REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 12 OF 2021

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

-Versus-

SAMUEL LOMOI……...…….……RESPONDENT

DECISION

Hearing: **18th August 2022.**

Panel:

Mrs. Elynah Sifuna-Shiveka	**-**	**Deputy Chairperson**
Mr. Gichuru Kiplagat	**-**	**Member**
Mr. Allan Mola	**-**	**Member**

Appearances: **Mr. Bildad Rogoncho, Advocate for the Applicant; Mr. Franklin Cheluget as instructed by the firm of TripleOKLaw LLP Advocates for the Respondent**

The Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter 'ADAK' or 'The Agency') a State Corporation established under Section 5 of the Anti-Doping Act, No. 5 of 2016, tasked with the responsibility of carrying out anti-doping activities in the Country in order to ensure and safeguard the right of athletes to participate in a doping free sport.

2. The Respondent is a male adult of presumed sound mind, a national level athlete (hereinafter 'the Athlete'). Mr. Franklin Cheluget from the firm of TripleOKLaw appears for the Respondent.

Preliminaries

3. The facts and the background giving rise to the current proceedings can be derived from several documents filed with the Tribunal both by the Applicant and the Respondent, more specifically the Charge Document filed by the Applicant with the Tribunal dated the 31st January 2022, setting out the charge against the Respondent, accompanied by the verifying affidavit of Peninah Wahome dated the same date, the list of documents and witnesses and the supporting documents including the Doping Control Form, Anti-Doping Rule Violation Notice, letter from the Respondent dated 3rd December 2021, pathological request form dated 6th October 2021 and Hematology results from the same date.

4. More specifically, the proceedings were commenced by the Applicant filing a Notice to Charge against the Athlete dated 23rd November 2021 addressed to the Chairman of the Sports Disputes Tribunal. It was presented to the Tribunal on 25th November 2021.

5. Consequently, directions were issued on 21st December 2021 that the Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, the directions given by the Tribunal and all relevant documents on the respondent by 7th January 2022. A panel was also constituted to hear the matter and the same scheduled for mention before the Tribunal on 20th January 2022 to confirm compliance and further directions.

6. When the matter came up for mention on the scheduled date, it was noted that the Applicant had not yet been able to serve the Charge Documents on the athlete and upon mention the Tribunal directed that the matter was set for further mention on the 10th of February 2022.

7. The matter came up for mention for directions on 10th February 2022. Counsel for the applicant stated that he had filed his pleadings in the matter within the last two days. He, however requested for an adjournment as he had tried in vain to reach the Respondent over the last few days to alert him of the mention. The Tribunal directed that the matter be set for further mention on 24th February 2022 and the Applicant to serve mention notice on the Respondent.

8. The matter came up for mention to confirm whether the Applicant had managed to trace the Respondent. Mr. Rogoncho stated that the Applicant had served the athlete but he had become evasive. He requested a hearing date and undertook to serve the Respondent with a hearing notice. Mr. Rogoncho further stated that if the athlete failed to attend the hearing, the Applicant would apply to invoke the relevant sections of the Anti-doping rules. The Tribunal granted the Applicant a further 3 weeks to trace the athlete. The matter was set for hearing on the 24th of March 2022.

9. It is instructive to note that the Respondent via the firm of TripleOKLaw LLP Advocates, filed their Notice of Appointment of Advocates dated 2nd June 2022. Mr. Rogoncho stated that he had received an email from Mr. Cheluget in regards to his appointment as representative for the Respondent. He stated that he had served the Counsel with the Charge document. Counsel for the Respondent requested 14 days to discuss substantive issues of the case with the Respondent. The Tribunal listed the matter for mention on 23rd June 2022.

10. The matter came up for mention to confirm that the Respondent had filed and served their statement of defence. The secretariat confirmed that the defence had been filed. Mr. Rogoncho requested a hearing date. Mr. Cheluget confirmed that he would be calling two witnesses; the Respondent and the Doctor who prescribed the medicine in question. The Chairman directed that the parties could have a virtual hearing in one day on 21st July 2022.

11. The matter came up for hearing on 28th July 2022. Mr. Kivyindio holding brief for Mr. Cheluget stated that the matter was scheduled for hearing but he had been instructed to request an adjournment as Mr. Cheluget and the Respondent were unavailable. The Tribunal directed that the matter was to be listed for hearing on the 18th of August 2022.

12. When the matter came up for hearing, Mr. Cheluget intimated to the Tribunal that considering the nature of the defense and the evidence to be presented for the case, it was his prayer that the tribunal allows the matter to be determined by way of written submissions. Mr. Rogoncho stated that he did not have an objection to the prayer. The Deputy chairperson stated that each party would then have 14 days each to file and serve their submissions after which the matter would be mentioned for confirmation for compliance and a date for judgment be taken. The matter was listed for mention on 15th September 2022.

13. The matter came up for mention on 15th September 2022 to confirm filing of submissions. Mr. Rogoncho stated that he had been having challenges using the e-platform and had not effected the filing and serving yet and prayed for more time to file through the platform. The Tribunal listed the matter for further mention on 29th September 2022.

14. The matter came up for mention to confirm filing of submissions and confirming filing of submissions and confirm that the respondents had been served. Mr. Cheluget did not wish to orally highlight his submissions. Parties were ready to take a date for judgement. The matter was listed for judgment on 27th October 2022.

Facts & Background

15. The Applicant vide the Charge Document filed at the Tribunal on the 31st January 2022 brought charges against the Respondent observing that on 12th September 2021 during the

Volksbank Munster Marathon held in Munster, Germany, a NADA – Germany Doping Control Officer ("DCO") collected a urine sample from the Respondent. Assisted by the DCO, the Respondent split the urine samples into two separate bottles, which were given reference numbers A 3171107 (the "A Sample") and B 3171107 (the "B Sample") in accordance with the prescribed World Anti-Doping (WADA) Procedures.

16. Both samples were subsequently taken to the Laboratory for Doping Analysis – German Sports University Cologne in Germany, (the "laboratory"). The Laboratory analyzed the A sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). The analysis for the A sample returned an Adverse Analytical Finding ("AAF") presence of a prohibited substance *Triamcinolone acetonide*.

17. The findings were communicated to the Athlete via a letter dated 19th October 2021 through a Notice of Charge and mandatory provisional suspension. The athlete was offered an opportunity to provide an explanation for the same by 8th November 2021.

18. The same letter also informed the athlete of his right to request for an analysis of the B-sample and other avenues for sanction reduction including elimination of the period of ineligibility where there is No Fault or Negligence, Reduction of the period of ineligibility based on No Significant Fault or Negligence, Substantial Assistance in discovering or establishing Code Violations, Results management Agreements and Case Resolution Agreements.

19. The Respondent denied the charges and responded to the ADRV Notice vide a letter dated 3rd December 2021 and stated that on 6th September 2021, he visited a local hospital and was diagnosed with pneumonia and was prescribed with medication such as Levofloxacin, Doxycycline and Zithromax which he was to ingest for 21 days. He further attached medical records in support of the same.

20. Triamcinolone acetonide is listed as a Glucocorticoids under S.9 of the 2021 WADA Prohibited List.

The Charge

21. The Anti-Doping Agency of Kenya is therefore preferring the following charge against the Athlete: -

    Presence of a prohibited substance Triamcinolone Acetonide in the athlete's sample contrary to Article 2.1 of ADAK ADR, Article 2.1 of the WADC and Rule 32.2 (a) and Rule 32.2 (b) of the IAAF rules.

Jurisdiction of the Tribunal

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

Hearing

23. The Applicant's and Respondent's submissions were relied upon in this case.

Applicant's Case

24. Since the Applicant did not call any witness, its case is anchored on the Charge Document filed at the Tribunal on 31st January 2022 and its written submissions dated 14th September 2022.

25. The Applicant started by acknowledging the burden of proof placed upon it to prove its case before the Tribunal, noting that Article 3 of both the ADAK ADR and WADC rules requires it to discharge the burden of proof to the comfortable satisfaction of the Tribunal.

26. The Applicant goes further to submit that there are notable presumptions contained in Article 3.2 of the rules stated above pointing to the fact that facts relating to anti-doping rule violation may be established by any reliable means including admissions.

27. The Applicant ventures further to submit on the roles and responsibilities of an athlete as regards to anti-doping requirements under both the WADA Code and the ADA Act, specifically noting that the law places the responsibility on the Athlete to be knowledgeable and to ensure his/her compliance with anti-doping rules; to take responsibility of what they ingest and use; and to inform medical personnel of their obligation not to use Prohibited Substances, and to ensure that any such medical treatment received does not violate the anti-doping rules. The Applicant specifically relies on Article 22.1 of the WADA Code.

28. Furthermore, it was the Applicant's submission that the Athlete was under duty as required by the ADAK ADR to uphold the spirit of sport as embodied in the preface to the Anti-Doping Rules (ADR).

29. In their third limb of submission, the Applicant submits that they had fully discharged the burden of proof required of it, by dint of amongst others, the Respondent's admission that indeed there existed a prohibited substance in his body; he admitted of being aware of sample collection rules by virtue of being an active participant in athletic events; he admitted to not informing the doctor that he was an athlete; and that he admitted to failing to crosscheck the ingredients of the medication before ingesting them.

30. The Applicant further submitted that under the WADA Code, once the presence of a prohibited substance has been established, it was not necessary to prove intent, fault, negligence or knowledge on the part of the Athlete in order to establish a violation. It was in fact their submissions that the burden of proof shifts in that instance to the Athlete to demonstrate no fault, negligence or intention in order to entitle them to a reduction of sanction.

31. The Applicant therefore prayed that the Tribunal finds that there was a violation by the Athlete.

The Respondent's Case

32. The Respondent filed a statement of defence dated the 22nd of June 2022. He denied all the contents of paragraphs 4 to 12 of the Applicants claim and put to the Applicant to strict proof thereof.

33. In further response he stated that prior to the race he was diagnosed with pneumonia due to exposure to cold during his early morning runs, and was taken through a series of tests upon which the diagnosis was made. He was thereafter prescribed certain medication to cure his ailment.

34. He then proceeded to Germany and participated in the Marathon and on 12th September 2021 when the NADA Germany DCO collected a urine sample from him. On October 19th, 2021, the respondent received communication from the Applicant that the results had returned an AAF and he thereby received a Notice of Charge and mandatory provisional suspension dated 19th October 2021.

35. The Applicant offered the Respondent an opportunity to explain how the prohibited substance had entered his body. He responded by writing a letter dated 3rd December 2021 detailing his reasons and providing proof of the explanation.

36. From the foregoing, the Respondent alleged to have acted in good faith by taking the prescribed medicine in order to cure the pneumonia. The jurisdiction of the Tribunal was admitted.

The Issue of Intention

37. On the issue of intention on the part of the Athlete, it was the Applicant's submission that Rule 40.3 of the WA Rules sets out that the term intentional is meant to "identify athletes who cheat. The term requires the athlete or other person engaged in conduct which he 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."

38. Quoting the case of **Arbitration CAS 2019/A/6213 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Katerina Kaskova, award of 23 September 2019**, in support, the Applicant submitted that the Athlete bears the burden of establishing that the violation was not intentional. Lack of intention cannot be inferred from protestations of innocence, the lack of demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete's clean record.

39. It was therefore the Applicant's submission that the Respondent had failed to prove a lack of intention to cheat based on his failure to demonstrate the way the substance entered his body.

40. In **Arbitration Cas 2016/A/4716 Cole Henning v South African Institute for Drug-Free Sport (SAIDS)** the panel stated that, "the identification of the substance consumed by the athlete as the cause of the ADRV is a pre-requisite to negate the intentional element of the ADO applicable rules, without which identification of the intention to "cheat" maybe assumed.

    The Applicant contended that the Respondent had failed to provide the substance he ingested that contained the prohibited substance and submitted that the Respondent had every intention to cheat.

    Origin

41. The Applicant averred that from the explanation given by the athlete, he provided that the prohibited substance entered his body through medicine purchased from a pharmacy, yet an investigation into the medication provided didn't support his claim as the medicine didn't contain the prohibited substance. It was submitted that the origin of the substance had not been established.

    The Issue of Fault/Negligence

42. On the issue of fault, it was submitted by the Applicant that the Athlete bears the responsibility of being knowledgeable of the anti-doping rules and to ensure compliance with the said rules. It was therefore the Applicant's contention that the Athlete had failed to discharge this responsibility.

43. Quoting the cases of **CAS 2016/A/4889 Olga Abramova vs International Biathlon Union (IBU)** the Applicant contended that the Athlete had fallen short of the no fault or negligence threshold as he failed to establish how the prohibited substance entered his body. The athlete ought to have known the responsibility bestowed upon them to go an extra mile to check the substances they were ingesting did not violate the anti-doping rules.

44. It was therefore the Applicant's submission that failure by the Athlete to crosscheck the medicine that was prescribed to him by the doctor, amounted to negligence on his part in failure to exercise utmost duty of care.

The Issue of Knowledge

45. On the issue of whether the Athlete had knowledge of the presence of a prohibited substance in the medicine he was prescribed, the Applicant submitted that the principle of strict liability is applied. It means that the athlete is strictly liable for substances found in his bodily specimen and that an anti-doping rule violation occurs whenever a prohibited substance is found in the specimen, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.

46. In any case, the Applicant contended that given the experience of the Athlete and the exposure that comes with it, and his participation in both national and international races, his averments that he was unaware of possible anti-doping violation in his actions were untenable. It was therefore the Applicant's submission that ignorance was not an excuse for violation of the anti-doping rules.

Sanctions

47. On the sanctions to be meted by the Tribunal, the Applicant submitted that barring any evidence by the Athlete showing a lack of knowledge, fault or negligence, then this Tribunal should mete out the maximum sentence provided under Article 2.1 as read together with Article 10.2.1 of the WADA Code, which provides for a minimum ineligibility period of four (4) years. According to the Applicant, Article 10.4 creates two conditions precedent to the elimination or reduction of the sentence which would otherwise be visited on an athlete in breach of Article 2.1 which are that the athlete must establish how the substance entered his body and that he did not intend to take the substance to enhance his performance.

48. The case of **Cas 2019/A/6451 Hiromasa Fujimori v. Federation Internationale De Natation (FINA)** established the threshold for reduction of a sanction. The Applicant herein avers that the Respondent has adduced evidence in support of the origin of the prohibited substance. The evidence is however shaky due to its failure to prove how the substance entered the body. The Applicant is thus convinced that the Respondent has not

demonstrated no fault/negligence on his part as required by ADAK rules and WADAC to warrant sanction reduction.

Respondent's Submissions

49. We will briefly summarize the written submissions of the Respondent, as they are a brief response to the issues enumerated by the Applicant in its submissions. The submissions by the Respondent could be understood generally to be stating that the Respondent lacked the intention of doping and that there was also a lack of fault and or negligence on his part.

50. It was the submission of the Respondent that the anti-doping violation was not intentional, that there should be elimination of the period of Ineligibility since there is No Fault or Negligence on his part and that in the alternative, there should be a reduction of the Period of Ineligibility based on No Significant Fault or Negligence on his part.

51. On the issue of the violation being unintentional, the Respondent argues that the relevance of this argument is that if agreeable, then Article 10.2.1 of the ADR in terms of period of ineligibility ceases to apply in this case. He argues that with the violation involving a ban of four years for a specified substance, then it is the Applicant who should establish that the violation was intentional. The Respondent submits that the burden of proof then shifts to the Applicant to demonstrate that the violation was intentional. He argues that ADAK has not met the required burden of proof to show that the violation was intentional as under Article 10.2.3.

52. The Respondent also contends that a violation resulting from an AAF for a substance which is only prohibited In-Competition shall be rebuttably presumed to be "not intentional "if the substance is a specified substance and the athlete can establish that the prohibited substance was used Out-of-Competition. The Respondent avers that he used medication which contained the prescribed substance on 6th October which was a period before the competition and therefore its use was out of competition.

53. On the issue of fault and negligence on the part of the Athlete, the Respondent submitted that he bears no fault and as such the tribunal should eliminate the period of ineligibility because of the manner in which the substance entered his body, using a prescription he got from a doctor. He contended that most athletes cannot afford specialized sports doctors and that doctors in Kenya do not know the prohibited list of substances. The Respondent admitted that he bore the responsibility for what goes into his body and that he failed to do enough to prevent himself from taking a prohibited substance.

54. The Respondent urged the panel to rely on the legal opinion requested by WADA, wherein a former president of the European Court of Human Rights Jean-Paul Costa emphasized

the importance of equal treatment of athletes and sanction harmonization concluding that WADC Rules 10.2.1 and 10.2.2 must be compatible with principles of international law and human rights including proportionality of sanctions and prohibitions of excessively severe sanctions. They stressed that athletes are only human and have a right to seek medical redress that they can afford. The Respondent relied on the case of CAS 2006/A/1025 Mariano Puerta v ITF to emphasize on proportionality in meting out punishment.

55. On the issue of No Significant Fault or negligence, the Respondent averred that at most the panel should find that the fault or negligence was not significant, and that he should only be reprimanded for his mistake. He reiterated that before the violation he had never in his life committed a sporting violation and since the ban he has not never engaged in any other form of athletics to try and circumvent the ban. He prayed for a period of ineligibility of no more than 12 months beginning on the date of his suspension which was 19th October, 2021.

56. In conclusion, the Respondent submitted that the anti-doping rule was not intentional, that there should be an elimination of the period of ineligibility since there is No fault or negligence on his part and that in the alternative, there should be a reduction of the period of ineligibility based on No Significant Fault or Negligence on the part of the athlete to a ban of no more than 12 months.

Analysis and Determination

57. The Tribunal has considered and weighed the charge document, the submissions by both counsels for the Applicant and the Respondent and the oral testimony of the Respondent, and it is our analysis that the only issue for determination by the Tribunal is whether the anti-doping violation charged against the Respondent was intentional and whether the Respondent demonstrated elements of fault and/or negligence in his actions that led to the anti-doping violation.

The Law

58. From the analysis of the evidence placed before this Tribunal, we note that the claim as brought against the Respondent by the Applicant is one of anti-doping rules violation. We would therefore note that the law governing and prescribing what amounts to an anti-doping rule violation are well crystalized, both under our local jurisdiction and under the international plane.

59. What amounts to an anti-doping rule violation is well enumerated under Article 2 of the ADAK Anti-Doping Rules 2016 as read together with Article 2 of the WADA Code. We

would be quick to add however, that the Rules adopted under the Anti-Doping Act, No. 5 of 2016, are largely a reproduction of the provisions of the WADA Code and we would consider them to be complimentary to each other.

60. We find that perhaps a reproduction of the rule albeit briefly, would be instructive. The Article is couched in the following terms:

> **ARTICLE 2 — DEFINITION OF DOPING - ANTI-DOPING RULE VIOLATIONS**
> Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of these Anti-Doping Rules. The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.
> Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

61. As we had noted earlier, the rules adopted under the Act are a reproduction of the WADA Code. We therefore find that as per the provisions of the rules, one of the actions that constitute an anti-doping rule violation is 'the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.'

62. It is undisputed that the claim before the Tribunal is one for anti-doping rule violation, after the urine sample offered by the Respondent was found to contain Triamcinolone acetonide, a prohibited substance under S.9 of the World Anti-Doping Agency Prohibited List. This fact is not disputed by the Respondent.

63. We therefore find that the Tribunal has jurisdiction to determine the case under Section 31 of the Anti-Doping Act, which provides:

I. The Tribunal shall have jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organizations.

II. Tribunal shall be guided by the Code, the various international standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act, and the Agency's Anti-Doping Rules, amongst other legal sources.

III. Consequently, therefore, the Tribunal will be guided by the provisions of the Anti-Doping Act, 2016, the WADA 2021 Code and other legal resources.

Reasoning

At the center of the findings of the Tribunal it would be expected, would be the provisions of Articles 2 of the WADA Code and the ADK ADA Rules which are premised on the idea that an athlete bears the responsibility of monitoring and ensuring that no prohibited substance enters their bodies. The athlete is essentially called upon to take all the necessary steps to ensure that no prohibited substance or their metabolites or markers enter their bodies.

65. More specifically, the provision of Article 2.1.1 of the WADA Code is couched in the following terms:

> It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples.

66. The fundamental position the responsibility placed on an athlete we would note, has obtained the status of trite law that we need not regurgitate the numerous decisions of CAS. However, for reiteration we would rely on the observation of the court in the case of **CAS 2012/A/2804 Dimitar Kutrovsky v. ITF – Page 26:**

> …the athlete's fault is measured against the fundamental duty that he or she owes under the Programme and WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.

67. The Tribunal notes that it is not contested that the tests conducted on the Athlete's Sample did return an Adverse Analytical Finding (AAF) indicating the presence of a prohibited substance. This fact can be deduced from the Respondent's submissions and Statement of Defence wherein he acknowledged the finding but asked for leniency based on grounds we would interrogate later.

68. Having then been found to be in violation of Article 2 of the WADA Code and the ADAK ADA rules on anti-violation, the provisions of Articles 10.1 and 10.2 of the WADA Code would kick in, as the consequential provisions upon the finding of an anti-doping rule violation.

69. The provisions of Article 10.2.1 specifically provide that where an athlete is found to be in violation of an anti-doping rule under Article 2 of the Code, then they are eligible for sanctions of ineligibility of up to four (4) years where the violation involves a Specified

Substance and the Anti-doping Agency can prove the violation intentional. The provisions are couched in the following words:

> The period of Ineligibility shall be four years where:
> 10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti- doping rule violation was intentional.

The Issue of Intention

70. This Tribunal notes that at the center of the submissions by both the Appellant and the Respondent, was the issue of whether the Respondent intentionally ingested the prohibited substance. It is therefore the view of the Tribunal that in order to do justice to the respective party's cases, then we the Tribunal ought to deal with the issue conclusively.

71. Without seeming to regurgitate the Applicant's submissions as we have done so in detail above, we note that the Applicant's contention was that the onus was on the Respondent to demonstrate that they did not intend to enhance their performance by ingesting the prohibited substance, and to this effect, it was not enough for them to simply state that they did not know that the supplements contained prohibited substances.

72. On the other hand, at the heart of the Respondent's case, were the submissions that the anti-doping rule violation was not intentional which would bring into play Article 10.2.1 on the period of eligibility of four years for a violation involving a specified substance, shifting the burden of proof to the Applicant, as is the case herein. The Respondent also relies on Article 10.2.3 for substances that are only prohibited *In-Competition*, in arguing that it shall be assumed to be "not intentional" if the athlete can establish that a prohibited substance was used out-of-competition. Finally, the Respondent argues that he bears no fault or negligence and requests for the elimination of the period of ineligibility since the substance entered his body as a result of using a prescription he got from a doctor.

73. We find that our recourse is found in the provisions of the law in order to demystify the contentions raised by the parties, and our beginning point would be Article 2.1.1 of the Code, which provides:

> It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part

be demonstrated in order to establish an anti-doping rule violation under Article 2.1[Emphasis Ours]

The above is emphasis on 'presence'/occurrence

74. We underline the above specific provision of the rule for reiteration purposes and in order to point to its relevance in our quest to analyze the issue of intention as submitted by both parties. From the reading of the above provision, we find that the Applicant has shown and proved that an anti-doping rule violation has occurred with the presence of a prohibited substance in the athlete's body.

75. As we had earlier found and established, the anti-doping violation against the Respondent has been proven, a fact even the Respondent does not deny. However, we find that the provisions of the rules of WADA are very clear, that the Applicant upon establishing such a violation, must go an extra mile to showing that the violation was intentional on the part of the athlete if the violation involves a specified substance as is the case currently, and if they are seeking for the maximum ineligibility period of four (4) years to apply as the Applicant is currently praying. Article 10.2.1 of the WADA provides: -

> The period of Ineligibility, subject to Article 10.2.4 shall be four years where:
> 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 antidoping rule violation was intentional.

76. The burden of proving intention is squarely on the Applicant. In determining what amounts to intentional and whether the Applicant has demonstrated to the reasonable satisfaction of the Tribunal that the violation by the athlete was intentional, this Tribunal need not go further. The provisions of the WADA are very clear on what amounts to intentional, providing under Article 10.2.3 thus: -

> As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk [Emphasis Ours].

77. It would seem to us from the reading of the provision above, that for the Applicant to prove intention on the part of the athlete to the reasonable satisfaction of this Tribunal, the Applicant must demonstrate either of the following;

    i. that the athlete engaged in conduct which he knew constituted an anti-doping rule violation; or
    ii. the athlete knew there was a significant risk that his conduct would constitute or result in an anti-doping rule violation and manifestly disregarded the risk.

78. We underline elements of the above provision for emphasis and clarity. To this Tribunal's mind, the requirement of intentional violation is "two-tiered" so to say. It requires that either the Applicant shows that the athlete expressly knew that they were doping, or alternatively that they reasonably knew their conduct carried a real risk of violating the doping rules yet they went ahead with the said conduct hence disregarding the apparent risk clearly before them.

79. We would therefore in the clearest terms and for categorization purposes, observe that the law requires either the Applicant to prove intention 'directly' or 'indirectly'.

80. From the evidence adduced before these Tribunal, we find that such direct intention has not been proven by the Applicant to the comfortable satisfaction of this Tribunal. Clearly, the Respondent disputes that the violation was intentional - an important aspect in determining direct intention. The Respondent has also provided undisputed evidence in terms of medical records and prescription to show that he was placed under medication. Taking all these into account, we find that direct intention has not been proven by the Applicant to the required standard.

81. Upon such a finding, we would then turn to answer the question whether the Applicant has proven to the required standard any "indirect intention" on the part of the Respondent. On this, we would be quick to note that the jurisprudence has been set to the effect that intention can be either direct or indirect, commonly known as "dolus eventualis". In the case of **CAS 2011/A/2677 Dmitry Lapikov vs. International Weightlifting Federation (IWF),** the Panel noted: -

> … the term "intent" should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behavior as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behavior is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary

intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent" (CAS 2012/A/2822, para. 8.14).

… the Athlete took the risk of ingesting a Specified Substance when taking the Supplement and therefore of enhancing his athletic performance. In other words, whether with full intent or per "dolus eventualis", the Panel finds that the Appellant's approach indicates an intent on the part of the Appellant to enhance his athletic performance.

82. We therefore find that the provisions of the WADA and the jurisprudence emanating from the CAS could not be clearer. Intention can be proved on the part of the athlete where it shown through the conduct of the athlete, that they clearly disregarded material risk of anti-doping rule violation.

83. The Tribunal therefore notes that while it can be assumed or said the athlete took the medicine prescribed by the doctor for an illness-which does away with direct intention-however, the fact that the athlete ignored warning that such medication could lead to an anti-doping rule violation points to an animus on the part of the athlete, and shows that while the athlete was taking the medicine for medicinal purposes, he would be comfortable with any collateral result materialized out of her taking the same medicine.

84. We agree with the submissions of the Applicant that the mere fact that a doctor prescribed the medicine does not excuse the Athlete from his responsibility of ensuring he won't violate the rules. Article 21 of the Code is very clear on the responsibilities of the Athlete in providing:

To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code.
21.1.2 To be available for Sample collection at all times.
21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and Use.

85. This position has further been reiterated in the case of **WADA v. Indian NADA & Dane Pereira CAS 2016/A/4609** where the court observed as follows:

Given that athletes are under a constant duty to personally manage and make certain that any medication administered is permitted under the anti-doping rules, an athlete cannot simply rely on a doctor's advice; it follows that e.g. the prescription of a particular

medicinal product by an athlete's doctor does not excuse the athlete from investigating to his or her fullest extent that the medication does not contain prohibited substances [Emphasis Ours].

The finding that a violation was committed intentionally excludes the possibility to eliminate the period of ineligibility based on no fault or negligence or no significant fault or negligence.

86. The court in the same matter above observed regarding risk of violation as follows:

> In this context there is an inherent significant risk that medications may contain prohibited substances [Emphasis Ours]; this is all the more so with respect to medications that are taken by intramuscular injection and are certainly not administered inadvertently through, e.g. a tablet.

87. Furthermore, the actions of the Respondent and the explanations given by him in claiming that the prohibited substance entered his body through medicine purchased from a pharmacy, and investigations concluded by the Applicant show that his claims cannot be supported to confirm that the medication he took contained the prohibited substance. The origin of the prohibited substance has not been established.

88. The Tribunal therefore maintains the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules. It is of little relevance to the determination of absence of intention or fault that the product was prescribed with assumed professional diligence of a medical practitioner.

89. As averred by CAS 2008/A/1488 P. v. International Tennis Federation (ITF):

> To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.
>
> A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

90. We find that if athletes were allowed to violate anti-doping rules either through their intentional disregard for the risk involved on the pretext that they would ultimately disclose the same in the doping form, this would render the whole requirement placed on the athlete to ensure no banned substance is digested in their body, irrelevant. After all, all an athlete would need to do is simply unshackle his responsibilities as enumerated under the Code and the Act, while safely armed with the defense of disclosure after the fact or immediately prior to the act.

91. In this particular instance, by failing to even conduct an internet search to ascertain whether the medication could violate anti-doping rule, failure to even attempt to honestly disclose the origin of the ADRV points to a significant disregard of the risks for violation of anti-doping rules on the part of the Respondent.

Sanctions

92. Upon the finding that the athlete intentionally violated the anti-doping rule, we note that the WADA clearly provides that the ineligibility period shall be four (4) years, subject to the provided potential reduction criteria provided under Articles 10.4 (i.e. Elimination of the Period of Ineligibility where there is No Fault or Negligence), 10.5 (i.e. Reduction of the Period of Ineligibility based on No Significant Fault or Negligence) or 10.6 (i.e. Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault).

93. We however find that since it has already been established that the violation by the Respondent was intentional, the Tribunal finds it unnecessary to venture into a determination of whether the Respondent bears no fault or negligence. We hold this to be the case because the threshold for proving intentionality is higher than that required to prove no fault or negligence. This is well captured under Article 3.1 of the Code which provides as follows:

> The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability [Emphasis Ours].

94. Additionally, the Tribunal finds that the above reasoning also applies to "no significant fault or negligence" (Article 10.5 of the WADA Code). The Tribunal observes that the comment to Article 10.5.2 of the Code takes away any possible doubts in this respect:

> Article 10.5.2 may be applied to any anti-doping rule violation except those Articles where intent is an element of the anti-doping rule violation […] or an element of a particular sanction (e.g., Article 10.2.1) ….

95. As such, since the Respondent is found guilty of intentionally violating Article 10.2.1 of the Code, it is impossible to establish that the violation was committed with no significant fault or negligence. This was clearly held in the case of WADA v. Indian NADA & Dane Pereira CAS 2016/A/4609: -

> The finding that a violation was committed intentionally excludes the possibility to eliminate the period of ineligibility based on no fault or negligence or no significant fault or negligence.

96. Upon then finding that Articles 10.4 & 10.5 of the Code do not apply, the Tribunal must turn to examine the applicability of Article 10.6 that calls for the elimination, reduction and suspension of the otherwise applicable ineligibility period for other reasons.

97. By inviting the Tribunal to consider the principle of proportionality, the Respondent undoubtedly calls upon the Tribunal to exercise its discretion and invoke an overarching principle of law that not only finds shelter in the Sports arena but transcends it.

98. The rationale of imposing this principle is well articulated in **CAS 2008/A/1473 Joe Warren v. United States Anti-Doping Agency (USADA)** at paragraph 17 while quoting CAS 2006/A/1025 the Panel stated:

> … in all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account.
>
> But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the

> very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate…
>
> Thus, where WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, …. That gap is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based.

99. We would not hesitate to note that such judicial discretion must be used judiciously and in the rarest of cases. The Respondent must therefore prove to the Tribunal that there exist peculiar circumstances that would move this Tribunal to venture out of the provisions of the Code and the relevant laws to invoke such discretion.

100. In determining whether the principle of proportionality would be applicable in this particular case, we would seek to rely on the decision of the Football Association's (FA) Regulatory Commission in **Football Association v Jake Livermore** issued on 8th September 2015, where the Commission observed that the doctrine of proportionality would be applicable and therefore trump the mandatory doping sanctions under the WADC only in "exceptional" circumstances.

101. In the above case, the FA under its Anti-Doping Regulations (reflecting the 2009 WADA Code) had brought a charge against Jake Livermore, the Hull City player, for an in-competition positive test in April 2015 for the prohibited substance, cocaine.

102. However, despite that Mr. Livermore could not bring himself within the definition of "no fault or negligence" under the regulations, the Commission went on to disapply the penalty and arrive at the outcome that no period of suspension would be given.

103. The Commission in reaching its decision based on the principle of proportionality, had relied upon the evidence of a consultant forensic psychiatrist who testified that Mr. Livermore had the impairment to his thought processes and judgment at the time in question due to the death of his son.

104. Turning to the present proceedings before us, we find that the Respondent has not produced any evidence that weighed on a balance of probability, would convince this Tribunal to venture outside the provisions of the Code and the relevant laws. No evidence has been adduced by the Respondent that indicates his case falls under the category of "exceptional" circumstances or rare cases, that would move the Tribunal to invoke its discretion to apply the principle of proportionality.

105. We find therefore that the pleas under the principle of proportionality fail due to failure in meeting the threshold set for such pleas.

106. Consequently, the Tribunal finds that the Respondent could not claim No (Significant) Fault or Negligence in committing the anti-doping rule violation, nor shall the period of ineligibility of four (4) years otherwise be reduced or suspended.

Commencement of Ineligibility Period

107. Article 10.11 of the WADA Code provides as follows: -

> Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing of Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.
>
> 10.11.1 Delays Not Attributable to the Athlete or other Person
>
> Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of ineligibility, including retroactive Ineligibility, shall be disqualified.
>
> 10.9 Timely Admission
>
> Where the Athlete promptly (which, in all events, means before the Athlete competes again) admits, the anti-doping rule violation after being confronted with the anti-doping rule violation by the Anti-Doping Organization, the period on Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed…

108. We note that the above Article gives some form of flexibility and discretion to the Tribunal to determine this question. The Tribunal acknowledges that the Respondent

never challenged that triamcitolone acetonide as found in his urine sample as per the charge document.

Conclusion

109. In light of the above, the following Orders commend themselves to the Tribunal:

a. The period of ineligibility for the Respondent shall be four (4) years commencing on 12th September 2021.

b. The Respondent's results obtained from and including the 12th of September 2021 until the date of determination of this matter be disqualified, with all resulting consequences including forfeiture of medals, points and prizes pursuant to Article 10.1 of the WADA Code and the ADAK rules;

c. Each party shall bear its own costs;

d. Parties have a right of Appeal pursuant to Article 13 of the WADA Code and Part IV of the Anti-Doping Act, No. 5 of 2016.

Dated at **Nairobi** this day of January 2023

Mrs. Elynah Sifuna-Shiveka, Deputy Chairperson

Gichuru Kiplagat, Member **Allan Mola, Member**