REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO. E002 OF 2023

ANTI-DOPING AGENCY OF KENYA…… APPLICANT

VERSUS

BERNARD CHERUIYOT CHEPKWONY…… ATHLETE

DECISION

Hearing: 29th June 2023 (Online)

Panel:

J. Njeri Onyango FCIArb – Panel Chair
Allan Mola Owinyi – Member
Mary N. Kimani – Member

Appearances:

Mr. Bildad Rogoncho, Advocate instructed by the Anti-Doping Agency of Kenya for the Applicant;
Ms. Odhiambo Christine Emily, Advocate instructed by Mbuthia Kinyanjui & Co. Advocates for the Respondent Athlete.

Abbreviations:

ADAK – Anti Doping Agency of Kenya
ADAK ADR- Anti-Doping Rules 2016
WADA Code- World Anti-Doping Agency Code
DCO- Doping Control Officer
ADAMS- Anti-Doping Administration and Management System.
ISRM- International Standard for Results Management

ISTI- International Standard for Testing and Investigations

Contents

A. Introduction

i. Parties

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter referred to as **ADAK**), a state corporation established under section 5 of the Anti-Doping Act, No. 5 of 2016.
2. The Athlete is a male adult of presumed sound mind, a National Level Athlete, athletics, (hereinafter referred to as **the Athlete**).

ii. Procedural Background

3. Upon reading the Notice to Charge dated 16th February 2023 presented to the Tribunal on same date by Mr. Bildad Rogoncho on behalf of the Applicant the Tribunal directed in the order dated 17th February 2023, as follows:
    i. The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, this direction No. 1 and all relevant documents on the Athlete by 23rd February 2023;
    ii. The panel constituted to hear this matter shall be:
        a. J. Njeri Onyango (Mrs.) – Panel Chair
        b. Mr. Allan Owinyi – Member
        c. Ms. Mary N. Kimani – Member
    iii. The matter shall be mentioned on 23rd February 2023 to confirm compliance and for further directions.
4. The matter was brought up for mention on 23rd February 2023 where Mr. Rogoncho appeared for the Applicant. There was no appearance for the Respondent. Mr. Rogoncho stated that this was the first mention. He added that they were unable to get hold of the athlete and prayed for seven (7) days

to trace and serve the Athlete with the charge documents and mention notice.

5. The Tribunal directed that the matter be listed for mention on 2nd March 2023 for further directions.
6. During a mention on 16th March 2023 there were appearances by Mr. Rogoncho for the Applicant and no appearance for the Athlete. The Athlete was having challenges with joining the platform. Mr. Rogoncho asked for an adjournment so that he could assist the Athlete join. Mr. Rogoncho also made an application for constitution of a panel in the matter; the Tribunal directed that the panel constituted to hear the matter J. Njeri Onyango (Mrs); E. Gichuru Kiplagat and Peter Ochieng.
7. The matter was listed for mention on 23rd March 2023.
8. On 30th March 2023 Mr. Rogoncho appeared for the Applicant and Athlete was present on the platform. Mr. Rogoncho informed the Athlete that a prohibited substance had been found in his sample. He further informed the Athlete of his right to representation which the Athlete agreed to. The Chair directed the Secretariat identify a suitable *pro bono* counsel and link him up with the Athlete. The matter was set for mention on 13th April 2023.
9. During the mention on 20th April 2023 Mr. Rogoncho appeared for the Applicant while Ms. Odhiambo was in attendance for the Respondent Athlete. The Applicant was served with a notice of appointment. Ms. Odhiambo prayed 21 days to file a response to the charge. She confirmed that she is and has been in communication with the Athlete. The Tribunal allowed the Athlete the 21 days and listed the matter for mention on 11th May 2023.
10. When the matter was mentioned on 11/5/2023 Counsel for the Athlete stated that they had served the Applicant with the Response to the Charge

which was confirmed by the Applicant. Mr. Rogoncho also confirmed the original panel appointed by the Tribunal was Njeri Onyango, Mary Kimani and Allan Owinyi. The matter was listed to be heard virtually on 8/6/2023 at 2.30pm.

11. On 8th June 2023 with both Counsels present the Tribunal heard that the Respondent's Counsel was not ready to proceed due to illness; she prayed for two days to meet with the Athlete in order to finish their preparations. The matter was adjourned to 29/06/2023 at 2.30pm.
12. The matter was subsequently virtually heard interparties on 29/06/ 2023. Mr. Rogoncho was granted 14 days to file the Applicant's submissions (by 13th July 2023) while Ms. Odhiambo was granted 14 days thereafter (by 27th July 2023) to file the Athlete's submissions. The matter would be mentioned on 27/07/2023 to confirm compliance and give date of the decision.
13. At the mention to confirm compliance with filing of written submissions on 27th July 2023 with both Counsel present, it was confirmed that the Applicant had filed and served its submissions on 26th July 20223. Counsel for the Athlete indicated she had not yet received the same and requested for 14 days to file and serve the Athlete's submissions. The Tribunal listed the matter to confirm compliance on 10th August 2023 and take a Ruling date.
14. On 10th August 2023 the Tribunal confirmed receipt of submissions from both parties whose Counsel were in attendance. The Tribunal directed the decision be delivered on 7th September 2023.

Hearing on 29th June 2023 – Interparties

15. Mr. Rogoncho Counsel for the Applicant and Ms. Odhiambo for the Athlete were in attendance so was the Athlete.

16. The charge as articulated by Counsel for the Applicant was presence 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 (hereafter referred to as ADAK Rules). This is a Specified Substance.
17. During the hearing it was confirmed that there was no witness statement. The gist of the Athlete's Counsel's argument was whether the International Standards were followed. It was asserted the Athlete was not informed by the Applicant of his right to Sample B testing and there was also a failure to review the AAF. The Athlete also averred that the test results were not given in ten (10) days as per the International Standards.
18. Counsel for the Athlete called the Respondent Athlete to testify. The Athlete said he was not sure of his age. Nevertheless, the Athlete's ID is recorded as 46405446. The Athlete confirmed that he competed in the Kakamega Forest Marathon on 26th November 2022 where he gave out one Urine Sample to the DCOs. Asked about any information from the Applicant, the Athlete said he had received an email from ADAK but his phone was bad so he could not access the email/letter.
19. On cross examination the Athlete said he doesn't know how to read; he attended school up to class three (3) then went back to cattle herding. He said he started racing in 2000 and within the country he has done about seven (7) races. He won three (3) races abroad specifically in Spain in 2022. In 2017 he was a pace maker in a race in Korea; he was helped by a friend Elijah from Kemumu group to join this event. He had also raced in Greece, Switzerland and Gabon. His last manager was Gianni. The Athlete said he trained at Eldoret Litein during Covid in 2020.

20. The Athlete said he was first tested in Gabon in 2019 and the second time was at the Kakamega Forest Marathon in 2022, the test from which the current AAF arose. He said he went to Iten with a friend to be taught about doping after the Kakamega race.
21. On cross-examination the Athlete reiterated what he had written in his explanatory email that he was unwell, had rashes and was having a headache; he went to a chemist in Eldoret and was given an injection. Not knowing how to write the Athlete says he dictated to a friend who penned the email for him and he sent it to Mr. Mwakio. Asked if he was given a form in which to accept consequences the Athlete replied that he only got an email; his phone was bad so he did not have the letter.
22. On reexamination the Athlete said he told the doctor that he was an athlete but the doctor said no problem. The Athlete said he paid Ksh. 1,500 for all the medicines at the chemist's.

3. Parties' Submissions

i. The Applicant's Submissions

23. The Applicant adopted and owned its charge documents dated 28th February 2023 and the annexures thereto.
24. The Applicant submitted that the Athlete was a National-Level-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 Anti-Doping Rules (hereinafter ADAK ADR) applied to him. The Applicant charged him with the Anti-Doping Rule Violation of presence of ***Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamcinolone Acetonide*** contrary to the provisions of Article 2.1 of ADAK Anti-Doping Rules.

25. The Applicant submitted that on 26th November 2022 during the Kakamega Forest Marathon, an ADAK Doping Control Officer (DCO) collected a urine Sample from the Athlete and assisted by the DCO the Athlete split the Sample into two separate bottles which were given reference numbers **A 7125532** (the 'A Sample') and **B 7125532** (the 'B Sample') according to the prescribed WADA procedure.
26. Both Samples were transported to the World Anti-Doping Agency 'WADA' – accredited Laboratory in Qatar, Qatar Doping Control Laboratory. The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding (AAF) for presence of a prohibited substance ***Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamcinolone Acetonide*** which are listed as a Glucocorticoid under S9 of the 2022 WADA prohibited list
27. The findings were communicated to the Athlete by Sarah I. Shibutse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 23rd January 2023. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 13th February 2023.
28. The Respondent failed to respond to the charges within the specified timeline of 13th February 2023.
29. The Applicant stated that the Respondent Athlete's AAF was not consistent with any applicable TUE recorded at WA for the substances in question and there was no apparent departure from WA Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused the Adverse Analytical Findings.

30. Further the Athlete 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 the same with those of Sample A in any event.
31. The response and conduct were evaluated by ADAK and it was deemed to constitute an ADRV and referred to the Sports Disputes Tribunal for determination.
32. A charge document was prepared and filed by ADAK Advocates and the Athlete presented a response thereto.
33. The matter went through a hearing process before a panel of the Sports Disputes Tribunal in the manner prescribed by the rules resulting in request for submissions from the parties
34. On legal position it was the Applicant's submission that under Article 3 of the ADAK ADR and WADC, the Agency had the burden of proving the ADRV to the comfortable satisfaction of the hearing panel.
35. The Applicant submitted that the presumptions at Article 3.2 were applicable:
    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 the 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 Finding 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 person establishes that the decision violated principles of natural justice.

e. …

36. The Applicant added that under Article 22.1 the Athlete had 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…

    f. To cooperate with Anti-Doping organizations investigating Anti-Doping rule violations;

    In addition, the Athlete was also under duty to uphold the spirit of sport as embodied in the preface to the Anti-Doping Rules.

37. On proof of the ADRV the Applicant reiterated that the Athlete was charged with presence of Prohibited Substance, a violation of Article 2.1 of ADAK ADR. ***S9. Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamcinolone Acetonide*** *was a Specified Substance and attracts a period of ineligibility of 4 years*.

38. Further Applicant 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 to establish an ADRV. Similarly, Article 10.2.1 the burden of proof shifts to the athlete to demonstrate no fault, negligence, or intention to entitle him to a reduction of sanction and therefore the Applicant urged the Tribunal to find that an ADRV had been committed by the Athlete"*.

39. On intention relied on Rule 40.3 of the WA Rules stating 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 there was a significant risk that*

the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk".

40. The Applicants quoted: *"**CAS 2018/O/5754 Sergey Fedorovtsev v. Russian Anti-Doping Agency (RUSADA), World Anti-Doping Agency (WADA) & Fédération Internationale des Sociétés 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 submission**s."*

41. Addressing the issue on intention, it was the Applicant's 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. 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".*

42. Arguing that there is a consistent line of jurisprudence that supports the importance of establishing source "*when an athlete seeks to prove the absence of intent",* the Applicant quoted *"**CAS anti-doping Division (OG***

PyeongChang) 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 is 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 source, 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 failed to provide any explanation."*

43. The Applicant averred that "*The athlete has failed to meet the threshold established by CAS praxis. His failure to prove the source of the prohibited substance, only points to one thing; the athlete's guilt and intention to cheat when inducing the prohibited substance.*
44. Concluding regarding intention the Applicant stated at it para *31.* "*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 offence, regardless of the intention of the athlete to commit such offence."*
45. Submitting on origin, the Applicant stated that "*The Respondent didn't provide any explanation as to how the prohibited substance* ***Glucocorticoids/triamcinolone acetonide and its metabolite 6B-Hydroxy-Triamcinolone Acetonide*** *entered his system. In that regard, we do submit that the origin of the prohibited substance has not been established."*

46. In regard to Fault/Negligence the Applicant contended that *"the Respondent is charged with responsibility to be knowledgeable of and comply with 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 23.1.3 of ADAK ADR"*.

47. The Applicant further stated that *"the athlete has a personal duty to ensure that no prohibited substance enters their body."* The Applicant relied on *"**CAS 2017/A/5301 Sara Errani v. International Tennis Federation (ITF) & CAS 2017/A/5302 National Anti-Doping Organisation (Nado) Italia v. Sara Errani and ITF** the panel in paragraph 3 observed that "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"*. The Applicant asserted that *"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 system."*

48. The Applicant also contended that, *"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. He was grossly negligent. 37. […] 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."

49. Submitting on knowledge, the Applicant *"contended 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 specimens, and that an ADRV occurs whenever a prohibited substance (or its metabolites or markers) is found in bodily specimens, whether the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault"*.
50. It was the Applicant's averment that *"the Athlete has had a career in athletics, and it is evident that he has had exposure to the campaign against doping in sports."*
51. The Applicant held that *"an athlete competing in national and international competitions and who also knows that he is subject to doping controls because of his participation in the national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited/specified substances."*, submitting that *"it cannot be too strongly emphasized that the athlete is under a continuing personal duty to ensure that the ingestion of a prohibited substance will be a 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."*
52. Submitting regarding sanctions, the Applicant stated *"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"*.

53. Further the Applicant said *"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"*.
54. The Applicant then quoted ***CAS 2021/A/8056 Olga Pestova v. Russian Anti-Doping Agency (RUSADA)*** where the panel provided the threshold for reduction of a sanction, stating *"According to the applicable regulations, in order for the standard sanction for a violation involving a specified substance and a non-intentional ADRV 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"*.
55. It was the Applicant 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 of ineligibility."*

56. Placing reliance on "***CAS 2018/A/5620 World Anti-Doping Agency (WADA) v. Hungarian National Anti-Doping Organization (HUNADO) & Darja Dmitrijevna Beklemiscseva*** which 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."* The Applicant reiterated that *"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 the Anti-doping organization 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."* The Applicant concluded that *"the respondent has not demonstrated no fault/negligence on his part as required by the ADAK rules and the WADAC to warrant sanction reduction".*

57. The Applicant summed up by urging the Panel to consider the sanction provided for in *Article 10.3.3* of ADAK Rules and sanction the athlete to 4 years' ineligibility stating:

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 themselves with anti-doping policies.*

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

D. *The maximum sanction of 4 years' ineligibility ought to be imposed as no plausible explanation has been advanced for the AAF.*

ii. Athlete's Submissions

58. It was the Respondent Athlete submission that ADAK has the burden of establishing that an Anti-Doping Rule Violation (ADRV) had occurred as under its Article 3.1 of the Anti-Doping Rules (ADR).
59. The Athlete laid out Article 2.1.2 of ADR 2020 on the mandatory procedure to be followed and also Article 5.1 of ADR 2020 which set forth the rationale for testing of athletes. Article 5.1.1 the Athlete stressed required *"All provisions of ISTI shall apply automatically in respect of all such Testing"*.
60. Relying on ***CAS 2002/A/385*** the Athlete noted: *"When looking at these rules, it is obvious that the athlete's direct rights are essentially limited to two i.e.* ***the request for an analysis of the B-Sample and the request to have this analysis carried out by another laboratory****… while in the Panel's view the Respondent's rules sufficiently (though not generously) respect the interests of the athlete,* ***the limited rights with which the athlete is left must be followed with care*** *so that for instance the federation attending the opening and the analysis of the athlete's urine sample is being opened and that at the time of opening the seal was intact; in addition the representative may also check the state of the urine sample at that time"*
61. The Athlete averred that the Applicant was under duty "*to promptly notify the Athlete"* and also to fulfill Article 7.3.1 *(c) the Athlete's right to request for the analysis of the B Sample.* It was the Athlete's contention that the Applicant

"*did not notify the Athlete of his right to request the analysis of the B Sample and to facilitate the realization of this right by linking and coordinating the athlete and the WADA Accredited Laboratory for purposes of Confirmation of the B Sample*." And further Applicant did not notify Athlete of right to "*request copies of A and B Sample laboratory documentation package which includes information as required by the ISL*".

62. These failures were contrary to WADA Code and ADR 2020 and tantamount to substantial departures from the ISTI and ISL the Athlete submitted.
63. Quoting Article 2.1.2 of ADR 2020 which dictates parameters sufficient for establishment of an ADRV, the Athlete submitted that his Sample B was not analyzed not because he waived his right to have the B Sample analyzed but because the Applicant did not inform him of his fundamental right to request for an analysis of the B Sample and the attendant rights.
64. The Athlete also submitted that it was unclear to him if his Sample A "*was further split into two and whether such splitting, if at all, was done in the presence of the Respondent Athlete.*", quoting *CAS 2008/A/1607* which involved a case where an athlete was denied the opportunity to be present in the opening of her B Sample.
65. It was the Athlete's assertion that Article 7.2 of ADAK's ADR that *"ADAK shall carry out the review and notification with respect to any ADRV in accordance with the ISTI"* which is mandatory by nature was not adhered to.
66. The Athlete submitted that *"The reading suggests that the Anti-Doping Organization (ADO) mandated to do a review of the ADO that initiated the test, in this case, the Qatar Doping Control Laboratory, in which case, the Applicant Agency assertion would be factually incorrect in absence of proof"*
67. The Athlete relied on ***CAS 2014/A/3639*** *para 70 "Doping is an offence which requires the application of strict rules. If the Athlete is to be sanctioned solely on the*

basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know the Respondent, as the Testing Authority, including the WADA Accredited Laboratory working with it, has strictly observed the mandatory safeguards."

68. Therefore, the Athlete urged the panel to find that his "*right to be notified and be informed of his right to request analysis of the B Sample was violated and the charge against Respondent has not been proved to the comfortable satisfaction of the hearing panel and the same be dismissed with costs."*

4. JURISDICTION

69. The Sports Disputes Tribunal has jurisdiction to hear and determine this matter in accordance with the following laws:
    a. Sports Act, No. 25 of 2013 under section 58.
    b. Anti-Doping Act, No. 5 of 2016 under section 31(a) and (b).
    c. Anti-Doping Rules under Article 8.
70. Consequently, the Tribunal assumes its jurisdiction from the above-mentioned provisions of law.

5. APPLICABLE RULES

71. Section 31 (2) of the Anti-Doping Act provides that:

    the tribunal shall be guided by the Anti-Doping Act, the Anti-Doping Regulations 2021, the Sports Act, the WADA Code 2021, and International Standards established under it, the UNESCO Convention Against Doping in Sports amongst other legal resources, when making its determination.

6. MERITS

72. Uncontested Facts:

a. The Athlete's urine samples were collected on 26th November 2022 during the Kakamega Forest Marathon by ADAK Doping Control Officer (DCO) as per the Doping Control Form (DCF) numbered 8 in the Applicant's Charge Document.

b. In his Response to Charge document, with respect to paragraph 7 of the Charge Documents, the Respondent Athlete admits receiving *Notice of Charge* dated 23rd January 2023 which provided for mandatory provisional suspension. (In its Charge Document dated 28th February 2023 signed by one Bildad Rogoncho, the Applicant refers to the attachment as '**the *Notice to Charge* dated 23rd January 2023, BBK3'**

Perusal of the documents held by the Tribunal indicate that the document referred to by both parties as *Notice to Charge* dated 23rd January 2023 is in actual fact titled '**Anti-Doping Rule Violation Notice'** date 23rd January 2023 signed by one Sarah I. Shibutse CEO.

The document in the Tribunal's records titled 'Notice to Charge' is dated 16th February 2023 and is signed by one Bildad Rogoncho and was received by the Tribunal on 16th February 2023.

The Tribunal strongly calls out the apparent referencing error on the part of the Applicant who are the authors of both aforementioned documents.

i. **Was there a Departure from any International Standards?**

73. The Athlete pleaded that his right to be notified and be informed of his right to request or demand analysis of the B Sample had been violated. The Athlete has relied on/ quoted various WADA Code/ADR articles including Articles 7.2 and 7.3.1 of ADAK ADR 2020. The applicable WADA Code/ADAK ADR is the **2021 version** since the AAF resulted from a Sample collected on 26th November **2022**. (Our Emphasis)

74. In the relevant 2021 World Anti-Doping Code (WADC), the articles the Athlete references are set out as follows:

> Article ***7.2*** *Review and Notification Regarding Potential Anti-Doping Rule Violations Review and notification with respect to a potential anti-doping rule violation shall be carried out in accordance with the International Standard for Results Management &*
>
> Article ***7.3*** *Identification of Prior Anti-Doping Rule Violations Before giving an Athlete or other Person notice of a potential anti-doping rule violation as provided above, the Anti-Doping Organization shall refer to ADAMS and contact WADA and other relevant Anti-Doping Organizations to determine whether any prior anti-doping rule violation exists.*

75. While in ADAK ADR 2020 the articles, which mirror the WADA Code are captured as follows:

> Article ***7.2*** *Review and Notification Regarding Potential Anti-Doping Rule Violations:*
>
> *ADAK shall carry out the review and notification with respect to any potential anti-doping rule violation in accordance with the International Standard for Results Management. &*
>
> Article ***7.3*** *Identification of Prior Anti-Doping Rule Violations:*

Before giving an Athlete or other Person notice of a potential anti-doping rule violation as provided above, ADAK shall refer to ADAMS and contact WADA and other relevant Anti-Doping Organizations to determine whether any prior anti-doping rule violation exists. (Our Emphasis)

76. By his own admission the Athlete said in his Response to Charge that he received *Notice of Charge* dated 23rd January 2023 addressed to him, "*which provided for mandatory provisional suspension*"; perusal by the Panel of the same said *Notice of Charge* reveals paragraph 4.1 which details the said mandatory provisional suspension; further, **paragraph 5.1.2** in the same document clearly spells out, '***You have the right to request the analysis of your B Sample at your own cost to confirm (or otherwise) the AAF made in relation to your A Sample. If you do not request the B Sample, the B sample analysis may be deemed irrevocably waived***'. (Our Emphasis) Notably too, paragraph 5.1.1 in the same *Notice of Charge* stated '*You have the right to request copies of the A Sample Laboratory Documentation Package at your own cost. Should you wish to do so, please let us know.*' (Our Emphasis)

77. In his Response to Charge the Athlete "*avers that he does not know how to read hence he could not understand the contents of the letter.*" When giving his testimony during the oral hearing, the Athlete also alluded to his phone '*being bad so he did not have the letter*'. This Panel surmises that despite his vehement denial and plea of non-literacy and/or malfunctioned phone, the Athlete had been duly served his Notification by the Applicant which detailed his right to request for his B Sample, likewise the relevant documentation package, in accordance with the applicable International Standard for Result Management (ISRM) and hence we find that the Athlete has not established a departure from the IRSM which could reasonably have caused his anti-doping rule violation (ADRV).

78. Further to this, as earlier mentioned, it is on record that the Athlete's Urine Sample was taken on 26th November 2022. The Test Report, numbered 9 in the Charge Document shows the Laboratory received the Athlete's Sample on 01-Dec-2022 then submitted its test results on 10-Jan-2023. Subsequently a Wahome Peninah printed out the Athlete's Test Report on 13-Jan-2023. The *Notice to Charge*/ Anti-Doping Rule Violation dated 23rd January 2023 which the Athlete admitted to having received all indicate that the timeframes were well within those recommended by the applicable ISRM & ISL Code instruments.

79. On the contest regarding the number of samples, the uncontested Doping Control Form indicates that the Athlete assisted by the DCO divided his Urine Sample into two separate bottles, namely **A 7125532** and **B 7125532** and it was the 'A Sample' the Laboratory tested and submitted a Test Report for.

80. It was the Athlete's submission in its paragraph 39 that, "*The reading suggests that the Anti-Doping Organization (ADO) mandated to do a review of the ADO that initiated the test, in this case, the Qatar Doping Control Laboratory, in which case, the Applicant Agency assertion would be factually incorrect in absence of proof.*" This Panel observes that this is an erroneous interpretation of the WADC/ADAK ADR by the Athlete. The Panel is guided by WADC's/ADAK ADR's Article 7 and in particular Article 7.1 '*[…] Results Management shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection.*'

81. In this case it is obvious that the Lab did not initiate the sample collection, rather as a matter of fact ADAK/Applicant did so on 26th November 2022 as confirmed by the uncontested Doping Control Form produced as evidence in this matter. In the Test Report it is evident that the Laboratory having completed and reported on its core function then noted to the ADO (ADAK) responsible for results management to '*Please correlate the findings with a valid TUE if any.*' In other words, ADAK/Applicant was required to 'review' the apparent AAF, that is if for instance, the Athlete might have applied for and was approved for a Therapeutic Use Exemption (TUE) which could have allowed him to take the prohibited substance, in which case, the Applicant would determine, only after such review, whether or not to proceeded with the issuance of the ADRV Notice to the Athlete.
82. Therefore, cumulatively this Panel was of the opinion that there were no departures from any WADC/ADAK ADR instruments and/or policies as claimed by the Athlete.

ii. Did the Athlete commit the charged anti-doping rule violation?

83. The Applicant's prosecution was based on the charge of ***Presence of a prohibited substance S9. Glucocorticoids/triamcinolone acetonide and its metabolite6B-Hydroxy-Triamcinolone Acetonide*** as outlined at paragraph 10 of its charge document dated 28th February 2023.
84. Article 2.1 of the ADAK ADR and, similarly Article 2.1 of the Code provide the charge to be determined as follows:

    '2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample'
85. In his Response to Charge, the Athlete admitted having being tested at the Kakamega Forest Marathon by ADAK DCO on 26th November 2022. It is

noted that he (Athlete) has not denied the Doping Control Form (DCF) – numbered 8 in the charge document – which he signed, (and commented O.K) when his urine sample was collected during the Kakamega Forest Marathon event that gave rise to the Adverse Analytical Finding (AAF) in this case.

86. Further, in his Response to Charge document the Athlete "*controverts the contents of paragraph 9 of the* (Applicant's) *Charge Document* *and avers that* ***he does not know how to read hence he could not understand the contents of the letter.***" Additionally, the Athlete "*avers that he did not receive alongside the Notice to Charge, the Test Report submitted by World Anti-Doping Agency (WADA)- Accredited Laboratory in Qatar, Anti-Doping Lab Qatar (the Laboratory*). (Our Emphasis)

87. Denying, from the outset, that he is in violation of Article 2.1 of ADAK ADR/WADC in the face of the Test Report served upon him by the Applicant, together with *Notice to charge*/ ADRV Notice, (which he admitted receipt of), on account of the claim that he does not know how to read is a weak a plea by the Athlete. Non-literacy is not sufficient defence against the scientific Test Report which shows presence of proscribed substance in his body system. The panel stresses that ignorance in all its manifestations is not a plea under the WADA Code.

88. As observed by the Applicant in its submissions *'where use and presence of a prohibited substance has been demonstrated'* – in the Test Report of the Athlete's Urine Sample from the Accredited Laboratory tabled (No. 9 attachment in the charge document) by the Applicant – '*it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated to establish an ADRV*'.

89. Therefrom it is this Panel's finding that the Applicant had established the Athlete's anti-doping rule violation (ADRV) to its comfortable satisfaction.

iii. Was the violation committed by the Athlete intentional?

90. For Article 10.2 *Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method - The period of Ineligibility for a violation of Article 2.1, […] shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:*

Pursuant to WADC's & ADAK ADR Article 10.2.1 *The period of Ineligibility, subject to Article 10.2.4, shall be four (4) years* ***where:***

> *10.2.1.2 The anti-doping rule violation* ***involves a Specified Substance or a Specified Method 'and' the Anti-Doping Organization can establish that the anti-doping rule violation was intentional****,* which is the operative article in this case.
>
> ***10.2.2 If*** *Article* ***10.2.1 does not apply****, subject to Article 10.2.4.1, the period of Ineligibility shall be two (2) years*. (Our Emphasis)

91. Further, WADC's & ADAK ADR's Article 10.2.3 provides:

> *10.2.3 As used in Article 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.59 An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule*

violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

59 [Comment to Article 10.2.3: Article 10.2.3 provides a special definition of "intentional" which is to be applied solely for purposes of Article 10.2.]

92. The WADA Anti-Doping Organizations Reference Guide under section 10.1 provides that:

> *'Intentional' means an athlete, or other person, engaged in conduct he/she knew constituted an ADRV, or knew there was significant risk that the conduct might constitute an ADRV, and manifestly disregarded the risk'*

93. Consequently, in determining whether there was intention to commit the violation, the first aspect to be reviewed in this case is ***if*** the ADO/Applicant establishes ***that the anti-doping rule violation was intentional***. (Our Emphasis)

94. This Panel noted that during the oral hearing, the Athlete reiterated what he had written in his explanatory email to that Applicant, that "*he was unwell, had rashes and was having a headache; he went to a chemist in Eldoret and was given an injection.*" The test revealed that whatever he was given at the Chemist fell in the category of Specified Substances.

95. The Panel calls attention of both parties to ***CAS 2016/A/4716 Cole Henning v. SAIDS***, "*[…] when an ADRV is in respect of a specified substance*, ***the burden rests with the Anti-Doping Organization to establish that the violation was intentional***… ". (Our Emphasis)

96. We opine that, the Applicant having established that the Athlete committed the anti-doping rule violation which specifically involved a Specified

Substance, the conjunctive present at WADC's Article ***10.2.1.2*** now placed the onus squarely on the Applicant to ***establish that the anti-doping rule violation was intentional.*** (Our Emphasis)

97. Nonetheless, in the totality of its submission regarding 'intention', the Applicant steered clear off its own burden and mistakenly placed its burden on the Athlete. For instance, this Panel noted that both ***CAS/ 2018/O/5754 Sergey Fedorovtsev v. Russian Anti-Doping Agency (RUSADA)*** & ***CAS Anti-Doping Division (OG PyeongChang) AD 18/003/World Curling Federation (WCF) v. Alexksandr Krushelnickii*** relied upon by the Applicant to convince the Panel that the burden rested on the Athlete involved Non-Specified Substances (in WADA's 2018 Prohibited List). The long established CAS praxis indeed places the burden on athletes to establish the ADRV was not intentional **when** the substance is Non-Specified. When the proscribed substance is a Specified Substance as is the case in the present matter, WADC/ADAK ADR's Article 10.2.1.2 firmly applies as clarified by the panel in Cole Hemming.

98. Further, the Applicant while submitting specifically on intention proceeded to divest itself of the burden to prove intentionality by positing in its para.31 that, "*[…]* ***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 offence, regardless of the intention of the athlete to commit such an offence*" (Our Emphasis). It is true in the first limb of this matter that proof of 'Presence/Use' establishes an ADRV regardless of intention. That notwithstanding, progressing to the matter of establishing intentionality, WADC's Article 10.2.1.2 specifically addresses where the burden to establish intention rests in relation to

Specified Substances/Methods, therefore the Agency does not have the leeway to limit its burden in the present case.

99. On the matter of establishment of intention in WADC's Article 10.2.1.2, this Panel aligns itself with the panel in ***CAS 2016/A/4716 Cole Henning v. SAIDS*** para. 53. *'In the event, that the Sole Arbitrator is comfortably satisfied that an ADRV has occurred, as admitted by the Appellant, it rests upon the Respondent to discharge the burden of proving intention on the part of the Appellant, as provided for in Articles 10.2.1.2 and 10.3 of the SAIDS Rules, in order for the Sole Arbitrator to determine which sanctions or other results should follow, the ADRV being in respect of a Specified Substance*' (Our Emphasis).

100. Further, in regard to standard of proof, as per WADC's Article 3.1, we lean on ***CAS 2016/A/4716 Cole Henning v. SAIDS*** para. 47 *'[…]. Although the WADA Code is silent on the precise standard of proof which the Respondent must provide to establish that a violation was intentional, the practice is that the standard required by CAS Panels would be the same "comfortable satisfaction" standard that Anti-Doping Organisations (hereinafter referred as "ADOs") are held to establish in an ADRV, especially since "comfortable satisfaction" has been recognised in CAS awards as the general standard applicable in disciplinary matters.'*, and *para. 48. 'The CAS practice in disciplinary matters also points to a general acceptance of the comfortable satisfaction standard on the prosecuting sports organisation. That said, comfortable satisfaction is a variable standard, described in the WADA Code as "greater than a mere balance of probability but less than proof beyond a reasonable doubt"'.*

101. In the circumstances, it is our considered opinion that the Applicant erroneously self-limited its legitimate Code burden and thereby seriously limited itself in discharge of its burden; hence the Applicant was not able to establish to the comfortable satisfaction of this Panel that the Athlete's anti-

doping rule violation was intentional. Arising therefrom, WADC's/ ADAK ADR's Article 10.2.2 was applicable in this case.

iv. No Fault/Negligence & No Significant Fault/Negligence – Origin – Knowledge

102. WADC's Article 10.5 Elimination of the Period of Ineligibility where there is No Fault or Negligence provided:

> *If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.65*
>
> *65 [Comment to Article 10.5: This Article and Article 10.6.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They **will only apply in exceptional circumstances**, for example, where an Athlete could prove that, despite **all due care**, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances:*(Our Emphasis)
>
> *a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the*

unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.6 based on No Significant Fault or Negligence.] (Our Emphasis)

103. It was the Applicant's contention that the Athlete was personally Code bound to ensure that no prohibited substance entered his body, WADC's Article *'2.2.1 It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies and that no Prohibited Method is Used'*. We agree with the Applicant as we are not persuaded that the Athlete fully complied with his duty of care considering ignorance was not a tool at his disposal within the Code dictates. Anti-Doping Rules (ADR) are considered cross-cutting sports rules in the same way athletic rules are of importance for athletes around the sports world and strict observance is a key commandment of the WADC/ADAK ADR. In the very same way the Athlete had trained himself from the year 2000 to improve his athletic abilities likewise, the WADA Code Article 21.1 ***Roles and Responsibilities of Athletes*** *21.1.1 'To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code',* required him to glean out at least the basic requirements regarding anti-doping. By not making himself Code-knowledgeable, the Athlete was not able to take all due care or what is called 'utmost caution' in CAS parlance and therefore this Panel finds that **No Fault/Negligence** does not appertain in his case.

104. WADC's Article 10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence provides:

> *10.6.1 Reduction of Sanctions in Particular Circumstances for Violations of Article 2.1, 2.2 or 2.6. All reductions under Article 10.6.1 are mutually exclusive and not cumulative.*
>
> *<u>10.6.1.1</u> Specified Substances or Specified Methods*

Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

105. Further, as defined in the WADC 2021, No Significant Fault or Negligence is:

The Athlete or other Person's establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, ***the Athlete must also establish how the Prohibited Substance entered the Athlete's system*** (Our Emphasis).

106. It is obvious that in canvassing for No Significant Fault or Negligence, **origin/**establishing how the Prohibited Substance got into the Athlete's system is mandatory as per the definition in WADC 2021. (Our Emphasis)

107. On origin this Panel is in agreement with the Applicant that the Athlete did not tender evidence of how the prohibited substance entered his system and therefore the origin of the prohibited substance has not been established and hence the Athlete cannot benefit from reduction of sanction under No Significant Fault or Negligence.

108. Further Article 10.7 provides:

10.7 Elimination, Reduction, or Suspension of Period of Ineligibility or Other Consequences for Reasons Other than Fault

109. On Knowledge the Applicant upheld the principle of strict liability submitting that ignorance is no excuse. The Athlete did testify that he received some anti-doping awareness in Iten after the Kakamega Forest Marathon which was after the deed and we accept that it is better late than never and the awareness forum was a good start for the Athlete to promote clean sport in the future.

110. Nevertheless, WADA's International Standard for Education (ISE) 2021 Article 7.2.1 provides: '*Each National Anti-Doping Organization shall be the authority on Education as it relates to clean sport within their respective country. National Anti-Doping Organizations should support the principle that an Athlete's first experience with anti-doping should be through Education rather than Doping Control*' (Our Emphasis).

111. Some of the core competencies the Applicant ought to be delivering to its stakeholders, one of whom is the Athlete, is enumerated under ISE's Article 3.3 Anti-Doping Education: '*Delivering training on anti-doping topics to build competencies in clean sport behaviors and make informed decisions*' and *5.2 • Use of medications and Therapeutic Use Exemptions.*

112. With a career spanning over two decades and achieving his first formal anti-doping education shortly after only his second doping testing, (the first within his own country) in the same two-decade period, should paint for the Applicant the glaring gaps that continue to exist for those sportspeople like the Athlete who practice their individual sports relatively unsupervised and who may be challenged in accessing quality, easy to understand/usable clean sport anti-doping information from genuine doping authorities. In ***CAS 2010/A/2107 Flavia Oliveira v. USADA***, *CAS considered that the athlete's lack of any formal anti-doping training was a relevant factor under Article 10.4 WADC (reduction for specified substance where substance*

not intended to enhance performance) when assessing her failure carefully to check the label of a product she took for therapeutic purposes'.

113. It is noted by the Panel that this was the Athlete's first violation and his level of formal educational attainment was very basic.

SANCTIONS

114. The Applicant "*urged the panel to consider the sanction provided for in **Article 10.3.3** of the ADAK Rules and sanction the athlete to 4 years' ineligibility*", whereas the Athlete prayed for the charge to be dismissed. At this juncture, we wish to note to the Applicant that Article 10.3.3 is tailored for violations of Article 2.7 or 2.8 and is not relevant to this case. The ADRV in this matter is under Article 2.1 as correctly noted by the Athlete.

115. Additionally, while submitting regarding the sanction the Applicant wrote in its paragraph 45 that, "*[…] 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 the Anti-doping organization 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.*" The Panel notes that no such documents were adduced by the Applicant to prove their claim.

116. Further Code Article 10.10 provides:

Article 10.10 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation;

> *In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample*

was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes. (Our Emphasis)

73 [Comment to Article 10.10: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]

i. Credit for time served under the provisional suspension

117. WADC's Article 10.13.2 provides that credit may be awarded for a provisional period of suspension served by the Athlete as against the period of ineligibility they are sanctioned for. There was no contestation that the Athlete was respecting his mandatory provisional suspension.

DECISION

118. Consequent to the discussion on merits of this case, the Panel finds:

a. The applicable period of ineligibility of two (2) years is hereby upheld.
b. The period of ineligibility shall be from the date of the Athlete's Mandatory Provisional Suspension which began on **13th February 2023** for a period of two (2) years: (13th February, 2023 to 13th February, 2025).
c. Disqualification of any and/or all of the Athlete's competitive results from **26th November 2022**.
d. Each party shall bear its own costs.

e. The right of appeal is provided for under Article 13 of the ADAK ADR and the WADA Code.

Dated at Nairobi this __ 7th _____day of _____September_____2023

_____

Mrs. J Njeri Onyango, FCIArb, Chairperson

_____ _____

Mr. Allan Owinyi, Member **Ms. Mary N. Kimani, Member**