REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. 3 OF 2022

ANTI-DOPING AGENCY OF KENYA…… APPLICANT

VERSUS

AGATHA JERUTO KIMASWAI……ATHLETE

DECISION

Panel:

J. Njeri Onyango FCIArb	– Chairperson
Gabriel Ouko	– Member
Edmond Kiplagat	– Member
Allan Owinyi	– Member
Mary N. Kimani	– Member

Appearances:

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

Contents

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, middle distance (800m) runner, (hereinafter referred to as **the Athlete**).

ii. Factual Background

3. Upon reading the Notice to Charge dated 1st March 2022 presented to the Tribunal on even date by Mr. Bildad Rogoncho on behalf of the Applicant, the Tribunal directed in the order dated 2nd March 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 25th March 2022;
    ii. The panel constituted to hear this matter shall be:
        a. J. Njeri Onyango (Mrs.);
        b. Gabriel Ouko;
        c. Allan M. Owinyi;
    iii. The matter shall be mentioned on 31st March 2022 to confirm compliance and for further directions.
4. When the matter came up for first mention on 9th June 2022 before a reconstituted panel of: Edmond Gichuru Kiplagat – Member, Allan Owinyi- Member and Mary Kimani- Member;

The Athlete Ms. Agatha Kimaswai informed the Tribunal that this was a very personal and private matter for her and she was uncomfortable being represented. She informed the Tribunal that she was aware that the Tribunal regularly held court circuits in Eldoret and requested that if one is held before the end of July 2022, she be allowed to represent herself and be heard in Eldoret.

The Deputy Chairperson directed Mr. Rogoncho (present for the Applicant) to coordinate with the Secretariat and determine whether the circuit could be held before end of July 2022.

Further the Tribunal directed the matter be listed for mention on 23rd June 2022 to confirm if the Tribunal would be sitting in Eldoret during the month of July 2022.

5. During the mention on 23rd June 2022 Mr. Rogoncho for the Applicant was in attendance while there was no appearance for the Respondent Athlete.

6. Mr. Rogoncho stated that the last time the matter came up on 9th June 2022 the Athlete was present. He added that the Athlete made a request to represent herself in Eldoret during the Tribunal's Circuit and in case there would be no circuit, she would be requesting for pro-bono counsel. The Chairperson of the Tribunal confirmed that there would be no circuit therefore the option of being represented by pro-bono counsel would be the most viable. Further the Tribunal directed and ordered that

    I. The Tribunal Secretariat provide a pro-bono counsel to the Respondent Athlete within seven (7) days;

    II. The matter was listed for mention 14th July 2022 at 2.30 p.m.to confirm appointment of a pro-bono counsel.

7. On 28th July 2022 via Microsoft Teams Mr. Rogoncho appeared for the Applicant while Mr. Cheluget held brief for Mr. Kivindyo for the Respondent Athlete who had been had been appointed as pro bono Counsel via Notice of Appointment dated 27th July 2022. The Athlete requested for 14 days to file the Athlete's Statement of Defense. The Tribunal ordered and directed that the matter be mentioned on 18th August 2022 to confirm compliance.
8. At the mention on 18th August 2022 with Mr. Rogoncho for the Applicant and Mr. Cheluget holding brief for Mr. Kivindyo for the Athlete, the matter coming up to confirm filing and serving of defense it was stated by Counsel for the Athlete that the Athlete was yet to respond. Athlete's Counsel requested for seven (7) days to confirm compliance. The Tribunal listed the matter for mention on 1st September 2022.
9. Mr. Rogoncho for the Applicant and Mr. Kivindyo for the Athlete appeared before the Tribunal on 1st September 2022. Counsel for the Athlete indicated that he had filed and served his response in defense to the application on 9th September 2022 via email. Mr. Rogoncho indicated that the served response was emailed to him 3 minutes before the session so he had not yet had the time to look at it. The Tribunal directed that the matter be listed for mention on 8th September 2022
10. Upon mention of this matter on 8th September 2022 before the Tribunal, it was confirmed that the Applicant perused the response to the charge and parties requested a hearing date. The Tribunal directed and ordered that the matter be set for hearing on 6th October 2022 at 2.30pm.
11. On 8th September 2022 when the matter came up for mention, Mr. Rogoncho stated that the hearing would not proceed as he had agreed with Mr. Kivindyo that they proceed by way of written submissions. Mr. Kivindyo

confirmed the same, adding that he was ready to proceed physically but that the Athlete was missing in action therefore written submissions would be the preferred way. Counsel for the Athlete prayed for fourteen (14) days. Mr. Rogoncho prayed for seven (7) days after service. Further, the Tribunal directed:

I. Mr. Kivindyo to file written submissions within fourteen (14) days;
II. Mr. Rogoncho to file response seven (7) days thereafter;
III. Both Counsel to file submissions on the portal and by email to each panel member;
IV. The matter was listed for mention on 27th October 2022 to confirm compliance and allocate the decision date.

12. When the matter was mentioned on 1st December 2022, Mr. Rogoncho appeared for the Applicant. There was no appearance for the Athlete. Mr. Rogoncho stated that he had spoken to Mr. Kivindyo who had informed him that he would not be able to attend the proceedings as he would be attending an arbitration matter. Mr. Rogoncho confirmed that the Applicant had filed written submissions. Mr. Kivindyo prayed for one week to comply and file submissions for the Respondent Athlete.
13. The Tribunal ordered that the matter be mentioned on 8th December 2022 to confirm filing of submissions and for further directions.
14. When the matter was mentioned on 15th December 2022 before the Tribunal, Mr. Rogoncho stated that he had been served with any submissions. The Tribunal ordered and directed that:

I. Mr. Kivindyo file and serve his submissions failure to which the panel will proceed to determine the matter;

II. The matter be listed for mention on 19th January 2022 at 2.30pm for further directions

15. On 26th January 2023 the matter was mentioned; appearances were Mr. Rogoncho for the Applicant and Mr. Cheluget holding brief for Mr. Kivindyo for the Athlete. Mr. Cheluget stated that he had filed and served his submissions and prayed for a decision date. Mr. Rogoncho acknowledged receipt of the Athlete's submissions. The Tribunal listed the matter for Decision on 16th February 2023 at 2.30pm and on that date the Decision was postponed to be delivered on 2nd March 2023 at 2.30pm.

B. Hearing

16. Both parties elected to proceed by way of written submissions.

C. Parties' Submissions

i. The Applicant's Submissions

17. The Applicant to adopted and owned its charge document dated 13th April 2022 and the annexures thereto.

18. The Applicant in its written submissions dated 16th November 2022 stated that "*the Athlete herein is charged with an Anti-Doping Rule Violation of presence of a prohibited substance Clomifene metabolite hydroxy-clomiphene contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).*"

19. It was 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.

20. The Applicant submitted that "*the matter came up for hearing, the athlete testified, and the parties presented their respective questions in Examination in Chief and Cross Examination and thereafter laid before the tribunal evidence and supporting documents for consideration*."

21. It was stated that "*on 23rd December 2021, an ADAK Doping Control Officer ("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 7023012*** *(the "A Sample") and* ***B 7023012*** *(the "B Sample") in accordance with the Prescribed WADA procedures.*"

22. Both Samples were transported to the World Anti-Doping Agency ("WADA") - accredited Laboratory in South Africa, South African Doping Control Laboratory - Bloemfontein an Anti-Doping Laboratory (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for presence of a prohibited substance **Clomifene metabolite hydroxy-clomiphene** which is listed as a Hormone and Metabolic Modulator under S4 of the 2021 WADA prohibited list.

23. The findings were communicated to the respondent athlete by Sarah I. Shibutse EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 18th February 2022. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 10th March 2022.

24. The Applicant stated that the "*Respondent denied the charges and responded to the ADRV Notice vide a letter dated 22nd February 2022, attached in the letter were*

medical support documents which served as an explanation as to how the substance entered her body."

25. The Applicant stated that "*The respondent athlete's AAF was not consistent with any applicable TUE recorded at the WA for the substances in question and there is no apparent departure from the WA Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused adverse analytical findings.*"
26. Further, "*The respondent 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.*"
27. The Applicant submitted that "*The response and conduct of the respondent were evaluated by ADAK and it was deemed to constitute an anti-doping rule violation and referred to the Sports Disputes Tribunal for determination.*"
28. Consequently, "*A charge document was prepared and filed by ADAK's Advocates, and the Athlete presented a response thereto. Consequently, the matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules and the matter is pending determination resulting to a request for submissions by the parties.*"
29. It was the Applicant's submission "*that under Article 3 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.*"
30. The Applicant said that "*it is 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 ….*"

31. 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."

32. Regarding proof of the ADRV The Applicant asserted that "*the Athlete is charged with presence of Prohibited Substance, Clomifene metabolite hydroxy-clomiphene, a violation of Article 2.1 of the ADAK ADR and the Applicant prays for a period of ineligibility of 4 years.*" Further, "*Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an ADRV. Similarly,*

Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence, or intention to entitle her to a reduction of sanction." The Applicant "*therefore urge the Tribunal to find that an ADRV has been committed by the Respondent herein.*"

33. The Applicant stated that "*Rule 40.3 of the WA Rules sets out that the term intentional is meant to "**identify those athletes who cheat. The term, therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk.***"

34. "*According to the established case-law of **CAS 2018/A/5592 Olga Kazankevich v. Russian Anti-Doping Agency (RUSADA)**, the panel in paragraph 2 asserted that, "**The burden of proof with respect to intent lies with the athlete, who has the duty to establish, on a balance of probability, that the anti-doping rule violation was not intentional; i.e. the athlete has the burden of convincing the CAS panel that the occurrence of the circumstances on which he/she relies is more probable than their non-occurrence.",*** was the submission of the Applicant.

35. The Applicant asserted that "*The establishment of the source of the prohibited substance in the Respondent's sample is not a sine qua non of proof of absence of intent. It's the Respondents responsibility to disprove intent by providing cogent evidence and convincing explanations to justify the presence of the prohibited substance in her sample.*"

36. Placing further reliance on **CAS 2018/A/5583 Joshua Taylor v. World Rugby**, Applicant said "*the panel provided that, "It is for the athlete to establish that the anti-doping rule violation (ADRV) was not intentional. Establishment of source does not by itself prove negative intent although it may be a powerful indicator of the*

presence or absence of intent to be defined. In contradistinction to the provisions which bear on disproof of fault or negligence the provision as to disproof of intention makes no reference to proof of source as a sine qua non condition. For the purpose of satisfying this burden of disproof, several CAS cases have held that the athlete must necessarily establish how the substance entered his/her body whereas other CAS cases have held that such establishment, while not always necessary, will normally be so and that the exceptions to that norm will be extremely rare. On any view, the presence or absence of such proof of source is obviously material to the issue of intention".

37. It was the Applicant's argument that "*There exists an inherent significant risk that medications may contain prohibited substances. Questions arise regarding the Respondents conduct on whether she manifestly disregarded the risk that her conduct might constitute or result into an Anti-doping rule violation (ADRV). In light of the risks involved with taking medication, the Respondent should have taken all the conceivable steps to ensure that she didn't commit an ARDV. A sign of good faith would be leaving no reasonable stone unturned before ingesting any kind of medication*."

38. Therefore, it was the Applicant's contention that "*The Respondent has failed to identify any steps she took in discharging her duty to avoid the presence of a prohibited substance in her sample. It's the Applicants submission that her level of fault was high. Thus, under the ADAK ADR, an offence has therefore been committed as soon as it has been established that a prohibited substance was present in the athlete's tissue or fluids. There is thus a legal presumption that the athlete is responsible for the mere presence of a prohibited substance. The burden of proof resting on the Agency is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids. If the Agency is successful in proving this requirement, there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such offence*."

39. Submitting regarding 'origin', the Applicant stated that "*The case of* ***CAS 2016/A/4534 Maurico Fiol Villanueva V. Federation Internationale de Natation (FINA)*** *under Par.36 (i) stated that it is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance. Based on the explanation provided in this case-law, the Applicant wishes to contend that from the explanation given by the Athlete was evaluated and constituted an ADRV, she provided medical prescription notes which the applicant is in the process of authenticating.*"

40. Regarding Fault/Negligence 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.*"

41. The Applicant reiterated that "*the athlete has a personal duty to ensure that no prohibited substance enters their body. 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 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 to establish an anti-doping rule violation under Article 2.1.*"

42. The Applicant submitted that "*In* ***CAS 2018/A/5581 Filip Radojevic v. Fédération Internationale de Natation (FINA),*** *the panel observed that "****The prescription of a medicinal product by an athlete's doctor does not excuse said athlete from investigating to their fullest extent that the medication at stake does not contain prohibited substances. Athletes cannot rely on the advice of their support personnel. Athletes themselves are responsible for***

knowing what constitutes an antidoping rule violation (ADRV) and the substances included in the Prohibited List.*" The applicant contends that the athlete in this case fell short of the no fault or negligence threshold due to her failure to exercise a high level of diligence expected from an athlete to avoid taking a prohibited substance. The Respondent failed to exercise the utmost duty and care, this is exhibited by her failure to question or undertake a simple internet search of the ingredients in the medicine prescribed to her, which would have revealed the presence of the prohibited substance."*

43. Further, "*In the case of* ***CAS 2017/A/5015 International Ski Federation (FIS) v. Therese Johaug & Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) & CAS 2017/A/5110 Therese Johaug v. NIF****, the panel observed that, "****An athlete fails to abide by his/her duty of diligence if, with a "simple check" she could have realized the medical product he/she was using contained a prohibited substance that was indicated on both the packaging of the product and its notice of use. A finding of No Fault applies only in truly exceptional cases. In order to have acted with No Fault, an athlete must have exercised the "utmost caution" in avoiding doping. Even where the circumstances are "extraordinary****" and there is minimal negligence, athletes are not exempt from the duty to maintain "utmost caution"."*

44. The Applicant stressed that "*The Respondent bears personal duty of care in ensuring compliance with the anti-doping regulations. The standard of care expected from an athlete of her caliber and experience is high. It's the Applicants submission that the respondent was negligent due to her failure to exercise caution to the greatest possible extent and her conduct doesn't warrant a finding of no fault and negligence."*

45. Regarding knowledge, "*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 the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault."

46. Further, "*the Applicant contends that the Athlete has had a long career in athletics, and it is evident that she has had exposure to the campaign against doping in sports.*"
47. It was the Applicant stand "*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 the products She ingests are free of prohibited/specified substances. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a 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.*"
48. Submitting on sanction, the Applicant stated that "*For an ADRV under Article 2.1, Article 10.2.1 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**". If Article 10.2.1 does not apply, the period of ineligibility shall be two years.*"
49. The Applicant asserted 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."

50. Further the Applicant stated that "*In* ***CAS 2019/A/6541 Hiromasa Fujimori v. Fédération Internationale de Natation (FINA)****, the panel provided the threshold for the reduction of a sanction, and it stated that '****In order to benefit from a fault related reduction, an athlete must prove the source of the prohibited substance. The applicable standard of proof for an athlete to establish the source of the prohibited substance and that there was no significant fault or negligence is by a balance of probability. It is not sufficient for an athlete merely to make protestations of innocence and to suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine, or other product. An athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete took contained the substance in question****'.*

51. Further to this the Applicant submitted that "*In the circumstances, the Respondent has adduced evidence in support of the origin of the prohibited substance and the origin of the prohibited substance was established. The conduct of the athlete however is questionable due to her failure to exercise a high level of diligence with all substances included in the World Anti-Doping Agency Prohibited List.*"

52. Seeming to argue the issue of reduction of period of ineligibility, the Applicant then submitted that "*In* ***CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)****, the panel asserted that, "****In order for a reduction or elimination of the otherwise applicable 2 years' period of ineligibility to apply, an athlete must first establish the origin of the prohibited substance on the balance of probabilities. The failure to demonstrate the origin of the substance excludes the reduction of the sanction. If the athlete establishes the source of the*

prohibited substance, then he must establish that he bore No Fault or Negligence or No Significant Fault or Negligence by a balance of probability".

53. It was also the Applicants submission "*that to allow athletes to shirk their responsibilities under the WADA rules by not questioning or investigating substances they ingest would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules. The respondent must bear the consequences for failing to exercise the required duty of care.*"

54. The Applicant then stated that "*The mere lack of intention to cheat does not signify that an athlete acted without significant fault or negligence. The concept of no significant fault or negligence requires more of an athlete than a conscious bona fide use of a prescribed medication. It's the applicant's submission that the respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.* "

55. The Applicant surmised that "*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 to establish an anti-doping rule violation by the analysis of the athlete's sample which confirms the presence of the prohibited substance.*"

56. Further the Applicant opined that "*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 concretely establish origin of the prohibited substance in her urine sample

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

D. The Respondent herein has failed to give any explanation for her failure to exercise due care in observing the products ingested and used and as such the ADRV was because of her negligent acts."

57. The Applicant prayed that "*The maximum sanction of 4 years ineligibility ought to be imposed as no plausible explanation has been advanced for the Adverse Analytical Finding. From the foregoing, we urge the panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the athlete to 4 years' ineligibility.*" It being the Applicant's 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.*"

ii. Athlete's Submissions

58. The Athlete's submissions dated 7th December 2022 were in opposition to the charge sheet from the Applicant dated 13th April 2022.
59. It was submitted that the Athlete "*was experiencing abnormal uterine bleeding, a health concern which prompted her to stay out of competition and it was during this period that she was prescribed medication meant to aid he ailment.*"
60. It is stated that while the Athlete "*was still recuperating, the Applicant's officers collected a urine sample from her.*" Subsequently the Athlete "*received communication from the Applicant that laboratory tests had returned adverse analytical findings as a prohibited substance had been detected in the sample.*" The Athlete also received a Notice to Charge and mandatory Provisional Suspension dated 18th February 2022.

61. It is submitted that "*the tests revealed the presence of a prohibited substance Clomifene metabolite hydroxyl-clomiphene. The Applicant offered the Athlete the opportunity to provide an explanation as to how the prohibited substance entered her body which she did by writing a letter dated 22nd February 2022 detailing the reasons for the prohibited substance in her body and providing proof of the explanation.*"

62. "*It was an undisputed fact that the Athlete's tests revealed the presence of the specified substance in violation of article 2.1 of ADAK Rules.*" stated Counsel for the Athlete.

63. Further, "*the ineligibility period for violations under articles 2.1, 2.2 or 2.6 were set out in article 10.2 of the ADAK Rules. The period of ineligibility for a specified substance is four years where ADAK can establish that the anti-doping rule violation was intentional as per article 10.2.1 and two years where it involved a specified substance, but no intentional violation was established as per article 10.2.2*".

64. Relying on ***CAS 2017/A/5301 Sara Errani –versus- International Tennis Federation (ITF) & CAS 2017/A/5302 National ANTI-Doping Organization (Nado) Italia v. Sara Errani and ITF*** the Athlete contended that "*the tribunal provided clarification on the applicable sanctions under the 2015 WADA Code stating as follows: "…**If the ADRV was not intentional, pursuant to article 10.2.2 of WADA Code 2015 the regular sanction for the presence of a specified substance shall be two years."*** The Athlete concluded that "*on the basic facts of the case herein it was clear that the applicable period of ineligibility was two years.*"

65. "*Article 10.2.3 defines the term intentional to identify those athletes who cheat,*" the Athlete submitted. Further, "*Article 10.2.3 explained that the term requires that the Athlete engaged in conduct which she knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.*"

66. It was the Athlete's averment that "*there exists a rebuttal presumption that any violation of the anti-doping rules intentional. This presumption is rebutted by evidence of how the prohibited substance entered the athlete's body as was stated under paragraph 46 of* ***CAS 2018/A/5593 Olga Kazankevich –versus- Russian Anti-Doping Agency (RUSADA)."***

67. The Athlete submitted that she was "*cognizant of the standard long established in CAS Jurisprudence that an athlete bears the burden of establishing that the violation was not intentional and therefore must show how the substance entered their body, a position well buttressed in* ***CAS 2017/A/4962***."

68. The Athlete stated that "*the Panel in* ***CAS 2016/A/4377*** *provided that the Athlete must establish how the substance entered her body and the Athlete must also establish the origin of the prohibited substance. It is not sufficient for an athlete "****merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question****".*

69. It was the Athlete's assertion that "*she had established that the specified substance entered into her body after the consumption of prescribed medication for the purpose of addressing her health aggravations which negated any presumption of intention to cheat.*"

70. The Athlete restated that "*Article 10.2.1.2 provided that the period of ineligibility shall be four years where the ADRV involved a Specified Substance and ADAK can establish that the ADRV was intentional.*" Concurrently the Athlete stated that "*in* ***CAS 2016/A/4716 Cole Henning -versus- South African Institute for Drug-Free Sport (SAIDS)****, the panel under paragraph 47 interpreted article 10.2.1 to place*

the burden of proving intent in the case of specified substance on the anti-doping agency."

71. The Athlete argued that "*in order to establish intention, there must be clear evidence that the athlete intended to enhance their sports performance through the consumption of the specified substance. In* ***CAS 2013/A/3115 WADA –versus- Rebecca Mekonnen & NOPC CAS 2013/A/3116 WADA –versus- Lasse Sundell & NOPC****, the sole arbitrator notes that intention requires that the athlete must have known they were consuming a particular product with the aim of improving their sporting performance even if they were unaware of the specific substance contained in the product.*"

72. It was the Athlete's contention that in the instance of her case, she/Athlete "*was unaware of the fact that her medication contained a specific substance. Furthermore, the consumption of the medication with the specified substance was not intended to improve sport-related performance. Instead, the Respondent was having health difficulties that compelled her to withdraw from competition as she sought medical intervention.*"

73. Relying on **CAS 2012/A/2822**, the Athlete said that "*the Panel held that there was a difference between recklessness as to whether a specified substance is ingested, which is equated to the athlete running into a minefield "****ignoring all stop signs along his way****", (which is characterized as indirect intent) and being merely "****oblivious****" as to whether the specified substance was contained in a product ingested.*"

74. The Athlete stated that "*the strict liability imposed by article 2.1 is indicative of the fact that lack of knowledge raises some degree of fault, but that fault does not necessarily rise to the standard of intention.*"

75. It was the Athlete's argument that "*an athlete can qualify for a reduced sanction if they are able to determine the source of their positive test and establish lack of intent*

to cheat. There was complete disclosure of medications used and in ***CAS No.12/13 of 2020 ADAK –versus- Alphas Leken Kishoyian*** *such disclosure is considered powerful evidence of the athlete's intent to comply with rules and leads to a finding that the athlete has no intent of cheating.*"

76. Henceforth, the Athlete asserted that "*it was clear that the Applicant had not discharged the burden of proving intent to a comfortable satisfaction level which is the accepted standard of proof for sports organizations as elaborated in* ***CAS 2018/O/5712 IAAF –versus- RUSAF & Ekaterina Galistskaia***."

77. Further, quoting **CAS 2016/A/4716 Cole Henning –versus- South African Institute for Drug-Free Sport (SAIDS)** the Athlete stated that the panel there "*makes reference to an article by Professor Antonio Rigozzi, Ulrich Haas, Mesdames Emily Wisnosky and Marjolaine Viret who warns hearing panels to assess the circumstances of the case and refrain from imposing a four-year period of ineligibility if they accept that the athlete did not intend to "****cheat****", even if technically the athlete's violation was committed with knowledge or recklessness.*" Therefore, the Athlete reiterated that "*it was clear that no intent had been demonstrated and as such the maximum sanction applicable in her instance was ineligibility for a period not exceeding two years.*"

78. On the issue of ***Fault*** the Athlete submitted that "*Article 10.4 and 10.5 of the ADAK Rules allowed for an elimination or reduction of the period of ineligibility based on the Respondent-Athlete's level of recklessness and culpability in lack of knowledge*", further arguing that "*elimination of period of ineligibility occurs where there is no fault or negligence or where there is no significant fault or negligence.*"

79. The Athlete stated that "*to claim no significant fault or negligence the athlete must establish that the fault or negligence when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in*

relationship to the anti-doping rule violation of article 2.1. The athlete must also establish how the substance entered her system."

80. "*The criteria for determination of the degree of fault was out in* ***(CAS 2013/A/3327 & 3335) Marin Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v, Marin Cilic*** *(hereafter the Cilic decision)",* the Athlete submitted.

81. The Athlete stated that "*in the Cilic decision it was determined that an "****objective****" and a "****subjective level of fault****" must be taken into consideration. The objective level of fault or negligence points to "****what standard of care could have been expected from a reasonable person in the athlete's situation****" and the subjective level consists in "****what could have been expected from that particular athlete, in light of his particular capacities****".*

82. The Athlete listed the subjective elements of the level of fault identified in Cilic (par. 76) as including: -

    - *the athlete's youth and/or experience;*
    - *language or environmental problems encountered by the athlete;*
    - *the extent of anti-doping education received by the athlete;*
    - *other "personal impairments" such as having taken a product over a long period of time without incident, previously having checked the product's ingredients;*
    - *suffering from a high degree of stress;*
    - *the awareness of the athlete being reduced by a careless but understandable mistake; and may be partly applicable to the Athlete involved in the present proceedings."*

83. The Athlete submitted that, "*Article 2.1 of the ADAK imposes strict liability on athletes who are expected to bear the responsibility for any substance they consume. This is the expected level of care for athletes and the objective standard."*

84. It was the Athlete's assertion that "*the subjective standards seek to ensure individual circumstances of athletes are taken into consideration. The Respondent Athlete, by her own admission, has claimed that she received minimal education on anti-doping which impairs her ability to make informed choices. Additionally, the Respondent was in ill-health which is likely to have affected her decision-making*".

85. The athlete restated that she "*was in ill-health which necessitated that she pulls out of competition and during the time of testing she was still in recuperation.*" "*Based on this evidence*" she continued "*it is clear that though the Respondent committed a violation under ADAK rules it was not her intention to enhance her performance. Her violation was not significant in relationship to the ADAK rule violation, and she bears a light degree of fault.*"

86. "*Article 10.5.1.1 provides for reduction of the period of ineligibility in case of specified substances where no significant fault or negligence is established to at a minimum, a reprimand, and no period of ineligibility, and at a maximum, two years of ineligibility.*", the Athlete submitted.

87. Moreover, while "*the Cilic decision was made in light of the 2009 WADA Code,* ***CAS 2017/A/5301 Sara Errani v. International Tennis Federation (ITF) & CAS 2017/A/5302 National Anti-Doping Organization (Nado) Italia v. Sara Errani and ITF*** *modified the Cilic Principles to satisfy the changes under the 2015 WADA Code. The time span of 24 months which is available now covers two of three categories of fault: -*

    - *normal degree of fault: over 12 months and up to 24 months with a standard normal degree leading to an 18-month period of ineligibility; and*
    - *light degree of fault: 0-12 months with a standard light degree leading to a 6-month period of ineligibility.*

88. In summary the Athlete stated that "*in light of the circumstances of this matter, particularly the Respondent's spotless record with regard to anti-doping, her limited*

education on anti-doping and the state of her health, it is just to consider that her degree of fault was light. As such the appropriate range of sanction for the Respondent would be a reprimand and no period of ineligibility or a maximum of 12 months of ineligibility."

89. The Athlete in concluding her submissions quoted **CAS 2010/A/268 I. – versus- F.I.A.** where the panel at paragraph 137 stated as follows:

"*Even after the entry into force of the WADC, CAS has recognized that any anti-doping sanction inflicted by a sports federation – that is, a private association – must in any event be consistent with the principle of proportionality:*

The sanction must also comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of misconduct and the sanction. In administrative law, the principle of proportionality requires that

(i) the individual sanction must be capable achieving the envisaged goal,

(ii) the individual sanction is necessary to reach the envisaged goal, and

(iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal.

A long series of CAS decisions have developed the principle of proportionality in sports cases. This principle provides that the severity of a sanction must be proportional to the offense committed. To be proportionate, the sanction must not exceed that which is reasonably required in search of the justifiable." xxx

90. In her closing submissions the Athlete stressed that "*the Anti-Doping program seeks to preserve what is intrinsically valuable about sport, that is "the spirit of the sport"*. She avers that "*the Respondent's actions were not aimed at marring the spirit of the sport and her violation was not significant in relation to ADAK rules."* Therefore, based on her assertions, "*[…] it is clear that the proportional hence appropriate sanction would be a reprimand and no period of ineligibility."*

D. JURISDICTION

91. 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.
92. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

E. APPLICABLE RULES

93. 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:** Specifically: -
>
> ***Article 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample 2.1.1 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. 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.*** *(7)*
>
> *7 [Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-*

doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

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, ...

F. MERITS

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

94. The Applicant's prosecution is based on the charge of **Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample** as outlined at paragraph 3 of its charge document dated 16th November 2022.

95. 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'

96. The Athlete in her written submission stated that "*It was an undisputed fact that the Athlete's tests revealed the presence of the specified substance in violation of article 2.1 of ADAK Rules*", in essence admitting the ADRV.

97. We note that such eventuality is countenanced by the Applicant in its submission where it stated "*that it was 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 […]*" (Our emphasis).

98. Further to WADC/ADAK ADR's Article's *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', the Panel accepts that the Applicant's has established to its comfortable satisfaction that the Athlete committed an ADRV.

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

99. WADC's & ADAK ADR's Article 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 elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

> *10.2.1 The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years where:*
>
> > *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.58*
> >
> > *10.2.1.2 <u>The anti-doping rule violation involves a Specified Substance or a Specified Method and the Anti-Doping</u> Organization* ***can establish that the anti-doping rule violation was intentional****.* (Our emphasis)
>
> *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.*
>
> > *58 [Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that*

the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]

100. The Applicant's Charge Document other than stating at is paragraph 6 that "*Clomifene metabolite hydroxyl –clomiphene I listed as a Hormone and Metabolite Modulator* ***under S4*** *of WADA's 2021 Prohibited List*" did not further clarify that the substance fell under the category of Specified Substances while the Athlete in her submissions did refer to it as Specified Substance as per the 2021 Prohibited List.

101. The Prohibited List 2021 states that Clomifene is Prohibited At All Time (In-And Out-Of-Competition). Further, prohibited substances in classes S4.1 and S4.2 are Specified Substances. Those in classes S4.3 and S4.4 are non-Specified Substances. Among hormone and metabolic modulators that are prohibited under S4 (2) are Anti-Estrogenic Substances [Anti-Estrogens and Selective Estrogen Receptor Modulators (SERMS)] which include Clomifene (specifically under S4.2).

102. On issue of burden in this matter the Athlete contended that "*Article 10.2.1.2 provided that the period of ineligibility shall be four years where the ADRV involved a Specified Substance and ADAK can establish that the ADRV was intentional.*" The Athlete's Counsel relied on ***CAS 2016/A/4716 Cole Henning -versus- South African Institute for Drug-Free Sport (SAIDS)***, where "*the panel under paragraph 47 interpreted article 10.2.1 to place the burden of proving intent in the case of specified substance on the anti-doping agency.*"

103. We set out in detail par. 47 in ***CAS 2016/A/4716 Cole Henning -versus- South African Institute for Drug-Free Sport (SAIDS)*** in more detail: "*[…]* ***If, where the ADRV is in respect of Specified Substances, as in the present case of the Appellant, the burden rests with the Respondent to establish that the violation was intentional****. Although the WADA Code is silent on the precise*

standard of proof which the Respondent must provide to establish that a violation was intentional, the practice is that the standard required by CAS Panels would be the same "comfortable satisfaction" standard that Anti-Doping Organisations (hereinafter referred as "ADOs") are held to establish in an ADRV, especially since "comfortable satisfaction" has been recognised in CAS awards as the general standard applicable in disciplinary matters. According to Rigozzi et al, one of the key policy drivers underlying the revision of the sanctioning regime was punishing "real cheats" more harshly, yet providing more flexibility in other circumstances. This policy therefore translates into treating intentional violations with a strict four-year period of ineligibility and the non-intentional violations with more flexibility, i.e., allowing the Fault-related reductions. From this perspective, according to Rigozzi et al, a violation would only be intentional, if the Athlete's Fault was rather high, at a level which can fairly be considered as "cheating", as opposed to a more "technical", albeit possibly knowing, violation of the Rules, where perhaps a finding of not intentional is proportional and better suited to WADA's policy goals." (Our emphasis).

104. The ***Hemming*** analysis above mimics the relevant WADC article and we accept the Athlete's interpretation. Pursuant to Article *10.2.1.2 'The anti-doping rule violation involves a Specified Substance or a Specified Method and the Anti-Doping Organization* ***can establish that the anti-doping rule violation was intentional'***, indicates that the burden clearly lies with the Applicant to establish that the Athlete's ADRV was intentional.

105. For avoidance of doubt we shall restate the Burdens and Standards of Proof as designated by the WADC/ADAK ADR Rules:

> *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 (18). Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability.

18 [Comment to Article 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

106. Further to this, the Applicant submitted, "*Where use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an ADRV.* ***Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no*** *fault, negligence,* ***or intention*** *to entitle her to a reduction of sanction.*" (*Our emphasis*)

107. Having started on a correct trajectory of proving the occurrence of the ADRV, unfortunately the Applicant proceeds to erroneously reassign the burden of proof required of it on the Athlete by standing WADC/ADAK ADR's Article 10.2.1.2 (which is applicable in this particular matter) on its head.

108. A perusal of ***CAS 2018/A/5592 Olga Kazankevich v. Russian Anti-Doping Agency (RUSADA) &*** **CAS 2018/A/5583 Joshua Taylor v. World Rugby** *&* ***CAS 2016/A/4534 Maurico Fiol Villanueva V. Federation Internationale de Natation (FINA)*** relied upon by the Applicant in regard to 'intent' in its attempt to seek to shift the burden of intention on the Athlete in this instant case, reveal that the ***Olga*** & ***Taylor*** & ***Villanueva*** cases involved non-

Specified Substances in the S1 class of prohibited substances in their relevant 2018 & 2015 Prohibited Lists and therefore are not comparable to the circumstances of the present case.

109. We note that at no point in the Applicant's submission did it reverse its incorrect stand in order to wrestle with the Code/ ADAK ADR Rules designated burden of proof. Therefore, suffice it to say that the Applicant effectively did not discharge its responsibility to 'establish that the Athlete's admitted ADRV was intentional'. Consequently, the Applicant was unable to discharge its burden to the comfortable satisfaction of this hearing Panel and therefore WADC/ADAK ADR Rules Article 10.2.2 is applicable in this case.

iii. **No Fault or Negligence/ No Significant Fault or Negligence? (NSF)**

110. Article 10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence, provides that:

> *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.*
>
> > *10.6.1.1 Specified Substances or Specified Methods*
> >
> > > *Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method,* ***and the Athlete*** *or other Person* ***can establish*** *No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.*

111. On the issue of ***Fault*** the Athlete submitted that "*Article 10.4 and 10.5 of the ADAK Rules allowed for an elimination or reduction of the period of ineligibility based on the Respondent-Athlete's level of recklessness and culpability in lack of knowledge*", further arguing that "*elimination of period of ineligibility occurs*

where there is no fault or negligence or where there is no significant fault or negligence."

112. The Applicant relying on CAS ***2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO)***, submitted that, *"[…] In order for a reduction or elimination of the otherwise applicable 2 years' period of ineligibility to apply, an athlete must first establish the origin of the prohibited substance on the balance of probabilities. The failure to demonstrate the origin of the substance excludes the reduction of the sanction.* ***If the athlete establishes the source of the prohibited substance, then <u>he must</u> establish that he bore No Fault or Negligence or No Significant Fault or Negligence by a balance of probability***". .

113. The Athlete variously explained how the substance got into her body. Further she said she had submitted to the Applicant her full medical documents including prescriptions that gave rise to her ADRV. The Applicant stated that it had indeed received her documentation and was still in the process of authenticating them.

114. Subsequently the Applicant submitted that "*In the circumstances, the Respondent has adduced evidence in support of the origin of the prohibited substance and the origin of the prohibited substance was established.* ***CAS 2014/A/3820 WADA v. Damar Robinson & JADCO***, at *para.* ***80 'In order to establish the origin of a prohibited substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation.'*** In this respect, the Panel is of the opinion that the first huddle of establishing origin had been overcome by the Athlete and has not been contested by the Applicant. The next huddle the Athlete had to overcome was to establish that she bore No Fault or Negligence or No Significant Fault or Negligence on a balance of probability.

115. It was the Athlete's argument that she "*was unaware of the fact that her medication contained a specific substance. Furthermore, the consumption of the medication with the specified substance was not intended to improve sport-related performance. Instead, the Respondent (Athlete) was having health difficulties that compelled her to withdraw from competition as she sought medical intervention.*" (Our emphasis)

116. The Applicant responded to the Athlete's plea of lack of awareness of prohibited substance in her medicine by stating that, "*The concept of no significant fault or negligence requires **more** of an athlete than a conscious bona fide use of a prescribed medication. It's the applicant's submission that the respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.*" (Our Emphasis) The 'more' that is required of an athlete is strict adherence to the WADC/ADAK ADR Rules which amongst others stipulates that the Athlete is strictly responsible for what she ingests. Just by being a member of the Athletics fraternity and by signing up in order to participate in WA sanctioned events whether nationally or internationally, the Athlete consents to WA Competition Rules in which the anti-doping policy falls. The fact that she was tested Out-of-Competition did not in any way absolve her because she was still an athlete under the Agency's jurisdiction.

117. We agree with the panel in ***DAMAR*** that the comments to the WADC/ADAK ADR Rules provide guidance as to when No Fault or No Negligence should and/or should not apply; for example:

> *65 [Comment to Article 10.5: […] Conversely, No Fault or Negligence would not apply in the following circumstances: […] (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (**Athletes are responsible for their***

choice of medical personnel <u>and for advising medical personnel that they cannot be given any Prohibited Substance</u>); (Our emphasis)

118. Additionally, this Panel notes that nowhere in her pleadings did the Athlete appear to inform and/or advised the doctor that she was an athlete by profession and that she was bound by anti-doping rules, prior to voluntarily submitting to the doctor's treatment program.

119. Further, CAS jurisprudence has pronounced itself variously on this matter, for example: ***CAS 2018/A/5581 Filip Radojevic v. FINA*** para.58 '*Taking the medicine for therapeutic purpose is irrelevant in assessing the degree of Fault as confirmed by CAS case law. As noted by the panel in* ***CAS 2008/A/1488*** *(para.17), "it is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and with clear therapeutic intention." In* ***CAS 2012/A/2959*** *(para.8.20), the panel confirmed that "it is irrelevant that Mr. Nilfurushan's consumption of Phentermine was allegedly for a legitimate therapeutic use. As it was made clear in ITF v. Nielson (…), athletes have a personal duty to ensure that any medication they are taking does not infringe the WADC code, and it "is not relevant to this issue whether the player might have been granted a therapeutic use exemption if he had taken proper steps to check all his current medication against the prohibited list from time to time.*'

120. Therefore, this Panel aligns itself with ***CAS 2018/A/5581 Filip Radojevic v. FINA*** para. 63 '*In conclusion, although the Panel does not consider the Athlete to have acted recklessly, he clearly <u>has been completely passive and even careless with regard to his anti-doping duties.</u> In addition to neglecting to check that the medicines prescribed by Dr. Milicevic did not contain prohibited substances, the Athlete failed to report the use of Defrinol forte in the doping control form (para. 6.22 of the Appealed Decision). The non-disclosure of the medication on the form is not an action that can illustrate NSF, quite to the contrary. The fact that the Athlete went to see a*

physician and used medication prescribed to him by Dr. Milicevic to treat his respiratory problems, combined with the lack of any precautions and lack of transparency through non-disclosure, do not justify a finding of NSF.' (Our emphasis)

121. It is therefore our considered view that the Athlete was unable to discharge her burden of proof by a balance of probability regarding establishing No Fault and same applied to No Significant Fault or Negligence.

122. Regarding 'experience' this Panel takes note of ***CAS 2018/A/5581 Filip Radojevic v. FINA*** para. 78 '*The Panel notes that the definition for "Fault" in the FINA DCR does not limit the scope of "experience" to be taken into consideration in assessing an athletes' degree of fault. Therefore, "experience", and the lack thereof, may relate to an athlete's experience in anti-doping matters but also to their experience in acting as an athlete.'* There being no hearing held for this matter many parameters such types/level of events local and international attended, number of doping tests and subjective elements claimed by the Athlete in her pleadings could not be gauged by the panel and therefore went begging.

G. SANCTIONS

123. Article 10.5 Elimination of the Period of Ineligibility where there is No Fault or Negligence, 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. (65)*
>
> *65 [Comment to Article 10.5: This Article and Article 10.6.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in*

exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances:

(a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1) and have been warned against the possibility of supplement contamination); ***(b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance);*** *and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.6 based on No Significant Fault or Negligence.]*

124. Article 10.6.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.6.1 (67), 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. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years.

67 [Comment to Article 10.6.2: Article 10.6.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8, 2.9 or 2.11) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.]

125. After a detailed examination (under our sub-heading iii. (**NSF**)), of the Athlete's pleadings to analyze whether the Athlete has met any of the provisions essential for mitigating the available sanction suffice it to state here that the Athlete did not meet any of the provisions essential for mitigating the available sanction.

126. On the issue of proportionality this panel adopts ***CAS 2018/A/5581 Filip Radojevic v. FINA*** where the panel remarked at para. 86 *'[…] the Panel is mindful that the CAS has also recently confirmed that the WADC, from which the FINA DCR is derived and on which it is based, is proportional. As noted in* ***CAS 2017/A/5015*** *(para.227), on the basis of* ***CAS 2016/A/4643****, "the WADA Code has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction,'* This Panel observes that in the circumstances of this case where the Athlete consciously elected to stop her career to attend to her health, the avenue of seeking a TUE offered by the WADC and variously utilized by other athletes was always open to her. Further, this Panel having had the Athlete's letter of resignation brought to its notice wishes to bring WADC's Article 5.6.2 to the attention of the Athlete.

127. Further Code Article 10.10 provides:

Article 10.10 Disqualification of Results in Competitions Subsequent to Sample Collection <u>or Commission of an Anti-Doping Rule Violation</u>;

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

128. 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

129. 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.

130. In ***CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (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'.

131. Considering, it is this Tribunal's presumption, with no evidence to the contrary, that the Athlete has respected the provisional suspension that began on 10th March 2022 at 5.00 pm and, shall, thereby be eligible for a credit on the sanction ultimately issued by the Tribunal.

H. DECISION

132. 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 period of ineligibility shall be from the date of the provisional suspension from 10th March 2022 for **twenty-four (24) months**.

c. Disqualification of any and/or all of the Athlete's competitive results from **10th March 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 __ 2nd_____day of _____March_____2023

Mrs. J Njeri Onyango, FCIArb, Chairperson

Mr. Gabriel Ouko, Member

Ms. Mary N. Kimani, Member

Mr. Edmond Kiplagat, Member

Mr. Allan Owinyi, Member