

REPUBLIC OF KENYA



THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 20 OF 2022

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

VERSUS

GEORGINA JEPKIRUI RONO..... ATHLETE

DECISION

Panel:

J. Njeri Onyango FCI Arb – Panel Chair
Gabriel Ouko – Member
Mary N. Kimani – Member

Appearances:

Mr. Bildad Rogoncho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant.

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

Contents

A. Introduction	3
i. Parties	3
ii. Factual Background	3
B. Hearing on 1st December 2022 – Ex parte	5
C. Parties’ Submissions	11
i. The Applicant’s Submissions	11
ii. Athlete’s Submissions	15
D. JURISDICTION	16
E. APPLICABLE RULES	16
F. MERITS	17
i. Did the Athlete commit the charged Anti-Doping rule violation?	17
ii. Was the violation committed by the Athlete intentional?	19
G. SANCTIONS	22
i. Credit for time served under the provisional suspension	24
H. DECISION	25

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, long distance runner, (hereinafter referred to as **the Athlete**).

ii. Factual Background

3. Upon reading the Notice to Charge dated 5th September 2022 presented to the Tribunal on 6th September 2022 by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in the order dated 29th September 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 14th October 2022;
 - ii. The panel constituted to hear this matter shall be:
 - a. J. Njeri Onyango (Mrs.).
 - b. Mary N. Kimani.
 - c. Gabriel Ouko.
 - iii. The matter shall be mentioned on 19th October 2022 to confirm compliance and for further directions.
4. The matter came up for mention on 19th October 2022 where Mr. Rogoncho appeared for the Applicant. The Athlete was not present. Mr. Rogoncho informed the Tribunal that Adak was having difficulty in serving the athlete although since this was the first mention, he requested the Athlete be given the benefit of doubt as Adak tried to serve her again.

5. The Tribunal on 19th October 2022 ordered that the matter shall be mentioned on 3rd November 2022 to confirm whether service of documents and hearing Notice had been effected.
6. During the mention on 3rd November 2022 Mr. Rogoncho for the Applicant was in attendance while there was no appearance for the Respondent Athlete.
7. Mr. Rogoncho stated that the Athlete was charged with evading and since she was notified she has been avoiding contact with ADAK. He said she has been avoiding and refusing to participate in the proceedings thus he prayed for a hearing date.
8. Upon mention of this matter on 3rd November 2011 the Tribunal directed and ordered that the matter be set for hearing on 24th November 2022 at 2pm.
9. On 24th November 2022 when the matter came for Ex-Parte virtual hearing on the request of Mr. Rogoncho and taking note of the circumstances namely an unexpected major technological hitch which affected network, making communication difficult, the matter was postponed to 1st December 2022. Mr. Rogoncho was directed to provide list and order of calling witnesses to the SDT Secretariat to facilitate admission when their turn came.
10. During the Ex-Parte hearing on 1st December 2022 the Applicant presented its case/witnesses against the Respondent/Athlete.
11. The Tribunal ordered that the matter be mentioned on 15th December 2022 to confirm filing of submissions by the Applicant and for further directions.
12. At the mention on 15th December 2022, the Applicant was represented while the Athlete was not present nor was she represented. Counsel for the Applicant confirmed that they had

filed their submissions on 14th December 2023 and requested a date for the decision. The Tribunal requested a soft copy of their submissions and directed that the decision be rendered on 26th January 2023.

B. Hearing on 1st December 2022 – Ex-parte

13. Mr. Rogoncho Counsel for the Applicant called five (5) Prosecution

Witnesses (PW) namely:

- (I) Mary Nyokabi Kairu (PW-1)
- (II) Patricia Nyiva Muli (PW-2)
- (III) Martin Nyongesa Wafula (PW-3)
- (IV) Peter Maseah Omwenga (PW-4)
- (V) Trizah Chemtai Too (PW-5)

Prosecution Witness 1.

14. PW-1 Mary Nyokabi Kairu was duly affirmed. The Panel was directed to Ms. Kairu's statement at Pg. 11 of an Investigation Report (paged 7 in Charge Document) which was dated 2nd August

2022 and filed at the Tribunal on 27th October 2022. There also was in form of evidence a Doping Control Form dated 27/10/2019 touching on the Respondent/Athlete. The witness statement was adopted as evidence in chief while the other documents were produced and admitted in evidence.

15. PW-1 said she was a senior testing officer who also doubled up as a DCO. She testified that she successfully took samples of the Respondent/Athlete at the Stanchart Marathon at Nyayo Stadium on 27th October 2019. It was an In-Competition testing and she took a urine and blood sample; therefore, she was in close proximity to the Athlete and can identify her. The chaperone

assisting PW-1 for the 27th October 2019 Stanchart Marathon mission was Patricia Nyiva Muli.

Prosecution Witness 2.

16. PW-2 Patricia Nyiva Muli preferred to communicate in Kiswahili language. She was duly affirmed. She stated that she was a trained Chaperone associated with ADAK. PW-2 confirmed that she was at Nyayo National Stadium on 27th October 2019 where ADAK conducted In- Competition testing, and also that the Respondent/Athlete herein was placed position number five (5) during that Stanchart Marathon. She said her instructions were to fetch the Athlete, fill the Notification Form found at Pg. 11 of the Charge Document after which she took the Athlete to the Lead DCO Mary Nyokabi Kairu, (PW1).
17. PW-2 confirmed that she had only one athlete to notify on that day and that she (PW-2) had been engaged in doping control tasks under ADAK since 2016.

Prosecution Witness 3.

18. PW-3 Martin Wafula Nyongesa was affirmed. He explained that he was a PE teacher at Loreto Matunda School and that he was also a DCO with ADAK.
19. The prosecution referred the panel to Pg. 12/13 of the Charge Document which was a Supplementary Report Form dated 23/09/2021 signed by PW-3 which was adopted. The Applicant's Counsel pointed out that there was an error in the date and requested it be corrected from 22nd September 2021 to read 29th September 2021. This request was allowed and amendment duly

effected. The witness stated that on this occasion, he was sent to collect a Sample from Georgina Jepkirui Rono. It would have been the first time he would be testing the Athlete.

20. PW-3 said he was given the Athlete's Whereabouts by ADAK as East View Estate but on getting to the house in issue they did not find the Respondent. A neighbor thereafter informed him that the Athlete had acquired a property, constructed a house thereon, and moved to her own house about 4km from a center known as Nangoi. He confirmed he was not successful in collecting her Sample on that date and consequently filed the Supplementary Report at Pgs. 12/13 of the Charge Document. He said he had been driven to the location by Peter Mwakazi who is a driver under ADAK employ.
21. Answering a query from the Panel, PW-3 said they were unable to trace the Athlete at her new residence. He stated that they made effort to trace the Athlete's new residence by following the neighbour's directions. The Athlete's new residence was pointed out to them by a Boda-Boda rider (motorcycle public transport). They proceeded there and a neighbor at the new place further directed them to the Athlete's house. They knocked on door and a man opened and identified the residence as that of the Athlete's by name. The man said he was the Athlete's brother and that the Athlete was away having gone to her child's school to handle a matter there, therefore the Out-of-Competition testing mission was not successful on that occasion.

Prosecution Witness 4.

22. PW-4 Peter Maseah Omwenga was duly affirmed. He stated that he was a member of staff at ADAK in the Human Resource department and also a DCO. He went to the residence of the Athlete utilizing her Whereabouts information but did not find her, instead he found a padlock securing the door. Therefore, he was not successful in collecting her Sample. His driver on the occasion was Ronald Amiani. The gentleman he found in the house said to be her brother (by name of Mathew Rono) said she was away. PW-4 then filled a Doping Control Form which is at Pg. 14 of the Charge Document which was adopted.
23. On 7th June 2022 PW-4 recorded a statement at Pg. 19 of the Charge Document which the panel duly adopted. The second time PW-4 went to conduct an Out-of-Competition test on the Athlete was on 27th May 2022 together with fellow Lead DCO Trizah Too. They were unsuccessful in collecting a Sample from the Athlete. PW-4 said Mary Nyokabi Kairu had issued him a typed Whereabouts note which guided the team on locating the Respondent's residence.

Prosecution Witness 5.

24. PW-5 Trizah Chemtai Too was duly affirmed. She stated that she was a teacher and also a DCO working under ADAK. She confirmed that on 27th May 2022 she was sent by ADAK as a lead DCO to collect a Sample from the Athlete Respondent herein, but she was not successful. She confirmed that the signed statement dated 7th June 2022 at Pg. 17 of the Charge Document was hers and prayed the same be adopted.

25. PW-5 stated that on the material day, having driven with her team to the location of the Respondent's residence, she elected to walk the last 200 or so meters to the Athlete's homestead for stealth purposes. She stated that on arrival at the Athlete's compound she saw people; in particular, there were 2 children seemingly of high school age and an adult male who was lying on a piece of sack spread next to a foot path. She testified that over and above being provided with description by Whereabouts note from ADAK, they also utilized Google Maps to locate the premises. Their driver Ronald Amiani had been to this location before so he knew the Athlete's house.
26. Additionally, a photo of the Athlete had been shared by Dennis Keitany, ADAK's Intelligence officer, (the said photo is at Pg. 15 of the Charge Document). PW-4 said she saw someone emerging from the out-doors washroom who matched the photo she had, and therefore she proceeded to greet her in mother tongue Kalenjin calling her by name 'Georgina'.
27. The Athlete, PW-5 said, showed recognition/response to the name, and she responded by saying, '*How do you know me and I don't know you*'. PW-5 said she invited the Athlete to sit down with her on a bench that was near the house, which the Athlete acquiesced. Upon sitting down, PW-5 identified herself to the Athlete and explained she was from ADAK, showed Athlete her identification documents and explained to the Respondent that she was required to provide her with a blood and urine Samples. The Athlete then abruptly stood up –after this Notification, which PW-5 said she had communicated in both Kiswahili and English languages. As the Athlete made for the house, PW-5 also stood up

and followed her. She told her she was not finished with the process and that she (Athlete) could not enter the house alone without PW-5 as she could not leave PW-5's sight as it was against the Doping Control rules. PW-5 stated that the Athlete then turned to walk towards the gate just as her colleague Peter was arriving in the vehicle. She clarified that upon sighting and making contact with the Athlete, she has sent a text to her colleague requesting him to join her. Peter was therefore arriving in response to that text.

28. Next PW-5 tried to signal to Peter to take the Athlete's photo but Peter did not take the cue in time; meanwhile the Athlete, exhibiting signs of discomfiture, changed direction and hurried past a detached kitchen, walking briskly. Peter only succeeded in taking a photo of her back side as she went past the house and disappeared into the farm. PW-5 said she did not fill the Doping Control/ Supplementary Report Form as Peter was the one holding the documents in the car and that the Athlete bolted off before PW-5 could get her to sign the Notification document.
29. PW-5 confirmed that the person she conversed with matched the photo in her possession provided by ADAK i.e. that of a light skinned lady with many spots on the face. Asked if she exhibited a threatening demeanor, PW-5 said she did not and additionally the Athlete did not deny Georgina to be her name during their brief encounter. PW-5 also said she believed the person resting on the sack could overhear their (hers & Athlete's) conversation though he did not interject to correct the name. The man lying on the sack eventually volunteered to Peter that '*this is not Georgina but rather Janet*'. PW-5 said that at some point the Athlete had asked

Mathew, the man on sack, ‘*What do these people want*’ in Kalenjin language but the man did not respond.

30. The man (Mathew) went into the farm twice to supposedly try to fetch the Athlete but returned alone. While they waited for about 20 minutes to see if the Athlete would return PW-5 said the man (Mathew) informed them that he was once an athlete. PW-5 said in her own estimation, after the Athlete perused her (PW-5’s) documentation, she had understood why the ADAK team was at her homestead.
31. Counsel for Applicant told the panel that the Athlete stopped picking the Applicant’s calls, eventually blocking their number. He also informed the panel that ADAK had made the decision to collect the samples from the Athlete after receiving intelligence information that the Athlete was doping. The panel also requested the Applicant’s Counsel for more details regarding the Athlete’s Whereabouts status as held in ADAK records.

C. Parties’ Submissions

i. **The Applicant’s Submissions**

32. The Applicant adopted and owned its charge documents dated 25th October 2022 and the annexures thereto.
33. The Applicant submitted that the Athlete was a National-Level- Athlete, hence the World Athletics (hereinafter WA) Competition Rules, WA Anti-Doping Regulations, the World Anti-Doping Code (hereinafter WADC) and the Anti-Doping Agency of Kenya Anti- Doping Rules (hereinafter ADAK ADR) applied to her. The Applicant charged her with the Anti-Doping Rule Violation of Evading,

Refusing or Failing to Submit to Sample Collection by an athlete contrary to the provisions of Article 2.3 of ADAK Anti-Doping Rules.

- 34.** Further the Applicant said that when the matter was set down for hearing the Athlete deliberately avoided communication with ADAK via her known telephone contact thus failed to appear and participate in this matter.
- 35.** The Applicant submitted that on 27th May 2022, when an ADAK Doping Control Officer sufficiently notified the Athlete that she was to undergo a doping control process, she deliberately and adamantly walked away from the scene and evaded, refused and failed to provide her sample for testing which failure to submit to sample collection resulted to the commission of an Anti-Doping Rule Violation ('ADRV') of Evading, Refusing or Failing to Submit to Sample Collection under Article 2.3 of the WADA Code (2021).
- 36.** The finding of an ADRV was communicated to the Athlete by Sarah I. Shibusse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 18th August 2022. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 8th September 2022 to which the Applicant said the Athlete gave no response.
- 37.** After evaluation by the Applicant of the Athlete's response and conduct, it deemed it an ADRV and referred the matter to the Sports Disputes Tribunal for determination.
- 38.** It was the Applicant's submission that under Article 3 of the ADAK ADR and WADC, the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel and that the presumptions at Article 3.2 were applicable.

39. The Applicant submitted that under Article 22.1 the Athlete had 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...
- f. To cooperate with Anti-Doping organizations investigating Anti-Doping rule violations;

In addition, the Athlete was also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping Rules.

40. The Applicant asserted that the Athlete intentionally evaded sample collection because when the Doping Control Officer in this case identified herself and informed the Athlete of her intention to collect her sample the respondent Athlete refused to relinquish her sample and perform the duties bestowed upon her under the Article 2.3 of the WADA code and instead she walked away, without providing any compelling justification. The Applicant relied on *CAS 2015/A/4063*, wherein the panel in paragraph 4 asserted that, “A refusal to submit to sample collection is presumed to have been committed intentionally and the burden of proving that the violation was not committed intentionally lies with the athlete. A refusal to submit to sample collection cannot be considered to have happened unintentionally when, after a first notification of the obligation to comply with out-of-competition control by the DCO in front of his house, the athlete returns into his/her house and fails to respond to repeated active attempts by the DCO to re- establish the contact”.

41. Further reliance was placed in “*CAS 2016/A/4631 William Brothers v. Fédération Internationale de Natation (FINA)*, the panel

provided that, “If an athlete can prove on the balance of probability that his/her act of refusing to submit to a collection of blood sample was compellingly justified, his/her rejection of the test will be excused. If it remained physically, hygienically and morally possible for the sample to be provided, despite objections by an athlete, the refusal to the test cannot be deemed to have been compellingly justified. Situations in which it is established that an athlete is deprived of his/her rationality and cognitive senses will, in most cases, be sufficient to ground the excuse of “compelling justification”.

- 42.** It was the Applicant’s submission that the Athlete had every intention to subvert the doping control process by not providing a sample. It argued that the Athlete since, the inception of this charge, hasn’t provided ADAK with a compelling justification as to why she couldn’t surrender her sample.
- 43.** The Applicant asserted that the Athlete *“cannot prove that on a balance of probabilities that her actions were compellingly justified. CAS jurisprudence in CAS 2013/A/3279 Viktor Troicki v. International Tennis Federation has established that if it remains “physically, hygienically and morally possible” for the sample to be provided and the athlete objects a refusal can’t be deemed to have been compellingly justified and thus an offense is deemed to have been committed under Article 2.3. 29.”*
- 44.** It was the Applicants submission that *“there are no physical, hygienic or moral circumstances which would have justified the Appellants refusal to provide her blood sample and thus she had every intention to cheat and subvert the doping control process”.*

45. On the issue of Negligence, it was the Applicant's contention that the Athlete "*failed to discharge her responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.*" Stating that, "*The Respondents conduct, namely walking away despite notification by the DCO of her intentions to collect a sample was grossly negligent. The respondent was only required to surrender her sample but instead failed to comply and ignored the risk that it might constitute an ADRV. This was a clear demonstration of her negligence.*"
46. Regarding knowledge, the Applicant's stand was that the Athlete was under a continuous duty and was at all times obligated by the WADA Code, to undergo testing when required to do so "*(refusal to give a sample, or the evasion or manipulation of sample-giving, constitutes an anti-doping rule violation)*", further arguing that "*the athlete has had a long and expansive career in athletics, and it is evident that she has had exposure to the campaign against doping in sports...The Applicant holds that an athlete competing in national and international competitions and who also knows that she is subject to doping controls because of his participation in the national and/or international competitions cannot simply assume as a general rule that she can refuse to submit to the doping control process without a compelling justification.*"
47. Submitting on sanction, the Applicant stated that "*for an ADRV under Article 2.3, evading sample collection, or without compelling justification, refusing or failing to submit to sample collection after notification as authorized in the World Anti-Doping Rules and ADAK rules provides for a sanction of a four-year period of ineligibility.*"

48. Applicant further submitted that, *“On its face Article 10.3.1 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 2.3. the athlete must: (i) Athlete can establish that the commission of the anti-doping rule violation was not intentional. If the athlete can prove that the violation wasn’t intentional the period of ineligibility shall be two-years. (ii), if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person’s degree of Fault.”*
49. It was the Applicant’s assertion that, *“In the present case, the Athlete intentionally refused to submit to sample collection without compelling justification, which excludes the possibility that she bears no fault or negligence as set out in Article 10.3.1.”* adding that *“The Respondent also bears the burden of establishing that the violation wasn’t committed intentionally. It’s the Applicants submission that the athlete failed to discharge her burden by a balance of probabilities and thus her conduct doesn’t warrant a finding of no significant fault or negligence.”*
50. The Applicant surmised that *“The Respondent also failed to show the mitigating or aggravating circumstances that hindered her from discharging her duties under Article 2.3 of the ADAK rules and WADA code. The athlete couldn’t assume that her refusal would be without consequence, thus we urge this panel to impose the full sanction of 4 years as the Respondent, didn’t meet the threshold set by ADAK rules and the WADC to warrant sanction reduction.”*

ii. Athlete's Submissions

51. The Athlete did not participate in these proceedings and thus did not make any submissions and/or make any appearance before the Tribunal despite numerous notices being served to her by the Applicant, (the Applicant filed the notices with the Tribunal). The Panel is also cognizant of the numerous adjournments recorded by the Tribunal from the time the matter was presented on 6th September 2022 right up to the time the matter was heard Ex-parte on 1st December 2022. Under the circumstances, the panel formed the view that the Respondent blocked efforts by the Respondent to reach her by telephone.

D. JURISDICTION

52. 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.

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

E. APPLICABLE RULES

54. 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:

Also relevant is *Code Article 2.3 Evading, Refusing or Failing to Submit to Sample Collection by an Athlete Evading Sample collection; or refusing or failing to submit to Sample collection without compelling justification after notification by a duly authorized Person. 11*

11 [Comment to Article 2.3: For example, it would be an anti-doping rule violation of “evading Sample collection” if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of “failing to submit to Sample collection” may be based on either intentional or negligent conduct of the Athlete, while “evading” or “refusing” Sample collection contemplates intentional conduct by the Athlete.]

F. MERITS

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

55. The Applicant’s prosecution is based on the charge of **Evading, Refusing or Failing to Submit to Sample Collection** as outlined at paragraph 9 of its charge document dated 25th October 2022.

56. Article 2.3 of the ADAK ADR and, similarly Article 2.3 of the Code provide the charge to be determined as follows:

‘2.3 Evading, Refusing or Failing to Submit to Sample Collection by an Athlete’

57. No response whatsoever was recorded from or for the Athlete records held at the Tribunal indicate. Did such a named Athlete exist? The Doping Control Form dated 27/10/2019 in the Charge Document presented by the Applicant and adopted and owned by their first witness PW-1 namely Mary Kairu indicates the existence of this Athlete. The fact of the existence of the Athlete is collaborated by the Applicant's 2nd witness PW-2 namely Patricia Nyiva Muli. Both PW-2 & 1 respectively testified that they physically chaperoned and tested the Athlete at an *In-Competition* mission at the Stanchart Marathon at Nyayo Stadium on 27th October 2019. PW-2 on cross-examination by the Panel said the Athlete emerged position number 5 although the overall results list of that particular event was not tabled by the Applicant for perusal by the Panel.
58. The Panel also requested from the Applicant that the existing details of the Athlete's ADAM's report, especially in regard to her *Whereabouts*, be summarized and availed to it in order to help establish her actual doping history and also firm up her identity but that information was not duly updated with the Tribunal when the Applicant filed their final submissions.
59. Nevertheless, the Panel is persuaded that a successful test was physically conducted by PW-1 & 2 who were verified as personnel from the Applicant's Agency, and this was as recorded in the DCF dated 27/10/2019 which does appear to be a legitimate WADA document. Therefore, we conclude that it was more probable than not that there existed such a person as the Athlete named in this matter.

60. Was the Athlete tested by PW-1 the same as the one said to be notified by PW-5? If it was the same person, then no doubt this was the Athlete in this matter. Minus the ADAM's Whereabouts Report of the Athlete, we cannot be sure whether this was her first *Out-of-Competition* testing, whereas with the information detailed in the DCF dated 27/10/2019, it was evident this was not the first time she was being sought out to be tested. We are not told though the total number of tests the Athlete had undergone by the time these proceedings were initiated.
61. A preponderance of testimonial evidence indicates the Athlete was the same athlete tested by PW-1 in 2019 and also notified by PW-5 in 2022. A clear photo showing her facial features was attached in the Applicant's Investigation Report (in the Charge Document) and the photo was said to be derived from an event she participated in at an international level. It was the same photo that the witnesses said had been distributed to them by ADAK.
62. PW-1, PW-2 and PW-5 testified that the photo signified a true likeness of the person they had physically encountered during their two separate missions. The photo incidentally was printed out by an intelligence officer whom we were not told if he had met the Athlete physically. The other person who saw the Athlete was PW-4 Peter Maseah Omwenga who confirmed that he had accompanied PW-5 on the 27th May 2022 mission as her assistant; in her oral evidence, PW-5 said she tried to signal to PW-4 to take a snap-shot of the Athlete but he did not take her cue in good time. The other person who could possibly have seen the Athlete was the driver – Ronald Amiani – who it was testified drove the car

into the Athlete's compound and whom PW-5 also referred to in her oral evidence but he was not called to the witness box.

63. The photo on record of the *Notification* shows a person's back as this person walks away, therefore, only the collaborating testimonies of the Applicant's witnesses put a face to the person asserted to be the Athlete and absent any contra version from or by the Athlete, the Panel accepts PW-5 Trizah Chemtai Too's testimony that indeed she notified the Athlete during an Out-of- Competition testing mission on 27th May 2022 but that the Athlete declined to take her test as evidenced by a photo of her apparently walking away. PW-5's assertions (she was confirmed as *a duly authorized Person*) are collaborated by testimonies of both PW-3 & 4 as outlined in Section B of this Decision. Thereby, the Applicant was able to prove the occurrence of an ADRV to the comfortable satisfaction of the Panel.

ii. **Was the violation committed by the Athlete intentional?**

64. WADC's & ADAK ADR's Article 10.3 'Ineligibility for Other Anti-Doping Rule Violations' provides:

The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.6 or 10.7 are applicable:

*10.3.1 For violations of **Article 2.3** or 2.5, the period of Ineligibility shall be four (4) years except:*

(i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years;

(ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person's degree of Fault; or

(iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault.

65. 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.

66. Especially applicable in this matter is the comment specific to Article 2.3 which elucidates as follows:

[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing.

A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.]

67. 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.
- 68.** There being not a shred of controverting evidence from the Athlete, the Panel accepts that the Athlete was finally physically located by the Applicant's authorized persons and after a brief conversation with the Lead DCO (PW-5), the Athlete, having been tested before and therefore knowing the importance of adherence to doping rules, consciously chose to walk away into the adjacent farm-field instead of cooperating and proceeding to give her Samples as required by the WADC. Such action is commensurate with 'evasion' which as per WADC Comment to Article 2.3 in regard to Sample collection '*contemplates intentional conduct by the Athlete.*'
- 69.** In the circumstances, as presented and supported by reliable circumstantial and documentary evidence adduced by the Applicant in this case, it is the considered view of this Panel that the Athlete was evading and/or refusing to submit to her Sample Collection and therefore committed the ADRV intentionally. That said, the Panel does not deem it necessary to assess whether the Athlete may have No Fault or Negligence in committing the ADRV, the rationale being that the threshold of establishing that an ADRV was not committed intentionally is lower than proving that an athlete had No Fault or Negligence in committing the ADRV.
- 70.** Additionally, the Panel finds that the above reasoning applies to No Significant Fault or Negligence.

G. SANCTIONS

71. The Applicant prayed for the maximum ban to be imposed on the Athlete stating thus:

“The Respondent also failed to show the mitigating or aggravating circumstances that hindered her from discharging her duties under Article 2.3 of the ADAK rules and WADA code. The athlete couldn’t assume that her refusal would be without consequence, thus we urge this panel to impose the full sanction of 4 years as the Respondent, didn’t meet the threshold set by ADAK rules and the WADAC to warrant sanction reduction.”

72. The WADC & ADAK ADR provides under Article 10.3 Ineligibility for Other Anti-Doping Rule Violations; that the period of *Ineligibility* for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.6 or 10.7 are applicable:

*Article 10.3.1 For violations of **Article 2.3** or 2.5, the period of *Ineligibility* shall be four (4) years except:*

- (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of *Ineligibility* shall be two (2) years;*
- (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of *Ineligibility*, the period of *Ineligibility* shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person’s degree of Fault; or*

(iii) *in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault.*

73. Article 10.6 provides that:

10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence 10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6. All reductions under Article 10.6.1 are mutually exclusive and not cumulative.

74. Further Article 10.7 provides:

10.7 Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault

75. Suffice it to state here that the Athlete did not meet any of the provisions essential for mitigating the available sanction.

76. Further Code Article 10.10 provides:

Article 10.10 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 of the resulting Consequences including forfeiture of any medals, points and prizes.*⁷³

77. In the course of the proceedings it was established that the ADRV was occasioned at an *Out-of-Competition* testing and no results were cited requiring disqualification but for avoidance of doubt the Panel will still review and pronounce itself of this specific issue.

i. Credit for time served under the provisional suspension

78. WADC's 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.

79. The aforementioned notwithstanding, WADC's Article 3.2.5 stipulates:

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.

80. The Panel makes the following specific findings in regard to this matter: -

- a) There had been several attempts to test the athlete prior to the date in question. The Athlete's residence had therefore been previously identified ahead of the last attempt;

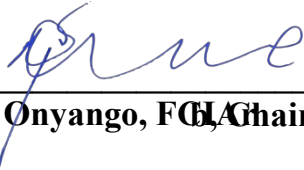
- b) The Panel is satisfied that the Athlete had previously been tested. Her details were available to the Applicant including her photo. On the material day, there was adequate time for PW-5 to identify the person contacted as the subject of the testing mission. The person responded to greetings issued by PW-5 in the local dialect (Nandi) and wondered how a stranger knew her. She was addressed by a name which she never denied to be hers;
- c) Proper contact was established by the Lead DCO PW-5, that contact led to a brief session of explanation of the mission and identification of the DCO coupled with inspection of her identification documents. There was no evidence of threat or other conduct that would lead the Respondent Athlete to fear and thereby lead to her walking away;
- d) Having found as above, the Panel holds that the Athlete intentionally committed the ADRV in question by willfully and intentionally absconding the intended testing process in terms of WADC's Article 10.3.

H.DECISION

81. Consequent to the discussion on merits of this case, the Panel finds:

- a. The applicable period of ineligibility of four (4) years is hereby upheld.
- b. The period of ineligibility shall be from the date of this decision for a period of four (4) years. (26th January,2023 to 25th January 2027).
- c. Disqualification of any and/or all of the Athlete's competitive results from 27th May 2022.
- 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 WADA Code.

Dated at Nairobi this _____ 26th ___day of ___
____January____2023



Mrs. J Njeri Onyango, FCLAC Chairperson



Mr. Gabriel Ouko, Member



Ms. Mary N. Kimani, Member