REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
ANTI-DOPING CASE NO. 10 OF 2022

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

-Versus-

MATHEW KIPLANGAT SAWE…………………………...……..………RESPONDENT

DECISION

Panel: **Mrs. Elynah Sifuna-Shiveka - Deputy Chairperson**
Mr. Gabriel Ouko - Member
Mr. Allan Mola - Member

Appearances: **Mr. Bildad Rogoncho, for the Applicant**
No representation by the Respondent Athlete

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').

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 12th 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, email from the Respondent dated 26th June, 2022, out-patient continuation sheet dated 24th April, 2022 from County government of Meru, department of health Meru Teaching and referral hospital.

4. More specifically, the proceedings were commenced by the Applicant filing a Notice to Charge against the Athlete dated 30th June, 2022 addressed to the Chairman of the Sports Disputes Tribunal. It was received at the Tribunal on 1st July, 2022.

5. Consequently, directions were issued on 4th July, 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 Wednesday 20th July, 2022. A panel was also constituted to hear the matter and the same scheduled for mention before the Tribunal on Thursday 21st July, 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 4th August, 2022.

7. The matter came up for mention on 4th August, 2022 as directed. Counsel for the applicant stated that he had not filed the charge documents and prayed for 14 days to file the same. The Tribunal directed that the matter be set for further mention on 18th August, 2022 and the Applicant to serve mention notice on the Respondent.

8. When the matter came up for mention on 18th August, 2022 Mr. Rogoncho confirmed filing of the charge document and other relevant documents. He intimated that the Respondent had informed him that he wasn't feeling well and would therefore not be able to join the proceedings. Nevertheless, Rogoncho stated that the Respondent prayed for a pro bono counsel to represent him.
9. The matter came up for mention on 1st September, 2022. The Tribunal had gotten a pro bono counsel for the athlete Mr. Maranga from Wann Law Advocates. He was present during the mention and stated that he was yet to get in touch with the Respondent athlete and requested for 14 days to file a response.
10. On 6th October, 2022 the matter came up for mention and Mr. Rogoncho stated that he had not been served with the defence by Mr. Maranga. Representing the Respondent in the matter Mr. Maranga admitted that he was yet to file his defence since his client had not send him the signed statement though the documents were ready. He requested for a further seven (7) days to comply. His prayer was granted but was asked to file the statement of response.

11. On 19th October, 2022 the matter came up for another mention and ADAK was represented by Mr. Rogoncho while Mr. Maranga continued appearing for the Respondent. Once again Mr. Maranga informed the Tribunal that he was yet to file and serve the response since he was yet to receive a signed document from the Respondent and requested for 7 days to do so. Leave was granted and the matter was to be mentioned on 3rd of November, 2022.

12. On 3rd of November, 2022 when the matter came up for mention. The Respondent was not present neither his counsel. Mr. Rogoncho for the Applicant stated that the mention was to confirm whether the Tribunal will have a court circuit in Eldoret. The Tribunal was indeed to sit in Eldoret on the 9th of November,2022 where the matter was to be heard.

13. Come the 9th of November 2022 Mr. Rogoncho who was prosecuting the matters in Eldoret informed the Tribunal that, the Counsel for the Respondent had indicated that the hearing would not proceed due to challenges he was encountering getting in touch with the Respondent athlete.

14. The matter was stood over for quite some time till it was listed for mention on 23rd of February, 2023. In the interim Mr. Maranga withdrew from representing the Respondent. Mr. Rogoncho for the Applicant stated that the hearing would not proceed. He added that they had tried to contact the athlete but he was elusive and full of excuses. He prayed for twenty-one (21) days to put in written submissions.

15. The matter came up for mention on 16th March, 2023 to confirm filing of the Applicant's submissions. Mr. Rogoncho had not filed his submissions and he requested for 7 days to do so. In the meantime, there was no appearance by the Respondent while any documentation filed on his behalf. The Applicant was granted leave of 7 days to comply and the matter listed for mention on 23rd of March, 2023. On 23rd March, 2023 the Applicant confirmed that he had filed written submissions and was waiting for the decision date since the matter was undefended.

Applicant's submissions

16. The Anti-Doping Agency of Kenya wishes to adopt and own the charge documents dated 12th August, 2022 and the annexures thereto as an integral part of its submission.
17. The Athlete herein is charged with an Anti-Doping Rule Violation of a prohibited substance ***Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamcinolone Acetonide*** contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules (hereinafter referred to as ADAK Rules).
18. The Athlete is a national level athlete and therefore the result management authority vests with ADAK which in turn delegated the matter to the Sports Disputes Tribunal as provided for in the Anti-Doping Act No. 5 of 2016 as amended to constitute a hearing panel which the athlete was comfortable with.
19. The matter was set for hearing and the athlete failed to appear and the Tribunal directed the matter to proceed by written submissions on any sanction or penalty which might be imposed.

Background/Facts

20. The respondent is a male 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 rules (hereinafter ADAK ADR) apply to him.
21. On **26th April, 2022,** an ADAK Doping Control Officer ("DCO") collected a urine sample from you. Assisted by the DCO, the athlete split the sample into two separate bottles, which were given reference numbers A **7022036** (the A Sample) and B **7022036** (the "B Sample") in accordance with the prescribed WADA procedures.
22. Both Samples were transported to the WADA accredited Laboratory in Qatar. The Laboratory analyzed the A sample in accordance with the procedures set out in WADA's International Standard for Laboratories.
23. Analysis of the A sample returned an Adverse Analytical Findings (AAF) for presence of a prohibited substance ***Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamconolone Acetonide*** which is listed as a Glucocorticoids under S9 of the 2022 WADA prohibited list.
24. The findings were communicated to the respondent athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice to Charge and mandatory provisional suspension dated 21st June 2022. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 11th July 2022.
25. The Respondent accepted the charges and responded to the ADRV Notice vide a letter dated 26th June, 2022. In his communication, he stated that he had a problem with his knees and decided to visit the hospital to seek medical attention. He further attached a doctor's prescription note in his defense.
26. 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.
27. The Respondent did not request a sample B analysis thus waiving his right to the same under WA rule 37.5 and confirmed that the results would be same with those of sample A in any event.

28. 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.
29. A charge document was prepared and filed by ADAK's Advocates, and the Athlete presented a response thereto.
30. The matter was undefended and therefore the panel made a decision based on the written submissions.

Legal Position

31. 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.

Presumptions

32. It 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 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 Findings** 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……*

Roles and responsibilities of the Athlete

33. That under Article 22.1 the Athlete has 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,

__c) To take responsibility, in the context of anti-doping, for what they ingest and use,__

__d) To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-doping rules,__

e) To disclose to his or her international federation and to the agency any decision by a non-signatory finding that he or she committed and Anti-Doping Rule Violation within the previous 10 years,

f) To cooperate with Anti-doping organizations investigating Anti-doping rule violations.

34. The athlete herein is also under duty to uphold the spirit of sports as embodied in the preface to the Anti-Doping Rules which provides as follows;

> *"The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including:*

- *Health*
- *Ethics, fair play and honesty*
- *Excellence in performance*
- *Character and education*
- *Fun and joy*

- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity."*

Anti-Doping Agency of Kenya Position

35. The burden of proof expected to be discharged by the Anti-Doping Organisation under Article 3 of the ADAK Rules and WADC was ably done by prosecution.

Proof of Anti-Doping Rule Violation

36. The Athlete is charged with presence of a Prohibited Substance, a violation of Article 2.1 of the ADAK ADR. ***Glucocorticoids/triamcinolone acetonide and its metabolite 6 B-Hydroxy-Triamcinolone Acetonide*** is a specified substance and attracts a period of ineligibility of 4 years.

37. ADAK submitted 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 in order to establish an ADRV.

38. Similarly, ADAK noted that in Article 10.2.1 of WADA Code the burden of proof shifts to the athlete to demonstrate *no fault, negligence or intention* to entitle him or her to a reduction of sanction.

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

Intention

40. 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."

41. It has long been established by CAS praxis that the athlete bears the burden to establish that the violation wasn't intentional. In **CAS 2018/0/5754 Sergey Fedorovtsev v. Russian Anti-Doping Agency (RUSADA), World Anti-Doping Agency (WADA) & Federation Internationale des Societes d'Avirons (FISA),** the panel in paragraph 2 averred that, **"In order to disprove intent, an athlete cannot merely speculate as to the possible existence of a number of conceivable explanations for the adverse analytical finding (AAF) and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent: a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur. Instead, an athlete has a stringent obligation to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions.**
42. It's the Applicants submission that the Athlete failed to discharge his burden by a balance of probabilities. The respondent failed to show how the prohibited substance got into his system and the explanations he adduced were unsubstantiated. By a balance of probabilities, the Respondent failed to provide a plausible explanation supported with concrete evidence of how the prohibited substance got into his system.
43. There is a consistent line of jurisprudence that supports the importance of establishing source when an athlete seeks to prove the absence of intent. In **CAS anti-doping Division (OG Pyeong Chang) AD 18/003 World Curling Federation (WCF) v. Aleksandr Krushelnickii** the panel in paragraph 4 stated that **"Establishment of the source of the prohibited substance in a sample in not mandated in order to prove an absence of intent. However, the likelihood of finding lack of intent in the absence of proof of source**

would be extremely rare, and if an athlete cannot prove, it leaves the narrowest of corridors through which the athlete must pass to discharge the burden which lies upon him". The Respondent failed to establish how the prohibited substance got into his system; the athlete's explanations were unsubstantiated as they had no evidentiary basis supporting them; the athlete instead adduced forged medical records that sought to explain the source of the prohibited substance.

44. The Respondent's main defense was supported by medical records. An analysis and authentication of the medical notes was undertaken, and the subsequent results proved that the medical records were forged thus meaning that the source of the prohibited substance couldn't be proved nor established.
45. The Applicant contends that, there is no reason for an athlete to falsify medical documents. The only motive and explanation for engaging in an elaborate process of falsifying would be to conceal the fact that the athlete has intentionally used a prohibited substance. The fact that he knowingly facilitated the falsification of medical documents provides compelling inferential evidence of intention when ingesting the prohibited substance. (Annexure 1).
46. It's the Applicant's submission, that the Respondent's production of falsified documents didn't occur as an isolated incident, but it was the culminating peak in an overall strategy of the athlete to cover up or conceal his intention when taking the prohibited substance and to prevent the competent authorities from issuing the appropriate sanction.
47. The athlete has failed to meet the threshold established by CAS praxis. His failure to prove the source of the prohibited substance, coupled with the falsification of medical records that he adduced as evidence of how the prohibited substance entered his system only points to one thing; the athlete's guilt and intention to cheat when inducing the prohibited substance.
48. 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 offense, regardless of the intention of the athlete to commit such offence.

Origin

49. From the explanation given by the athlete, he provided that the prohibited substance ***Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamcinolone Acetonide*** entered his body through medicine he obtained from a doctor. An investigation into the medication provided didn't support his claim as the medication didn't contain the prohibited substance.
50. In that regard, the Applicant submits that the origin of the prohibited substance has not been established.

Fault/Negligence

51. 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 his responsibilities under rules 22.1.1 and 22.1.3 of ADAK ADR.
52. The Applicant submits 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.*

53. In **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** the panel in paragraph 3 observed that the **"In order to determine the athlete's level of fault, 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 the light of his/her capacities. The point of**

departure for the level of care to be expected from athletes is their high responsibility to take care that no prohibited substance enters their system. A player is responsible for any prohibited substance or any metabolites or markers found to be present in his/her sample". Athletes as custodians of the WADA code are required to undertake rigorous measures to discharge their obligations. The respondent in this case has failed to portray the steps he undertook to ensure no prohibited substance entered his; in fact, his conduct speaks to the contrary, as he went through the elaborate process of falsifying medical documents. The respondents conduct paints a clear picture of his level of culpability when in contact with the prohibited substance and his attempt to hide to it.

54. Athletes are expected to conduct themselves with greater care than would normally be expected of an ordinary person in their situation. The discovery of a prohibited substance in the Respondents system is a deviation from the standard of care expected of him; additionally, the respondent tried to subvert the doping control process and conceal his level of fault of falsifying medical documents. His actions clearly demonstrate that he was grossly negligent and attempted to use devious tactics to conceal his fault and negligence.
55. From the foregoing, the onus is on the Respondent to ensure that he upholds high standards which are bestowed upon him by virtue of being an experienced athlete. It's the applicant's submission that the respondent was negligent due to his failure to exercise the utmost duty of care.

Knowledge

56. 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 or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault.
57. Further, the Applicant contends that the Athlete has had a long career in athletics, he has competed on both the national and international stage and it's evident that he has had exposure to the campaign against doping in sports.

58. The Applicant holds that an athlete competing at international level and who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products/ medicines he ingests are free of

prohibited/specified substances.

59. We submit that it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that ingestion of a substance will not be in 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.

Sanctions

60. 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.
61. 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.
62. In **CAS 2021/A/8056 Olga Pestova v. Russian Anti-Doping Agency (RUSADA)** the panel in paragraph 4 provided the threshold for the reduction of a sanction, and it stated that **"According to the applicable regulations, in order for the standard sanction for a violation involving a specified substance and a non-intentional anti-doping rule violation to be reduced on the basis of "No Significant Fault or Negligence", the athlete must, on a balance of probabilities, firstly establish how the prohibited substance entered his/her system (the so-called "route of ingestion"). This is the "threshold" condition established by the anti-doping rules to allow "access" to a finding of "No Significant Fault or Negligence". Secondly, s/he must establish the facts and circumstances that are relevant to his/her fault and, on that basis, why the standard sanction should be reduced. A period of ineligibility can be reduced based on "No Significant Fault or Negligence" only in cases where the circumstances justifying a deviation from the duty of exercising the "utmost caution" are truly exceptional, and not in the vast majority of cases."** It's the Applicant's submission that in view of CAS jurisprudence regarding the strict nature of the duty of athletes to establish the origin of the prohibited substance in their system, the respondent

in this case hasn't satisfied this burden moreover he has failed to demonstrate that the violation wasn't intentional and must be sanctioned with a four-year period ineligibility.

63. The panel in **CAS 2018/A/5620 World Anti-Doping Agency (WADA) v. Hungarian National Anti-Doping Organization (HUNADO) & Darja Dmitrijevna Beklemiscseva** provided that **"Where the intentionality of the commission of the ADRV cannot be demonstrated, in order for the athlete to benefit from a lower sanction than the otherwise two years' ineligibility, he or she must establish that he or she bears No Significant Fault or Negligence. It naturally follows that the athlete must also establish how the substance entered his or her body. The standard of proof is the balance of probabilities. This standard requires the athlete to convince the panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence.** Proof of how the prohibited substance entered the athlete's sample is a prerequisite for the reduction of a sanction as established by CAS praxis. The respondent failed to adduce concrete evidence to support his claims and instead attempted to mislead ADAK by producing fake medical records. The athlete's inability to prove the source of the prohibited substance, coupled with his conduct, cannot be overlooked; consequently, he should face the full wrath of the law.

64. In the circumstances, we are convinced that the respondent has not demonstrated no fault/negligence on his part as required by the ADAK ADR rules and the WADA code to warrant sanction reduction.

65. 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.

67. We find that ideal considerations while sanctioning the athlete are;

a) The ADRV has been established as against the athlete;

b) The knowledge and exposure of the athlete to anti-doping procedures and programmes and/or failure to take reasonable effort to acquaint themselves with anti-doping policies;

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

68. Therefore, the Applicant prays for **the maximum sanction 4 years of ineligibility ought to be imposed** as no plausible explanation has been advanced for the Adverse Analytical Finding and **an additional sanction of 2 years** for presenting forged documents with the intention of misleading the investigating officer and the Honourable Tribunal.

69. From the foregoing, the Applicant urges the panel to consider the sanction provided for in Article 10.3.3 of the ADAK Rules and sanction the athlete to 6 years' ineligibility.

70. It is our 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.

Analysis and Determination

71. The Tribunal has considered and weighed the charge document, the submissions by the Applicant and no appearance by 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

72. 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.

73. 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.

74. 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.

75. 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.'

76. 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 as amended, the WADA 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.

78. 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.

79. 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.

80. 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.
81. 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.

82. 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.

83. 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, <u>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, an</u>d 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 <u>Specified Substance or a specified method and the Anti-Doping Organization can establish that the antidoping rule violation was intentional.</u>

84. 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 <u>knew constituted an anti-doping rule violation</u> or <u>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].</u>

85. 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 <u>he knew</u> constituted an anti-doping rule violation; or
    ii. the athlete <u>knew there was a significant risk</u> that his conduct would constitute or result in an anti-doping rule violation and manifestly disregarded the risk.

86. 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.

87. 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'.
88. From the evidence adduced before these Tribunal, we find that such direct intention has been proven by the Applicant to the comfortable satisfaction of this Tribunal. Clearly, the Respondent did not dispute that the violation was intentional - an important aspect in determining direct intention. The Respondent produced medical records that were falsified and at the same time failed to show up at the Tribunal even after being given a pro-bono lawyer to represent him. Taking all these into account, we find that direct intention has been proven by the Applicant to the required standard.

89. Furthermore, the actions of the Respondent and the explanations given by him in claiming that the prohibited substance entered his body through medication from a doctor, and investigations concluded by the Applicant show that the medical records were falsified meaning he never was even sick. The origin of the prohibited substance has not been established.

90. 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.
91. 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.

92. 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.

93. 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

94. 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).

95. 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].

96. 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) ….

97. 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.
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.

Decision

98. 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 11th July 2022.

b. The Respondent's results obtained from and including 26th April 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 **29th** day of June 2023

Signed:

Mrs. Elynah Sifuna-Shiveka

Deputy Chairperson, Sports Disputes Tribunal

Signed:
Mr. Gabriel Ouko

Member, Sports Disputes Tribunal

Signed:
Mr. Allan Mola

Member, Sports Disputes Tribunal