this decision for fourteen (14) months and three (3) weeks;

d. Each party shall bear its own costs;

e. The right of appeal is provided for under Article 13 of the ADAK ADR and the Code.

Dated at Nairobi this 29th day of *September* 2022

Mrs. J Njeri Onyango, FCI Arb, Chairperson

Mr. Peter Ochieng, Member

Ms. Mary N. Kimani, Member