



**REPUBLIC OF KENYA**

**IN THE SPORTS DISPUTES TRIBUNAL AT NAIROBI**

**ANTI DOPING NO. 9 OF 2022**

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

**VERSUS**

**KELI EVERLYNE SYOMBUA..... RESPONDENT**

**DECISION**

**Panel:**

1. Mrs. Elynah Sifuna-Shiveka – Deputy Chairperson
2. Mr. Allan Mola - Member
3. Mr. Peter Ochieng - Member

**Appearances:**

The Applicant is represented by Mr. Rogoncho from Anti-doping Agency of Kenya

The Respondent is represented by Ms. Ouko from Nancy Ouko and Company Associates

**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 female adult of presumed sound mind and a national level athlete (hereinafter 'the Athlete').

### **Preliminaries**

3. The Applicant filed an application, the Charge Document, with the Tribunal dated 12<sup>th</sup> August 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 23<sup>rd</sup> May 2022 and pictures of drug substances.
4. The proceedings were commenced by the Applicant filing a Notice to Charge against the Athlete dated 21<sup>st</sup> June 2022 addressed to the Chairman of the Sports Disputes Tribunal.
5. The Tribunal issued directions on 22<sup>nd</sup> June 2022 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 15<sup>th</sup> July 2022. A panel was also constituted to hear the matter and the same scheduled for mention before the Tribunal on 21<sup>st</sup> July 2022 to confirm compliance and further directions.
6. When the matter came up for mention on 28<sup>th</sup> July 2022, it was noted that the Applicant had not yet been able to file the Charge Documents and requested 14 days to do so. The Respondent stated that she wished to be represented by a pro bono counsel. The Tribunal granted the Applicants Request for 14 days to file the charge document and upon mention the Tribunal directed that Tribunal Registry was to find a pro bono counsel for the Respondent and the matter was set for further mention on 18<sup>th</sup> August 2022.
7. The matter came up for mention to confirm filing of response to the charge on 18<sup>th</sup> August 2022. Ms. Ouko for the Respondent stated that she had just filed a notice of appointment and had not yet responded to the charge. The Tribunal directed that the matter was to be mentioned on 1<sup>st</sup> September to confirm filing of response to the charge.
8. On 1<sup>st</sup> September 2022, the matter came up for mention to confirm filing. Counsel for the Respondent stated that she had been unable to file the response and serve it to the parties and sought for 7 days to file her response. The Tribunal ordered that the

response was to be filed by 8<sup>th</sup> September 2022 and the matter was listed for mention on 8<sup>th</sup> September 2022.

9. The matter came up for mention on 8<sup>th</sup> September and Mr. Rogoncho for the Applicant requested to take a hearing date while he perused the response to the charge. The Tribunal listed the matter for hearing on 13<sup>th</sup> October 2022. The matter was set for a further hearing on 3<sup>rd</sup> November 2022.
10. When the matter came up for hearing on 3<sup>rd</sup> November, Mr Rogoncho had authenticated the medical documents provided by the athlete and they confirmed that they had been forged. Ms Ouko for the Respondent sought more time to deliberate with her client before proceeding and by way of consent both counsels agreed to take the matter out of the cause list. The Tribunal directed that the matter was to be mentioned on 17<sup>th</sup> November 2022.
11. The matter came up to confirm on how the parties wished to proceed on 17<sup>th</sup> November 2022. Counsels for both parties agreed to proceed by way of written submissions. The matter was listed for mention on 8<sup>th</sup> December to confirm compliance and allocate a decision date.
12. On 15<sup>th</sup> December 2022 the matter came up for mention to confirm filing submissions. Counsel for the Applicant stated that he had filed and served the same and added that he had not been served by the Respondent who hoped to do the same by the next day. The matter was listed for decision on 2<sup>nd</sup> February 2023.

### **Facts and Background**

13. The Applicant filed a Charge document at the Tribunal on the 12<sup>th</sup> of August 2022 bringing charges against the Respondent observing that on 26<sup>th</sup> February 2022, during an Athletics Mountain Running 8km competition, an ADAK Doping Control Officer (“DCO”) collected a urine sample from the Respondent. The sample was split into two separate bottles, which were given reference numbers A 7022302 (the “A Sample”) and B 7022302 (the “B Sample”) in accordance with the Prescribed WADA procedures.
14. The Samples were transported to the South African Doping Control Laboratory - Bloemfontein an Anti-Doping Laboratory (“WADA”) - accredited Laboratory in South Africa, (the “Laboratory”). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA’s International Standard for Laboratories. The analysis of the A Sample returned an Adverse Analytical Finding

("AAF") for presence of a prohibited substance **S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and 19-noretiocholanelone** which are listed under S1.1 of WADA's 2022 Prohibited List.

15. The findings were communicated to the respondent athlete by Sarah I. Shibusse, the Ag. ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 23rd May 2022. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 12<sup>th</sup> June 2022.
16. The same letter also informed the athlete of her right to request for the 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. The athlete was given until 12th June 2022 to respond and request for a hearing if need be.
17. The Respondent accepted the charges vide a letter dated 23rd May 2022 and, in her communication, she stated that she used Norandrosterone to relieve pain from her knee injury and allergies and further denies using the Norandrosterone to gain an extra advantage during competitions. She further attached images of a tablet together with her letter.

### **The Charge**

18. The Anti-Doping Agency of Kenya ADAK therefore is preferring the following charge against the Athlete Respondent: -  
**Presence of a prohibited S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and 19-noretiocholanelone**

### **Jurisdiction of the Tribunal**

19. 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**

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

### The Applicant's Case

21. The foundation of the applicant's case is the Charge Document submitted to the tribunal on 12<sup>th</sup> August 2022 and its written submissions dated 7<sup>th</sup> December 2022
22. The Applicant submits that under Article 3 the ADAK ADR and WADC the rules provides that the Agency has the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.
23. The Applicant stated that the Respondent was being charged with an Anti-Doping Rule Violation of presence of a prohibited substance **S1.1 Anabolic Androgenic Steroids (AAS)/19- norandrosterone** contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).
24. The respondent being a female Athlete, 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) apply to her.
25. The Respondent accepted the charges and responded to the ADRV Notice vide a letter dated 23<sup>rd</sup> May 2022. In the letter she admitted to using the Norandrosterone to relieve pain from a knee injury. Attached in the letter were medical support documents which served as an explanation as to how the substance entered her body.
26. The Applicant stated that Athlete is charged with presence of Prohibited Substance, a violation of article 2.1 ADAK ADR. S1.1Anabolic Androgenic Steroids(AAS)/19-norandrosterone is a non-Specified Substance and attracts a period of ineligibility of 4 years.
27. The Applicant went 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.
28. They further provided that 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.
29. 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.

30. The Applicant therefore urged the Tribunal to find that an ADRV had been committed by the Respondent herein.

### **Respondent's Case**

31. The Respondent filed a Response to Charge dated 7<sup>th</sup> September 2022 praying that the Charge Document be dismissed in its entirety. The Response to the Charge denied the allegations contained in the Charge document, and put the Applicant to strict proof.

32. In the Respondent's written statement, she stated that after participating in the Cross-Country championship on 12th February 2022, she fell ill and the pain in her left knee became worse. The Respondent added that, that was when she decided to go to Machakos Level V Hospital for comprehensive treatment on 18th February 2022.

33. The respondent received communication from the Applicant that there were results on some testing which indicated an issue of doping. The Respondent informed the Applicant that that she had received treatment at Machakos Level V Hospital sometime in February 2022 after the cross-country championship.

34. The treatment was due to pain which the Respondent was experiencing because of the intense athlete training sessions at the camp in Machakos. When asked about the pain, the Respondent informed the hospital that she was an athlete at the Athletics Kenya camp and that the training had been vigorous due to upcoming competitions.

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 23<sup>rd</sup> May 2022 detailing her 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 relieve her pain. The jurisdiction of the Tribunal was admitted.

### **Applicant's Submissions**

#### **Issue of Intention**

37. The WA Rules specifies that the term "intentional" refers to athletes who cheat and requires that the athlete or person engaged in behavior that they knew was a violation of anti-doping rules or knew there was a significant risk of such a violation and disregarded that risk. As per the case-law in the Olga Kazankevich v. Russian

Anti-Doping Agency (RUSADA) case, the athlete bears the burden of proving that the anti-doping rule violation was not intentional. The athlete must prove, with a balance of probability, that the circumstances they rely on are more likely to have occurred than not.

38. The Applicant argues that the Respondent has failed to demonstrate a lack of intent to cheat based on her actions. The requirement of intent is met when there is a significant risk of an anti-doping rule violation and the athlete disregards it. The Respondent's defense that she ingested the prohibited substance due to a knee injury is further weakened by her behavior throughout the case. The Respondent admitted to ingesting the substance and provided medical records to support her claims, but these records were later found to be forged, making it impossible to determine the source of the prohibited substance.
39. The Applicant argues that the Respondent's falsification of medical records shows her intention to cheat and subvert the doping control process. If she had another intention, she would not have gone to the lengths of falsifying documents. The athlete bears the burden of proving that the violation was unintentional and explaining how the banned substance entered her body, but has failed to do so. This, combined with the falsification of medical records and inability to prove the source of the prohibited substance, points to the athlete's guilt and intention to cheat.
40. Under the ADAK ADR, an offense is committed as soon as a prohibited substance is found in the athlete's tissue or fluids. There is a legal presumption that the athlete is responsible for the mere presence of the substance, and the agency only needs to prove that the substance was properly identified. If the agency succeeds in this, there is a legal presumption that the athlete committed the offense, regardless of their intention.

### **Issue of Origin**

41. From the explanation given by the athlete, she provided that the prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone entered her body through medicine she obtained from a doctor. An investigation into the medication provided didn't support her claim as the medication didn't contain the prohibited substance.
42. . In that regard, we do submit that the origin of the prohibited substance has not been established.

### **Fault/negligence**

43. The Respondent is responsible for understanding and following the anti-doping rules and for being accountable for anything they consume. However, they failed to meet their obligations as outlined in rules 22.1.1 and 22.1.3 of ADAK ADR.

The athlete has a personal obligation to make sure that no prohibited substances enter their body. This responsibility applies even if there is no intent, fault, negligence, or knowing use on the athlete's part.

44. In the case of Aleksei Medvedev v. Russian Anti-Doping Agency (RUSADA), the panel stated that in determining an athlete's level of fault, specific and relevant circumstances must be taken into account. The panel also made it clear that a finding of no fault applies only in exceptional cases and that athletes must exercise the utmost caution to avoid doping. The athlete's fault is measured against their duty to avoid consuming prohibited substances.

Therefore, the Respondent has a responsibility to maintain high standards, being an experienced athlete, and the applicant submits that the respondent was negligent due to their failure to exercise the highest level of care.

### **Knowledge**

45. The applicant argues that the principle of strict liability applies in cases where an athlete's urine or blood samples have produced adverse analytical results. This means that each athlete is responsible for the substances found in their bodily samples, and an anti-doping rule violation occurs whenever a prohibited substance or its markers are found, regardless of whether the athlete intentionally or unintentionally used it or was negligent.

46. The applicant also points out that the athlete has a background in athletics and is aware of the anti-doping campaign in sports. They argue that an athlete who competes in national competitions and knows that they are subject to doping controls cannot simply assume that the products they consume are free of prohibited or specified substances.

### **Sanctions**

47. For an Anti-Doping Rule Violation (ADRV) under Article 2.1 of the Anti-Doping Agency of Kenya (ADAK) ADR, a regular sanction is a four-year period of ineligibility if the ADRV was intentional. If not, the period of ineligibility is two



years. To reduce the sentence, the athlete must establish how the substance entered their body and that they did not intend to take it to enhance performance. The burden of proof is on the athlete and must be established on the balance of probabilities. In the case of Sigfus Fossdal v. International Powerlifting Federation, the panel stated that the athlete must establish how the prohibited substance entered their system. The applicant claims that the respondent failed to meet this burden, and by a balance of probabilities, it's more likely that the athlete knowingly consumed the prohibited substance. The respondent failed to prove how the prohibited substance entered their sample and their conduct cannot be excused. The panel is convinced that the respondent has not demonstrated no fault or negligence, so they should face the full consequences.

### **Respondent's Submissions**

48. As the Respondent's written submissions constituted a succinct response to the issues listed in the Applicant's submissions, we shall briefly describe them. The Respondent's submissions might be interpreted broadly as claiming that she did not intend to dope and that their lack of fault/negligence on her part.
49. The Respondent cited Article 3 the ADAK rules provides that the ADAK has the burden of proving the anti-doping rule violation to the comfortable satisfaction of the hearing panel. The Respondent filed a witness statement and provided evidence before this honorable tribunal in support of her case. The Respondent responded to the charge by stating that she was treated at Machakos Level V hospital and provided evidence of the said treatment.
50. The Respondent demonstrated that their adverse analytical finding (presence of a banned substance) was not due to intentional use. The standard of proof in this case is by a balance of probability, as stated in the IAAF Competition Rules 2016-2017. The respondent relied on the case of Mwakima and Three others v. Republic [1989] KLR 530, where the burden of proof is not as high as proving a charge beyond reasonable doubt.
51. The Respondent also explained that the definition of intention in anti-doping rules refers to an element to identify those who cheat and requires knowledge and manifest disregard of a significant risk. The respondent cited the case CAS 2017/A/4962 WADA V. Comitao Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi, where it was established that for a non-intentional anti-

- doping violation, the athlete must prove lack of intention and how the substance entered their body.
52. The Respondent stated that she did not have any intention to commit an anti-doping rule violation. If it were not so, the Respondent would not have been willing to be tested, and subsequently, cooperate with the Applicant in providing all the possible medical/treatment records of what the athlete presumed may have caused the anti-doping violation.
  53. The Respondent argued that the adverse analytical finding was not the result of intentional use of prohibited substances and the standard of proof for the Respondent is on a balance of probability. They relied on a previous case where the standard of proof for the accused is never higher than that of the prosecution to prove a charge beyond reasonable doubt. The Respondent argued that for an anti-doping violation to be considered non-intentional, the athlete must prove lack of intention and how the substance entered their body.
  54. The Respondent provided evidence of treatment at Machakos Level V hospital as the likely cause of the presence of prohibited substances. The Applicant alleged that the medical documents were not genuine, but the Respondent argued that there was no evidence presented to show that the documents were forgeries and the legal burden of proof is on the balance of probability.
  55. The Respondent submitted that the degree of fault in the case can only be determined based on the prevailing circumstances and that there has been case law to establish this. The "no Significant Fault or Negligence" provisions aim to provide flexibility in the degree of sanction and require a purposive approach, instead of a literal interpretation, in line with the jurisprudence of the case. The Respondent argued that based on the athlete's explanation and accompanying evidence, as well as their cooperation and disclosure, there should be no fault found on the part of the athlete.
  56. That as noted by the Applicant, the Respondent in her witness statement stated that this was the first time she had been charged with a violation of anti-doping rules, in addition to the fact that she is young in her career, having joined the athletics camp in January 2021. The athlete had only participated in two other national events. The Athlete had clearly no intention of cheating. Having been suspended from 12th June 2022, the athlete had learnt her lesson and thus urged the honorable panel to discharge the Respondent to allow the athlete to pursue her athletics career.

### **Analysis and Determination**

57. The Tribunal has analyzed the charge against the Respondent, the submissions from both parties, and the written statement from the Respondent. The focus of the Tribunal is whether the anti-doping violation was intentional and if the Respondent showed any fault or negligence in their actions that caused the violation.

### **The Law**

58. The claim as brought against the Respondent by the Applicant is one of anti-doping rules violation.

59. We would therefore note that the law governing and prescribing what amounts to an anti-doping rule violation are well enumerated under both local and international jurisdiction.

60. 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.

61. 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. The following constitute anti-doping rule violations**

62. The rules under the Anti-Doping Act are a reproduction of the WADA Code and include a violation for the presence of a prohibited substance such as S1.1 Anabolic Androgenic Steroids (AAS)/19- norandrosterone in an athlete's sample. It is undisputed that the Respondent's urine sample contained a prohibited substance

and the tribunal has jurisdiction to determine the case under Section 31 of the Anti-Doping Act which provides

*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.*

*The 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.*

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

### **Reasoning**

64. The main focus of the Tribunal's findings is based on the provisions of Articles 2 of the WADA Code and the ADK ADA Rules, which hold athletes responsible for preventing the presence of prohibited substances in their bodies. They are expected to take all necessary steps to ensure that no prohibited substances or their by products are present. Specifically, Article 2.1.1 of the WADA Code states that it is each athlete's personal responsibility to make sure no prohibited substances enter their body and they will be held accountable for any prohibited substances found in their sample.

65. This responsibility placed on athletes has been established as a common principle and has been reinforced in various decisions by the Court of Arbitration for Sport. In this case, the Tribunal notes that the athlete's sample returned an adverse analytical finding for a prohibited substance, which was acknowledged by the Respondent, but they asked for leniency for reasons that will be further examined. 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.

66. 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:

**... 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 antidoping rule violation was not intentional.**

### **The Issue of Intention**

67. The Tribunal recognizes the main argument between the Appellant and Respondent was whether the Respondent intentionally consumed the prohibited substance. The Tribunal believes intent must be examined to fairly evaluate both parties' cases. The Appellant argued that it was the Respondent's responsibility to prove they did not intentionally consume the substance. However, Article 2.1.1 of the Code states that athletes are responsible for any prohibited substances found in their samples, regardless of intent. The provision emphasizes the importance of the presence of the substance in establishing an anti-doping violation.
68. 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, then the Article 10.2.1.1 is applicable and the burden is on the Athlete to prove otherwise.
69. The burden of proving intention in a doping case lies with the Athlete. The definition of "intentional" according to WADA's anti-doping rules is that the athlete or person engaged in conduct that they knew was a violation or knew carried a significant risk of violating the rules and disregarded that risk. To prove intention, the Applicant has also attempted to show that the athlete either knew they were doping or reasonably knew their conduct carried a risk of violating the rules and disregarded that risk.
70. 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.

71. We agree with the applicant's submission that the Respondent has failed to prove a lack of intention to cheat, based on her conduct. The Respondent in her defense admitted to ingesting the prohibited substance and provided medical documents to support her claims. An analysis and authentication of the medical reports was undertaken and subsequent results proved that the medical results were forged, thus meaning that the source of the prohibited substance couldn't be proved or established.
72. The Respondent's deliberate manipulation of her medical records indicates a clear intention to cheat and avoid the doping control process. If the athlete had any other motive, she would not have put effort into falsifying medical documents. Instead, she would have provided credible evidence to clear herself of the charge.
73. Any burden of proof expected to be discharged by the Anti-Doping Organization under Article 3 of the ADAK Rules and WADC was done by its prosecution.
74. In her defense, the Respondent made several admissions and a few general denials. In her evidence in chief the respondent made the following admissions,
- a) She admitted to being sick and seeking medication from a hospital.
  - b) She admitted to being treated for knee pain.
  - c) She admitted to being prescribed with various medication including Norandrosterone.
  - d) She admitted to using Norandrosterone to relieve knee pain.
  - e) She denied using the Norandrosterone to enhance her sporting performance.
75. In the case WADA v. Tyson Gay (USA) & USADA CAS 2013/A/3268: This case involved American sprinter Tyson Gay, who tested positive for a banned substance. Gay claimed that the positive test was due to his use of a medication that had been prescribed to him by his doctor. The Court of Arbitration for Sport found that Gay had taken the medication with the intent of enhancing his performance and that he had failed to properly check whether the substance was banned. As a result, he received a one-year ban.
76. The actions of the Respondent and explanations given by her in claiming that the prohibited substance was to relieve pain and not enhance her sporting performance, shows a failure on her part to take responsibility, in the context of Antidoping, for what they ingest and what they use which is a responsibility of an athlete under Article 22.1 of the ADAK ADR and WADC rules

77. In CAS 2016/A/4563 World Anti-Doping Agency (WADA) v. Egyptian Anti-Doping Organization (EGY-NADO) & Radwa Arafa Abd Elsalam, the panel stated that, "It is the athlete that bears the burden of proof of establishing that the violation was unintentional and thus to establish how the relevant forbidden substance entered into his/her body". The athlete did not reach the standard set by previous decisions made by the Court of Arbitration for Sport (CAS). The inability to show the origin of the banned substance and the manipulation of medical records presented as evidence of how the substance entered her body suggest only one conclusion: the athlete is guilty and intended to cheat by using the prohibited substance.

### Sanctions

78. 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).

79. The Tribunal has determined that the athlete intentionally violated the anti-doping rules, so there is no need to further examine whether the athlete was at fault or lacked negligence. The standard for proving intentionality is more stringent than the standard for proving the absence of 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].**

80. 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

81. 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.

### **Commencement of Ineligibility Period**

82. 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

83. 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 **S1.1 Anabolic Androgenic Steroids (AAS)/19- norandrosterone** as found in her urine sample as per the charge document.

### **Conclusion**

84. 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 12<sup>th</sup> June 2022.
  - b. The Respondent's results obtained from and including the 12th June 2022 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       **16th**       **day** of       **February**  
**2023**

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**Mrs. Elynah Sifuna-Shiveka.**  
**Deputy Chairperson**  
**Sports Disputes Tribunal.**

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**Mr. Peter Ochieng'**  
**Member**  
**Sports Disputes Tribunal.**



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**Mr. Allan Mola Owinyi**  
**Member**  
**Sports Disputes Tribunal**