



**Anti-Doping Agency of Kenya v Chelangat (Tribunal Case E001 of 2024) [2024] KESDT 644 (KLR) (9 May 2024) (Decision)**

Neutral citation: [2024] KESDT 644 (KLR)

**REPUBLIC OF KENYA  
IN THE SPORTS DISPUTES TRIBUNAL  
TRIBUNAL CASE E001 OF 2024  
E.SIFUNA-SHIVEKA, CHAIR, GABRIEL OUKO & E. G. KIPLAGAT, MEMBERS  
MAY 9, 2024**

**BETWEEN  
ANTI-DOPING AGENCY OF KENYA ..... APPLICANT  
AND  
SILVIA CHELANGAT ..... RESPONDENT**

**DECISION**

Panel

- 1. Mrs. Elynah Shiveka - Panel Chair
- 2. Mr. Gabriel Ouko -member
- 3. Mr. Gichuru Kiplagat -member

Counsel Appearing:

Mr. Bildad Rogoncho- Counsel For Adak/applicant

No Appearance For The 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

WA- World Athletics

AK-Athletics Kenya



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.

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## 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 proceeding by Mr. Rogoncho Advocate
2. The Respondent is a female adult of presumed sound mind, a national and athlete, not represented in these proceedings

## 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)/19-norandrosterone and S5. Diuretics and Masking Agents/acetazolamide”
- 3.2 S1.1 Anabolic Androgenic Steroids (AAS)/19-norandrosterone and S5. Diuretics and Masking Agents/acetazolamide which are listed as a Anabolic Androgenic Steroids and Diuretics and Masking Agents under S1.1 and S5 of WADA’s 2023 Prohibited List.

## 4 Background

- 4.1 On 14<sup>th</sup> October 2023, during an AK X-Country meeting 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 1271727` (the A Sample) and B 1271727 (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: S1.1Anabolic Androgenic Steroids (AAS)/19-norandrosterone and S5. Diuretics and



Masking Agents/acetazolamide which are listed as an Anabolic Androgenic Steroids and Diuretics and Masking Agents under S1.1 and S5 of WADA's 2023 Prohibited List.

- 4.3 The findings were communicated to the Respondent athlete by Sarah I. Shibusse, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 4<sup>th</sup> December 2023. The Respondent was, in the said communication, offered an opportunity to provide an explanation for the same by 24<sup>th</sup> December 2023. She was also informed of the process and possible consequences dependent on her actions in response to the Notice.
- 4.4 A notice of charge dated 8<sup>th</sup> January 2024 was presented to the Tribunal by Mr. Bildad Rogoncho, on behalf of the Applicant. The following were the Tribunal's directions dated the same day:
- 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 respondent, by 18<sup>th</sup> January, 2024;
  - ii. The Applicant shall engage with the Respondent for the purpose of establishing whether the respondent would require Pro bono counsel;
  - iii. The panel constituted to hear this matter shall be as follows;
    - a. Elynah Shiveka, panel chairperson,
    - b. Gabriel Ouko, member,
    - c. Gichuru Kiplagat, member
  - iv. The matter to be mentioned 25<sup>th</sup> January 2024 to confirm compliance and for further directions.
- 4.5 At the mention on 25<sup>th</sup> January 2024, Mr. Rogoncho informed the Tribunal that the athlete was absent as they were yet to serve the athlete with the charge documents and the athlete was yet to even make a maiden appearance before the Tribunal. He requested for 7 days to find the athlete and serve her appropriately. The Tribunal granted the request and ordered the matter to be mentioned on 1<sup>st</sup> February 2024.
- 4.6 During the mention on 1<sup>st</sup> February 2024, Mr. Mwakio for ADAK informed the Tribunal that they had been unable to locate the Athlete and they were working with Athletics Kenya to try and locate her. Mr. Mwakio prayed for fourteen (14) days to try trace the athlete. The Tribunal granted the request and set the next mention to be on 15<sup>th</sup> February 2024.
- 4.8 At the mention on 15<sup>th</sup> February 2024, Mr. Mwakio stated that the Athletics Kenya Federation who were assisting in tracing the Athlete, unfortunately, were unable to trace the Athlete. He added that they had served the Federation with the notices and that they are aware of the existence of the matter. He prayed that they be allowed to file their submissions as per Article 3.2.5 of the ADAK ADR and close this matter. The Tribunal directed the Applicant file a comprehensive Affidavit of service as evidence in efforts made in order to activate Article 3.2.5 of the ADAK ADR. The next mention was set for 29<sup>th</sup> February 2024.
- 4.9 During the mention on 29<sup>th</sup> February 2024, Mr. Mwakio informed the Tribunal that the purpose of the mention was to confirm filing of Affidavit of Service by the applicant. He confirmed to have complied with the same. He requested to be allowed to proceed by disposing of the matter by way of written submissions. He further requested twenty-one days to file their submissions. The Tribunal granted the request and gave the Applicant twenty-one (21) days to file their written submissions as the matter



would proceed under Article 3.2.5 of the ADAK ADR. The Tribunal set the next mention as 21<sup>st</sup> March 2024.

- 4.10 At the mention on 21<sup>st</sup> March 2024, Mr. Mwakio confirmed that the submissions had been filed and was now seeking a date for decision from the Panel. The Tribunal granted the date for rendering the decision as 25<sup>th</sup> April, 2024 at 2.30pm.

## 5. Submissions By Adak

- 5.1 ADAK's submissions were filed on 20<sup>th</sup> March 2024. 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 sample.
- 5.3 ADAK further submitted that the Respondent under Article 2.2 had to take responsibility in context of Anti-Doping, for what she 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 origin, the Respondent didn't participate in these proceedings thus no explanation was provided for the origin of the prohibited substance and therefore the origin has not been established.
- 5.7 On intention, ADAK submitted 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 relied on CAS 2019/A/6213 *World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková* the panel in paragraph 2 asserted that:
- “The athlete bears the burden of establishing that the violation was not intentional. Lack of intention cannot be inferred from protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete's clean record. The submissions, documents and evidence on behalf of the athlete must be persuasive that the occurrence of the circumstances which the athlete relies on is more probable than their nonoccurrence. It is not sufficient to suggest that the prohibited substance must have entered his/her body inadvertently from some supplements or other product. Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete, or that the specified product claimed to be taken, contained the substance in question. Absent any proof of purchase, information as to the specific type of supplement used, by whom it is produced, etc. and absent any disclosure of the food supplement on the doping control form, there is no element substantiating the athlete's contention that s/he did use that product or that it was contaminated”.
- 5.8 ADAK further submitted 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.



- 5.9 ADAK submitted that the likelihood of the Respondent establishing a lack of intent without providing a source would be extremely difficult.
- 5.10 ADAK submitted that the respondent was duly notified of the procedural steps and her rights in accordance with ADAK rules and WADA code. However, the Respondent's non-participation in these proceedings means that she failed to provide an alternative plausible explanation disproving her intent when she ingested the prohibited substance.
- 5.11 ADAK submitted that in view of her non- participation in these proceedings the Respondent didn't discharge her burden on a balance of probabilities, moreover an athlete with clean hands who faces an imminent four-year ban would leave no stone unturned in her quest to prove her innocence and non-intention to dope. The Respondent in this case, however, chose not to participate, and many questions regarding her intention remain unanswered.
- 5.12 ADAK further submitted 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.
- 5.13 It was ADAK's submission that an offence has therefore been committed as it was established that a prohibited substance was present in the athlete's tissues or fluids. There is thus a legal assumption that the Respondent is responsible for the mere presence of a prohibited substance, regardless of the intention of the athlete to commit such an offence
- 5.14 On the question of fault/negligence ADAK placed reliance on ADAK ADR 2.1.1 & 2.1.3. 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 placing reliance on CAS 2019/A/6482 *Gabriel da Silva Santos v. Fédération Internationale de Natation (FINA)*, the panel in paragraph 2 stated that that
- “Panels confronted with a claim by an athlete of No Fault or Negligence must evaluate what this athlete knew or suspected and what s/he could reasonably have known or suspected, even with the exercise of utmost caution. In addition, panels must consider the degree of risk that should have been perceived by an athlete and the level of care and investigation exercised by an athlete in relation to what should have been the perceived level of risk as required by the definition of Fault”
- the respondent didn't meet the set threshold by ADAK rules and the WADAC to warrant sanction reduction.
- 5.16 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.



5.17 Therefore, it was ADAK's submission that the panel should consider the sanction provided in Article 10.3.3 of the ADAK Rules and sanction the athlete to a period of ineligibility of four (4) years.

## 6. Jurisdiction

6. 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),( as amended from time to time).
  - c. ADAK Anti-Doping Rules , under Article 8.

In the circumstances, the Tribunal assumes jurisdiction from the above- mentioned provisions of Law.

## 7. Applicable Rules

7. 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 2023 and International Standards established under it, the UNESCO Convention against Doping in sports, amongst other legal resources when making its determination.

## 8. Merit

- 8.1. In the absence of participation by the Athlete, the following issues are uncontested.
  - a. That the urine sample was collected from the Athlete on the 14<sup>th</sup> of October 2023.
  - b. That there is no indication of previous ADRV by the Athlete.
  - c. That a notice of charge was issued by the Applicant's Chief Executive Officer, Dated the 4<sup>th</sup> of December 2023 and that in the said communication the Athlete was offered an opportunity to provide an explanation for the ADRV by the 24 December 2023, but no response was received from the Athlete despite the said charge document having been sent to the Athlete's known telephone number as contained in the doping control form.
- 8.2 On the question; Did the Athlete commit the charged anti-doping rule violation? The Applicant's prosecution is based on the provisions of the act which is as follows; Presence of S1.1Anabolic Androgenic Steroids (AAS)/19-norandrosterone and S5. Diuretics and Masking Agents/acetazolamide, as outlined at paragraph D10 of the charge documents, Dated 31 January 2024.
- 8.3 In the charge document, the Applicant has indicated that there was no known Therapeutic Use Exemption (TUE) recorded at the IAAF for the substances in question and there is no apparent departure from the IAAF Anti-Doping Regulations or from WADA International Standards for Laboratories which may have caused adverse analytical findings. The Applicant further submitted that they failed to respond to charges within the specified time as set out in the notification of charge and also, upon the respondent being served with the charge document in the current proceedings.
- 8.4 This panel has reviewed the Affidavit of Service filed by the Applicant at the request of the Tribunal to confirm effective service of the charge document. Having done so, the Panel is satisfied that much effort was put in by the Applicant to contact the Respondent via all known means, including through telephone service and through the Athletics Kenya Federation. The Affidavit in question is deepened



by Mr. Stanley Mwakio and is deponed on the 26<sup>th</sup> day of February 2024 and filed at the Tribunal on the 28<sup>th</sup> of February 2024.

- 8.5 The Applicant had also submitted that despite being notified of the adverse analytical finding by the Applicant, the Respondent did not request for the analysis of Sample B and therefore waved her right of analysis of the same.
- 8.6 Further, WC, WADC and ADAK ADAR articles 2.1.2 states as follows; Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following; Presence of a prohibited substance or its metabolites or markers in the Athlete's sample, A sample where the Athlete waves analysis of the B sample and the B sample is not analyzed or where the Athlete's B sample is analyzed and the analysis of the Athlete's B sample confirms the presence of the prohibited substance or its metabolites or markers in the Athlete's sample. Without a contrary analysis of the Athlete's A sample, then the presence of the prohibited substance in the Athlete's sample has been demonstrated by the Applicant as argued by the Applicant. 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.
- 8.7 The Panel is satisfied that proper service was effected on the Respondent who failed to respond. And in the circumstances, the Panel is comfortably satisfied that the Applicant has established that the Athlete in this matter has committed an ADRV.
- 8.8 On the question; Was the violation committed by the Athlete intentional (especially where an unspecified substance is involved)? The code places the burden of proof upon the Athlete to rebut a presumption or establish specific facts or circumstances, and the standard of proof shall be by balance or probability. In the present circumstances, in the absence of the athlete's participation or any document to the contrary, the presumption would be that the specified facts and circumstances have not been controverted.
- 8.9 In the absence of any response from the Respondent, it would not be necessary to go into the issues of whether the ingestion of the substance was intentional or otherwise or whether to assess the degree of fault or not at all. It is the position of the Panel, therefore, that the existence of The ADRV has been sufficiently demonstrated to the required degree by the Applicant.

## **9. Sanctions.**

- 9.1 It was the submission by the Applicant that 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 committed intentionally. If Article 10.2.1 does not apply, the period of eligibility shall be two years. It was further submitted that Article 10.4 creates 2 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. These are; that the Athlete must establish how the specified substance entered his or her body, or that the Athlete did not intend to take the specified substance to enhance his or her performance. It is only if those two conditions are met that the Athlete can benefit from a reduction in the period of ineligibility.
- 9.2 The Applicant's position in the submissions is that the Athlete in the current case has not discharged the burden by any degree to warrant reduction of the sanction specified. And as a consequence of the Respondent's lack of participation in these proceedings, no explanation has been provided for how the prohibited substance got into her system and therefore, the first venue to warrant reduction of a sentence is excluded. The Applicant further submitted that on the second limb, the Respondent would also not in the absence of intentionally setting out intentions, have any ground to establish the level of



degree of fault and that the same assessment is not applicable in the present circumstances. Therefore, at the end, the Applicant submitted that there are no grounds in the current proceedings to warrant any reduction of the sentence.

9.3 The Panel's position is that the breach of the relevant code requirements has been committed. There being no response by the Respondent to dispel that position, the Panel also considers that there is a duty upon the Respondent to acquaint themselves with the requirements of Anti-Doping Rule violations and to be responsible for what is ingested. It is the Panel's finding that in the absence of a response, there are no circumstances to grant the Respondent any reduction in the specified period of ineligibility. The Panel also makes the following findings:

1. WADC's Article 10.13.2 provides that credit may be awarded for the Provisional period of suspension served by an Athlete as against the period of ineligibility that they are sanctioned.
2. The panel has not been informed that there has been any Breach of the period of mandatory suspension by the Respondent.

#### **10. Decision.**

10. Consequent to the discussions on merits above, the Panel orders are as follows.

- a. The period of ineligibility shall be four ( 4) years;
- b. The period of ineligibility shall be from the date of the provisional suspension and therefore commences on the 4th December 2023 to the 3<sup>rd</sup> December 2027;
- c. Any and or all competitive results by the Respondent effective the 14th of October 2023 are hereby disqualified;
- d. Each party shall bear its own costs;
- e. The right of Appeal is provided for under Article 13 of the ADAC, ADR and the WADA Code.

**DATED AT NAIROBI, THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**SIGNED:**

**ELYNAH SHIVEKA, PANEL CHAIRPERSON**

**GABRIEL OUKO, MEMBER**

**GICHURU KIPLAGAT, MEMBER**

