

REPUBLIC OF KENYA



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IN THE SPORTS DISPUTES TRIBUNAL AT NAIROBI

NSSF BUILDING BLOCK (A) 24TH FLOOR

SDTADK NO. 12 OF 2022

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

-VERSUS-

PERISTER BOSIRE MORANGI.....RESPONDENT

SPORTS DISPUTE TRIBUNAL

DECISION

PANEL:

- | | |
|-----------------------|--------------|
| 1. MRS. NJERI ONYANGO | -PANEL CHAIR |
| 2. E GICHURU KIPLAGAT | -MEMBER |
| 3. PETER OCHIENG | -MEMBER |

COUNSEL APPEARING;

MR. BILDAD ROGONCHO- COUNSEL FOR ADAK/ APPLICANT

MS. NANCY OUKO - COUNSEL FOR RESPONDENT

1. ABBREVIATIONS AND DEFINATIONS

The following abbreviations used herein have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR- Anti- Doping Rule

ADRV-Anti- Doping Rule Violation

AK-Athletics Kenya

IJF- International Judo Federation

KJF- Kenya Judo Federation

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

All the definitions and interpretation shall be construed as defined and interpreted in the constitutive document both local and international.

2. PARTIES

1. The applicant is the Anti-Doping Agency of Kenya (hereinafter ADAK) a state corporation established under section 5 of the Anti-Doping Act No 5 of 2016, represented in this proceedings by Mr. Rogoncho Advocate
2. The respondent is a female adult of presumed sound mind, a national and athlete, represented in this proceedings by Ms. Nancy Ouko.

3. THE CHARGE

3.1 The Anti-Doping Agency has charged the respondent as an athlete with the charge of;-

“Presence of prohibited substance S1.1 Anabolic Androgenic Steroids (AAS)/ Methasterone and its metabolites, dimethyl-5, androstrane-3, 17B-diol, 18-nor-17, hydroxymethyl-17, methyl-2, methyl-5 and androst-13-en-3-one in the athlete’s sample”

3.2. S1.1 Anabolic Androgenic Steroids (AAS)/ Methasterone and its metabolites, dimethyl-5, androstrane-3, 17B-diol, 18-nor-17, hydroxymethyl-17, methyl-2, methyl-5 and androst-13-en-3-one is listed under S1.1 of WADA’s 2022 prohibited list.

4. BACKGROUND FACTS

4.1. On 8th June 2022, 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 7021859` (the A Sample) and B 7021859 (the B Sample) respectively.

4.2. Both samples were transported to the WADA accredited laboratory in Qatar where “A” sample was analyzed as prescribed and returned an adverse analytical finding (AAF) for presence of a prohibited substance:

S1.1 Anabolic Androgenic Steroids (AAS)/ Methasterone and its metabolites, dimethyl-5, androstrane-3, 17B-diol, 18-nor-17, hydroxymethyl-17, methyl-2, methyl-5 and androst-13-en-3-one **4.3.** *Methylhexanamine* .

4.3. The respondent did not have a therapeutic use exemption (TUE) to justify the presence of the substance in the urine system.

4.4. The AAF was communicated to the Respondent by Sarah I Shibusse, the Ag. ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 7th July 2022. The Respondent was, in the said communication, offered an opportunity to provide an explanation for the same by 28th July 2022. She was also informed of the process and possible consequences dependent on her actions in response to the Notice.

4.5. The Respondent responded to the charges vide WhatsApp text on 12th July 2022 which stated that the Respondent had visited Consolata Hospital Mathari in Nyeri where she was diagnosed with calcaneal spur and the doctor’s professional opinion was to administer an injection to assist her to heal.

4.6. The Applicant reviewed the response and having not found the Respondent’s AAF consistent with any applicable Therapeutic USE Exemption (TUE) recorded at the IAAF for the substances in question and there having been no apparent departure from the IAAF Anti-Doping Regulation or from WADA International Standards for Laboratories which may have caused an Adverse Analytical Findings, preferred the present charge against the respondent.

4.7. ADAK prepared a Notice of Charge dated 19th July 2022 . The same was placed before the Tribunal chair on 20th July 2022 who appointed the present panel to hear the matter and also directed that Notice of Charge document

be served upon the Respondent with a mention notice for 18th August ,2022 for further directions.

4.8. The Respondent was present at the first mention on 18th August 2022 where she requested for pro-bono counsel. The Deputy Chair directed that the Secretariat to assist in appointing pro-bono counsel for the Respondent.

4.9. When the matter came up for mention on 1/09/2022, the Respondent's Advocate indicated that she had not been served. The Applicant's Advocate indicated that he would endeavour to serve the Respondent's advocate and Tribunal was notified of the Respondent's requests.

4.10 The matter came up for Mention on 15th September 2022 where the matter was set for Hearing on 13th October 2022 at 2pm.

4.11 When the matter came up on 13th October 2022, the Applicant's Counsel was unavailable and the Hearing Date was moved to 19th October 2022.

4.12 When the matter came up for Hearing , the Respondent's Advocate was not present and the matter was stood over to 03/11/2022 for hearing, the Applicant's Advocate was to serve a Hearing Notie to the Respondent's Advocate.

4.13. When the matter came up for Hearing on 3rd November 2022, the Applicant's Advocate had authenticated the medical report and verbally notified the Tribunal and the Respondent's Advocate that the Medical Report was authentic and that it was under further investigation by Internal Medical Experts. Based on these developments, the Respondent's Counsel sought more time to deliberate with her client. Both Advocates agreed to take the matter out of the Cause List.

4.14 When the matter came up for Mention on 17th November 2022, the Applicant's Advocate informed the Tribunal that the Internal Medical Expert from ADAK had confirmed that the athlete's prescription did not lead to the doping allegation. The Applicant's Advocate was ready to proceed with submissions while the Applicant's Advocates sought to have the Hearing proceed by viva voce evidence. The Respondent was directed to file their witness statement and serve the Applicant and the matter would be heard on 8th December 2022.

4.15 When the matter came up for Hearing on 8th December 2022, the Respondent's Advocate was unwell and the matter was mentioned on 15th December 2022.

4.16 When the matter came up for mention on 15th December 2022, the Respondent's Advocate was unwell and the matter was stood over for Hearing till 2nd February 2023.

5. DISCUSSION

5.1. ADAK's submissions were filed on 14/1/2023. The Respondent is stated to be a national level athlete, and thus the WA Competition rules, the WADC and ADAK ADR apply to her.

5.2. ADAK submitted that they had met the requirements of Article 3.2 and had to the required standards and methods established the fact of an ADRV by the Respondent. That there was analytical proof of the presence of a prohibited substance in the Respondent's 'A' sample, and the Respondent had not requested for testing of the 'B' sample.

5.3. ADAK further submitted that the respondent under Article 22.2 had to take responsibility in context of Anti-Doping, for what he ingested and used.

5.4. It was ADAK's position 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.

5.5. ADAK further submitted that Article 10.2.1 shifts onus to the athlete to demonstrate no fault, negligence or intention, in order to be a beneficiary of reduction of the 4 years ineligibility sanction set out in Article 2.1.

5.6. On intention, ADAK submits that for an ADRV to be committed non-intentionally, the Respondent must prove on a balance of probability that the ADRV was not intentional. ADAK relies on CAS 2018/A/35592 at paragraph 2 'The burden of proof with respect to intent lies with the athlete, who has the duty to establish, on a balance of probability, that the anti-doping rule violation was not intentional; i.e the athlete has the burden of convincing the CAS Panel that the occurrence of the circumstances on which he/she relies is more probable than their non-occurrence'.

5.7. ADAK further submits that since proof of source is a critical first step in exculpation of intent, the Respondent's inability to establish how the prohibited substance entered her body, raises questions regarding her intention when she was in contact with the prohibited substance. ADAK relies on CAS 2016/A/4534 at Paragraph 36(i) 'It is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by the presence of a prohibited substance in his sample (a fortiori though use of such substance) if s/he cannot establish the source of such substance.'

5.8 ADAK submits that the likelihood of the Respondent establishing a lack of intent without providing a source would be extremely difficult.

5.9 ADAK submits that since the Respondent has failed to put forward a credible explanation with concrete evidence showing how the prohibited substance got into her system leaves the Tribunal with the tough job of examining the Respondent's degree of diligence and absence of fault and makes it difficult to prove a lack of intention to cheat.

5.10 ADAK submits that the Agency's burden of proof is limited to establishing that a prohibited substance has been properly identified in the athlete's tissue or fluids. If the Agency is successful in proving this requirement, there is a legal presumption that the athlete committed an offence, regardless of the intention of the athlete to commit such offence.

5.11 ADAK therefore submits that an offence has therefore been committed as it was established that a prohibited substance was present in the athlete's tissues or fluids.

5.12 On the question of origin, ADAK submits that the explanation given by the athlete was that the prohibited substance entered her body through medicine prescribed to her after a doctor's visit; which explanation was disproved as an investigation to the medication prescribed to her was found not to contain the prohibited substance in question.

5.13 ADAK submits that the origin of the prohibited substance has, therefore, not been established.

5.14 On the question of fault/negligence ADAK places reliance on ADAK ADR 22.1.1 & 22.1.3. The Respondent has responsibility to be knowledgeable and comply with the ADAK ADR, but was negligent in discharging such responsibility.

5.15. ADAK urged this panel to apply the principle of strict liability in this instance. ADAK considers that the following relevant issues have arisen and should be considered in setting the sanction.

- a) The ADRV has been established as against the athlete
- b) The knowledge and exposure of the athlete to anti-doping procedures and programs and/or failure to take reasonable effort to acquaint herself with anti-doping policies.
- c) The Respondent herein has failed to give any explanation for her failure to exercise due care in observing the products ingested and used and as such the ADVR was a result of her negligent acts.

5.16. ADAK therefore submits that the maximum sanction of 4 years has to be imposed in this instance.

ATHLETE'S SUBMISSION

5.17. The Counsel for the Athlete's submissions were filed on the 14th day of March 2023.

5.18 On the question of proof of the violation, Counsel for the Athlete submits that 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.

5.19 Counsel further submits 'the Standards of Proof rules under Article 32(2) of IAAF Competition Rules 2016-2017 states thus: -

"Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability" '

5.19 The Athlete in her witness statement contends that ' she was treated at Consolata Hospital in Nyeri due to a calcaneal spur growth which was significantly affecting her training as a Judo athlete and has provided evidence of the said treatment and in effect, she has demonstrated that the substances adverse analytical finding was not as a result of an intentional act on her part.'

5.20. Counsel therefore submits that where the law places the burden of proof on the accused person, the standard of proof is never, unless the law clearly says so, as high as that on the prosecution to prove a charge beyond reasonable doubt.

5.21. On the question of Intention, Counsel submits that the description of the element of intention under Rule 40.3 of the WA Rules, contains two aspects, knowledge and manifest disregard.

5.22 Counsel further relies on CAS 2017/A/4962 where it was established that for an anti-doping violation to be committed non-intentionally, the onus is on the athlete to prove the lack of intention on his or her part, and thereby to establish how the relevant forbidden substance entered his/her body.

5.23 Counsel further submits that the Athlete did not have any intention to commit an anti-doping rule violation due to her willingness to be tested, and subsequently, cooperate with the Applicant in providing all the possible medical/treatment records of treatment at Consolata Hospital in Nyeri due to a calcaneal spur growth as the likely cause of the anti-doping violation.

5.24 On the question of fault, Counsel submits that established the degree of fault can only be established by an examination of the sum total of prevailing circumstances. Counsel relies on:

- i. CAS 2016/A/4676 Arijan Ademi V. Union of European Football Associations (UEFA)
- ii. Re: Ashley Johnson

5.25 Counsel further submits that no significant fault does not mean that any fault must be de minimis, but rather that a panel must weigh up degrees of fault and negligence and decide the appropriate sanction.

5.26 Counsel for the Athlete therefore submits that in view of the Athlete's elaborate explanation accompanied by documentary evidence of the same, and together with her open cooperation, disclosure, and forthrightness as demonstrated in the response and witness statement, that the Tribunal find no fault on the part of the athlete.

6. MERITS

6.1. The panel will address the following issues

- a) Whether there was any occurrence of an ADRV and the burden and standard of proof
- b) If (a) above is in the affirmative, whether the ADRV was intentional
- c) What sanctions to impose in the circumstances of this case

WAS THERE AN ADRV?

6.2 ADAK has produced and relied on the laboratory test results from the WADA Accredited laboratory in Qatar. The laboratory test shows an AAF for an Anabolic Androgenic Steroids (AAS)/ Methasterone and its metabolites, dimethyl-5, androstrane-3, 17B-diol, 18-nor-17, hydroxymethyl-17, methyl-2, methyl-5 and androst-13-en-3-one in both the A Sample and the B Sample.

6.3. Methasterone under Wikipedia is shown to have other synonyms. Routes of administration is oral. It was sold legally for 9 years as a body building supplement before it was prohibited. It has also been banned in many sports and is on the WADA banned list. It is a Specified Substance.

6.4 Accordingly ADAK has proved the presence of a prohibited substance to the required standard as required by Article 3.1 & 3.2 of WADC (and ADAK ADR)

6.5. This panel therefore finds and holds that the ADRV has been established to its comfortable satisfaction.

INTENTIONALITY

6.6. The Respondent as an athlete had the duty and responsibility to ensure that what she ingested was safe. She is also charged under Article 22.1 to be knowledgeable of and to comply with Anti -Doping rules.

6.7. The Respondent stated that she had received treatment at Consolata Hospital in Nyeri due to a calcaneal spur growth and further stated that the medication she had received for the treatment as the likely cause of the anti-doping violation.

6.8. ADAK has also submitted the Respondent has not shown the exact source of the prohibited substance as the Respondent's explanation was disproved through a medical investigation of the medicine prescribed to the

Respondent which proved that the medicine was found not to contain the instant prohibited substance.

6.9 In CAS 2016/A/4377 the Panel made the following comments:

'51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered her body. The Athlete is required to prove her allegations on the "balance of probability". This standard, long established in the CAS jurisprudence, 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. E.g., CAS 2008/A/1515, at para. 116.

52. To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question.'

6.10 The Panel is mindful of CAS 2016/A/4534 and CAS 2016/A/4676, where the Panels considered that an Athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance.

6.11 In CAS 2016/A/4676, at para 72, it is stated that "the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare". The Panel finds that there are no exceptional circumstances in the present case which show on the balance of probability that the ADRV was not intentional (without the Athlete having to establish the origin of the prohibited substance).

6.12. Under Article 10.2.1 WADC, the period for ineligibility for presence of a prohibited substance is 4 years. Under Article 10.2.1.2 the 4 years ineligibility is applicable where "The Anti-Doping rule violation involves a Specified Substance and the Anti-Doping organization can establish that the Anti-Doping rule violation was intentional.

6.13. We have looked at Article 10.2 and 10.3 and importantly the definition of “intent” under WADC’s ADV Reference guide (section 10.1 ‘what does intentional mean?’ pg. 24

“Intentional means the athlete, or person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk. Article 10.2 is clear that it is 4 years of ineligibility for presence of unspecified substance, unless an athlete can establish the violation was not intentional, for specified substance, it is also 4 years if the ADO can prove a violation was intentional”

Note: Specified Substances are more susceptible to a credible, non-doping explanation. Non-specified substances do not have any non-doping explanation for being in an athlete’s system.

6.14. In view of the above, we have reviewed the circumstances related by the Respondent. We note that the AAF is in respect of a Specified Substance. We have equally considered that the Respondent has provided no credible explanation or proof of the source of the prohibited substance.

6.15 It has not been demonstrated to any degree that the medication prescribed to the Respondent at Consolata Hospital could cause or caused the ADRV for the substance in issue.

6.16 Further, the athlete in the Doping Control Form completed by her at the time of Sample Collection did indicate that she was not on any medication. This was on the 8th of June 2021. The medication stated to have been prescribed on 6th January 2021. It is not stated for how long the same was used. In any event, the Panel reminds itself that it has not been established that the prescribed medication has caused the AAF.

6.17. It is the panel’s considered view that the totality of the circumstances and explanation given do not, on a balance of probabilities, point to lack of intention to enhance performance on the part of the Respondent. The Panel, therefore, will not delve into the issue of degree of fault.

SANCTION

The ADRV having been established, and the panel being convinced that the Respondent has failed to discharge on a balance of probabilities the proof of origin and lack of intent to enhance Sports performance, this panel sets the following sanctions

- a) The Respondent shall be ineligible for a period of 4 years with effect from **28/7/2022**
- b) All results obtained by the Respondent from 08/06/2022, inclusive of points and prizes are disqualified
- c) **Each party shall bear its own costs**
- d) There shall be a right of Appeal as provided under Art. 13.2.1 WADC and Art. 13 ADAK Rules

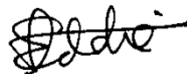
Dated at **NAIROBI** thisday of2023

SIGNED:



NJERI ONYANGO

PETER OCHIENG



GICHURU KIPLAGAT