

REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI-DOPING CASE NO. E004 CONSOLIDATED WITH E012
OF 2023

ANTI-DOPING AGENCY OF KENYA.....APPLICANT

-versus-

JARINTER MAWIA MWASYA..... RESPONDENT

DECISION

Hearing: 27/07/2023

Panel: Mrs. Elynah Sifuna-Shiveka - Chairperson
Mr. Peter Ochieng - Member
Mr. Gichuru Kiplagat - Member

Appearances: Mr. Rogoncho for the Applicant
Mr. Baraza for the Respondent

The Parties

1. The Applicant is a State Corporation established under Section 5 of the Anti-Doping Act No.5 of 2016.
2. The Respondent is a female athlete competing in national events.

Background and the Applicant's Case

3. The proceedings have been commenced by way of filing charge documents against the Respondent by the Applicant dated 25/04/2023.
4. The Applicant brought charges against the Respondent that on 27/11/2022 an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7125529 ("A" sample) and B 7125529 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
5. The "A" sample was subsequently analysed at the WADA accredited laboratory in Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance **S2. Peptide Hormone, Growth Factors, Related Substances and Mimetics/Erythropoietin (EPO)** which is listed as a peptide hormone growth related substance and mimetics under S2 of the 2022 WADA prohibited list.
6. On 7/12/22 an ADAK Doping Control Offices collected a urine sample from the Respondent and gave it code numbers A 7126330 ("A" sample) and B 7126330 ("B" sample) under the prescribed World Anti-Doping Agency (WADA) procedures.
7. Sample "A" was subsequently analysed at the WADA accredited laboratory in Qatar and an Adverse Analytical Finding revealed the presence of prohibited substance

Pregnanediol, Androsterone, Androstan.e, Ketoetiocholanolone, Androstenediol, Etiocholanolone, Adilos, Epitestosterone and Testosterone which is listed as an Anabolic Androgen under S1 of the 2022 WADA prohibited list.

8. The first findings were communicated to the Respondent by Sarah Shibutse, Chief Executive Officer of ADAK through Notices of Charge and mandatory provisional suspension dated 07/02/23 to which the Respondent made written submissions via WhatsApp dated 03/04/2023.
9. The Respondent denied the charges stating that she fell during the competition and went to seek medical assistance where she was directed to a doctor who injected her with unknown medication that she suspected had the prohibited substance. She further stated that she was willing to offer substantial assistance in unmasking the identity of the doctor.
10. The second findings were communicated to the Respondent by Sarah Shibutse, Chief Executive Officer of ADAK through Notices of Charge and mandatory provisional suspension dated 06/03/23 to which the Respondent made written submissions via WhatsApp dated 03/04/2023.
11. The Respondent denied the charges stating that she fell during the competition and went to seek medical assistance where she was directed to a doctor who injected her with unknown medication that she suspected had the prohibited substance. She further stated that she was willing to offer substantial assistance in unmasking the identity of the doctor.
12. The Applicant states that the Respondent's explanation in both instances was not satisfactory and that she did not request a sample B analysis hence waiving her right to the same.

13. The Applicant further states that the Respondent's AAF were not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at IAAF for the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards in both instances.
14. Moreover, the Applicant states that the Respondent has a personal duty to ensure what whatever enters her body is not prohibited.
15. Subsequently, ADAK preferred the following charges against the Respondent:

Presence of S2. Peptide Hormone, Growth Factors, Related Substances and Mimetics/Erythropoietin (EPO)

and

**Presence of
Pregnanediol, Androsterone, Androstane, Ketoetiocholanolone, Androstanediol, Etiocholanolone, Adilos, Epitestosterone and Testosterone**

16. The Applicant for both ADRVs prays separately for:
- a) The athlete be sanctioned to a four-year period of ineligibility as provided by the ADAK Anti-Doping Rules, Article 10.2.2.
 - b) In the alternative and if ADAK can prove that the ADRV was intentional then the athlete be sanctioned to a four-year period of ineligibility as provided by the ADAK Anti-Doping Rules, Article 10.2.1.2.
 - c) Disqualification of results in the event during which the ADRV

occurred and in competitions after sample collections or commission of ADRV with all resulting consequences including forfeiture of any medals, points or prizes.

d) Automatic publication of sanction.

e) Costs of the suit, Article 10.12.1

17. The Applicant contends that this Tribunal has jurisdiction to entertain the two matters under Sections 55, 58 and 59 of the Sports Act and sections 31B(a) and 32 of the Anti-Doping Act.

The Response

18. The Respondent filed a consolidated response to charges dated 14/06/2023. The Respondent denied the charges stating that she fell during the competition and went to seek medical assistance where she was directed to a doctor at a chemist in Eldoret who injected her with unknown medication that she suspected had the prohibited substance. She further stated that she was willing to offer substantial assistance in unmasking the identity of the doctor.

19. The Respondent further stated that she was denied the opportunity to request for analysis of her B samples.

20. The Respondent did not attach any medical notes showing the treatment, management and medication she received.

21. The Respondent prayed that the charges be dismissed in their entirety with costs.

Hearing

22. The matter came up for mentions on various dates. Furthermore, the two cases ADAK Case No.E004 of 2023 and ADAK Case No.E012 of 2023 were consolidated as they touched on the same Athlete and the courses of action arose within ten days of each other.
23. The Applicant was represented by Mr. Bildad Rogoncho while the Respondent was represented by Mr. Baraza Advocate of Olunga and Baraza Mwabe Company Advocates.
24. The parties on 27/07/2023 indicated to the Tribunal that they had both filed and served their written submissions and requested for a decision. The Applicant filed written submissions dated 26/07/2023 while the Respondent filed written submissions dated 25/07/2023. The Tribunal set down the date for the decision for 17/08/2023. However, on 17/08/2023 the decision was rescheduled to 31/08/2023.

Decision

25. The panel has taken into account the written submissions by the Applicant and the Tribunal's records. We make the following findings.
26. **Peptide Hormone, Growth Factors, Related Substances and Mimetics/Erythropoietin (EPO)** which is prohibited under S2 of the 2022 WADA prohibited list and **Pregnanediol, Androsterone, Androstane, Ketoetiocholanolone, Androstenediol, Etiocholanolone, Adilos, Epitestosterone and Testosterone** which is prohibited under S1 WADA prohibited list are alleged to have been found in the Respondent's urine samples. These are both non-specified substance and are prohibited at all times as per WADA Prohibited List of 2022.
27. Article 2 of the WADC states that:

“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”

28. Additionally Article 2.1 WADC provides that:

“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 sample.

Accordingly, it is not necessary that intent, fault negligence or knowing on the athlete’s part be demonstrated in order to establish an anti-doping rule violation under WADC Article 2.1 (emphasis ours).

29. Article 2.1.2 WADC requires sufficient proof of an anti-doping rule violation. It defines it under 2.1 as:

“presence of a prohibited substance or its metabolites or markers in the athlete’s A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or.....”

30. In this case the presence of prohibited substances has been established in the Athlete’s A sample and has not been denied by the athlete.

31. Article 2.1 of the WADA code establishes “strict liability” upon the athlete. Once presence is established as in this case the onus is upon the athlete to render an explanation and to dispel the presumption of guilt on her part. Such explanation must however be assessed while bearing in mind sections of Article 2.1.1 of WADC as set out above and emphasized.

32. The two prohibited substance are non-specified substances. The burden of proof shifts to the athlete to demonstrate to us that the use of the prohibited substances was not intentional as per WADC Article 10.2.1.1. A case that involves a non-specified substance is presumed intentional unless the athlete can establish that it was not intentional.

33. To determine whether the athlete had the intention to cheat one has to establish origin. Comment number 58 of the WADC to Article 10.2.1.1 provides that:

“While it is theoretically possible for an athlete or other person to establish that the ADRV was not intentional without showing how the prohibited substance entered one’s system, it is highly unlikely that under a doping case in Article 2.1 an athlete will be successful in providing that the athlete acted unintentionally without providing the source of the prohibited substance.”

34. The athlete on both occasions when her samples were collected declared that she had used nifedipine, piriton, diclofenac, ferol, dolo act in her Doping Control Form. We have analyzed the medications so declared but failed to find any ingredients or chemical composition as forming part of either prohibited substances.

35. Secondly, in her WhatsApp message of 03/04/2023 and consolidated response to the charge dated 14/06/23 she states that she fell during the competition and went to seek medical assistance where she was directed to a doctor at a chemist in Eldoret who injected her with unknown medication that she suspected had the prohibited substance. She further stated that she was willing to offer substantial assistance in unmasking the identity of the doctor. This is such extreme casual behavior from the athlete. Furthermore, the Athlete never afforded us any evidence supporting her assertions. The Athlete has not been able to establish origin and his explanations are not plausible.

36. We therefore find that the Respondent has not discharged her burden

of proof to dispel the charges leveled against her that she intended to enhance her sport performance. We find to our comfortable satisfaction that there was intention on the part of the Athlete to cheat on both occasions.

37. The Respondent also says that she was denied her right to sample B analysis with respect to the two ADRVs. Unfortunately, she did not provide evidence to help her cause. No form of documentary evidence was placed before us showing her displeasure towards the Applicant for denying her this right.

38. On her willingness to offer substantial assistance against the doctor who prescribed the drugs to her that allegedly contained the prohibited substances, the Respondent has again not provided any evidence of this to warrant reduction in sanctions. The furthest she has gone is to claim that she provided the contact details of the doctor to an ADAK officer one Mr. Mwakio but she fails to provide any communication or material to support this claim.

39. We will now down our tools at this point in time and not belabor on the question of “no fault or negligence” having made the above findings on intention and origin as per the dictates of WADC Article 10.2.1.

CONCLUSION

40. In the circumstances, the Tribunal imposes the following consequences:

- a. The period of ineligibility (non-participation in both local and international events) for the Respondent shall be for 4 years from the date of this decision that is from 31/08/2023 pursuant to Article 10.2.2 of the WADC;
- b. Disqualification of results in the event during which the ADRV occurred and in competitions after sample collections or commission of ADRV with all resulting consequences including forfeiture of any medals, points or prizes.
- c. Automatic publication of sanction.
- d. Each party to bear its own costs;
- e. Parties have a right to Appeal pursuant to Article 13 of the WADC and Part IV of the Anti-Doping Act No.5 of 2016.

41. The Tribunal thanks all the parties for their extremely helpful contribution and the cordial manner in which they conducted themselves.

**Dated and delivered at Nairobi this ___ 31st ___ day of ___ August ____,
2023.**

Signed:

Mrs. Elynah Sifuna-Shiveka



Chairperson, Sports Disputes Tribunal

Signed:

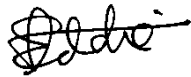
Mr. Peter Ochieng



Member, Sports Disputes Tribunal

Signed:

Gichuru Kiplagat



Member, Sports Disputes Tribunal