

**REPUBLIC OF KENYA**  
**SPORTS DISPUTES TRIBUNAL**

**ADAK CASE NO. 30 OF 2017**

**IN THE MATTER OF THE SPORTS ACT NO. 25 OF 2013 LAWS OF KENYA**

**IN THE MATTER OF ANTI-DOPING ACT NO. 5 OF 2016 LAWS OF KENYA**

**IN THE MATTER OF ADAK ANIT-DOPING RULES OF KENYA**

**WORLD ANTI-DOPING CODE 2015**

**IN THE MATTER OF INTERNATIONAL ATHLETICS FEDERATION RULES**

**IN THE MATTER OF ARBITREATION OF SPORTS DISPUTES**

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

**VERSUS**

**FERDINAND O. OMANYALA.....RESPONDENT**

**DECISION**

**PANEL:- 1. ELYNAH SHIVEKA - VICE CHAIR**  
**2. NJERI ONYANGO - MEMBER**  
**3. G.M.T OTIENO - MEMBER**

**APPEARANCES**

**PROSECUTION .....MR. ERIC OMARIBA**

**ADVOCATE FOR ADAK**

**RESPONDENT.....MS SARAH OCHWADA**

**ADVOCATE- CENTER FOR  
SPORTS LAW (CSL)**

**REPRESENTING THE  
RESPONDENT (PRO-BONO)**

**-RESPONDENT FERDIND  
OMANYALA PRESENT AT THE  
HEARING**

**1. THE PARTIES**

1.1. The applicant is a state corporation established under Section 5 of the Anti-Doping Act no. 5 of 2016. It is the body charged with managing Anti-Doping activities in the country including Result Management.

- 1.2. **FERDINAND OMANYALA OMURWA (HEREINAFTER FERDINAND)** is a male athlete sprinter aged 22 years. He is a student at the University of Nairobi.
- 1.3. The Sports Disputes Tribunal (**HEREINAFTER TRIBUNAL**) is an independent Sports Arbitration Institution created under the provisions of the Sports Act 2013 Laws of Kenya. Members of the Tribunal are appointed in terms of Section 6 of the said Act.

## **2. THE CHARGE**

- 2.1. By a charge dated the 14<sup>th</sup> day of November 2017 and filed at the Tribunal on 15<sup>th</sup> November 2017, Ferdinand is charged with  
**“Presence of a prohibited substance Glucocorticoids/ Betamethasone or its metabolites or markers in the athlete’s sample.”**
- 2.2. The Stated presence is an Anti-Doping Rule Violation (ADR) under Article 2.1 of the WADA Anti-Doping Code (WADC) and Rule 32.2(a) of the IAAF Rules.
- 2.3. Article 2.1.2 provides  
“It is each athlete’s personal duty to ensure that no prohibited substances 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 use on the athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.
- 2.4. The Provisions of Article 22.1 of the ADAK ADR places upon the athlete the responsibility to know and comply with the rules.
- 2.5. Ferdinand participated in the Athletics Kenya National Championships on the 9<sup>th</sup> June 2017 where ADAK Doping Control Officers in an in-competition testing collected a urine sample from him.
- 2.6. The sample was transported to the WADA Accredited Laboratory in Paris, France, where the ‘A’ Sample was analyzed in accordance with the procedure set out in WADA’s International Standards for Laboratories. The A sample returned an Adverse Analytical Finding (AAF) for the presence of a prohibited substance Glucocorticoids/ Betamethasone.
- 2.7. Glucocorticoids/ Betamethasone is a prohibited substance under Section 59 of the 2017 WADA prohibited List and is a specified substance( Article 4.2.2 of WADC)
- 2.8. Ferdinand was informed of the AAF by a letter from ADAK dated 14/9/2017 and was also, by that letter placed on provisional suspension. He was notified of his right to pursue the testing of the ‘B’ Sample but he did not pursue that option.
- 2.9. The Appellant ADAK, in its Charge Document states that no plausible explanation has been rendered for the AAF nor any mitigating factors set out for reduction of the sanction under the Rules, it therefore prays that:
  - a) All Competitive Results obtained by Ferdinand Omanyala Omurwa from and including June 9, 2017 until the date of determination of the matter herein be disqualified, with the resulting consequences (including forfeiture of medals, points and prizes (article 10.1 ADAK ADR)
  - b) Ferdinand Omanyala Omurwa be sanctioned to a 2-year period of ineligibility as provided by ADAK Anti-Doping Rules Article 10 of Adak and WADC Rules.
  - c) Costs, article 10.10

## **3. JURISDICTION**

3.1. The Sports Disputes Tribunal (SDT) has jurisdiction to hear and determine this matter under section 55, 58 and 59 of the Sports Act No. 25 of 2013 and Section 31 and 32 of the Anti-Doping Act no. 5 of 2016 as Amended.

#### **4. PRELIMINARY MATTERS**

- 4.1. The matter was first brought to the Tribunal by way of Notice of Charge filed at the Tribunal on 4<sup>th</sup> October 2017. It was mentioned before the SDT Chairperson on the same day for directions.
- 4.2. Directions were granted requiring the Appellant to file a formal charge to be served upon Ferdinand and the same to be mentioned on 18/10/2017 for further directions. A hearing panel, of Mr. John Ohaga, Mr. G.M.T. Otieno and Njeri Onyango, was constituted to hear and determine the matter.
- 4.3. A further mention was held on 18/10/2017 as directed. Ferdinand was present having been duly served. He confirmed that he had no objection to the panel appointed.
- 4.4. ADAK Counsel, Ms Ogama then stated that ADAK was preparing the Charge document and was also conducting some further investigations based on the response from Ferdinand in order to determine if to prefer charges against more persons tied to the ADRV, thus required some more time.
- 4.5. Ferdinand informed the Tribunal that he could not afford Legal Representation and requested for the appointment of counsel pro-bono.
- 4.6. The following directions were given:
  - i. The charge to be filed within 14 days and be served on the athlete or his duly appointed counsel.
  - ii. Ms Ogama to write to the Tribunal under Confidential Cover seeking its assistance in obtaining assistance from the Medical Practitioners and Dentist Board.
  - iii. Ms Sarah Ochwada for Centre of Sports Law appointed as pro-bono Counsel for the athlete.
- 4.7. The Charge Document was filed on 15/11/2017, which was the date set for Mention. The SDT therefore directed that the charge document be served upon Ms Ochwada, counsel for Ferdinand. A further Mention to confirm compliance was fixed for 29<sup>th</sup> November 2017.
- 4.8. On 30/11/2017, the parties had not fully complied with Directions as to filing of their respective documents. A further Mention to confirm Compliance was set for 6/12/2018
- 4.9. Ms Sarah Ochwada Advocate filed a Notice of Appointment of Advocate on 30/11/2017.
- 4.10. This matter was mentioned on 14/12/2017 together with case No. 33 of 2017 of MR DUNCAN AYIEMBA, the athlete Support Personnel, who was Ferdinand's coach, it was directed that both matters be mentioned on 18<sup>th</sup> January 2018. A Notice was to issue on Counsel for Ferdinand who was absent on that day.
- 4.11. Ms Ochwada filed the Response to the Charge on 17/1/2018, together with the Respondent's list of documents with copies thereof.
- 4.12. At the mention on 17/1/2018, it was agreed that the parties had complied with the requirements as to filing and therefore a hearing was set for 1/2/2018 at 2:30 pm.
- 4.13. On 1/2/2018, the matter was adjourned by consent for hearing on 22/3/2018.
- 4.14. When the matter came up on 22/3/2018, it was adjourned to 28/3/2018 by consent, on 28/3/2018, the parties were ready to proceed. However, the panel allocated this matter could not be constituted as some of the members were engaged in an urgent

hearing of a Sports Dispute touching on selection of Team Kenya for the Commonwealth Games due in early April. With the consent of parties, a new panel was constituted as shown above. The hearing thereafter started and the matter was subsequently fully heard.

## **5. THE HEARING**

- 5.1. At the hearing Mr Omariba for ADAK called no witness. He stated that he would rely on Article 2.1.1 and 3.1.
- 5.2. Mr Omariba also made oral remarks and stated that he would rely on the charge as presented together with the annexed documents.
- 5.3. He stated that the Respondent Ferdinand Omanyala was a male athlete whose sample was collected on 9/6/2018 in competition and upon analysis returned an AAF for the presence of a prohibited substances namely Glucocorticoids/ Betamethasone. This is a substance prohibited under section 59 of the 2017 WADA prohibited list and is a specified substance under Article 4.2.2 of the WADC
- 5.4. The athlete was informed of the AAF by ADAK CEO Mr Rugut vide a letter of 17/10/2017 which also placed him on suspension, by his response letter of 18/10/2017, which response in Mr Omariba's view was an admission., the athlete did disclose in the said letter that he saw a Doctor under direction of his coach who prescribed and administered Tramadol and Diprofos which the athlete stated would have been the cause of the AAF.
- 5.5. The appellant further submitted that Ferdinand did not request for the testing of 'B' Sample nor dispute the AAF. He was therefore charged before this Tribunal vide a charge filed on 15/11/2017 with:  
"The presence of a prohibited substance Glucocorticoids/ Betamethasone or its metabolites or markers..."

### **RESPONDENT'S CASE**

- 5.6. The athlete testified on his own behalf and also called two witnesses.
- 5.7. Ferdinand relied on his documents filed in this matter and also testified that he is a sprints athlete, 100 and 200 metres. He is 22 years (as at the date of hearing), born on 2/1/1996. As at the time, he was a second year university student studying at the University of Nairobi. He studied at Kamusinga High School, a sporting and academic giant by Kenyan Standards.
- 5.8. He started sprints by self-training with no coach in February 2016. He obtained a calendar from Athletics Kenya (AK) and selected the events. In March of that year, he posted some respectable times. He met Duncan Ayiamba (coach) in March in an AK meet at Nakuru. They discussed and the Coach agreed to assist him in training as he had no coach.
- 5.9. Under the guidance of the Coach, he attended various AK events, Eldoret Meet, Kenya Prisons Championships at Nyayo Stadium and the National Championships in June 2016 (Kasarani Stadium).
- 5.10. He also participated in the Rio Olympics Trials, July 2016. He ran other events including appearing at the East Africa University Games at Kasarani in December. He also qualified for the National Team for the World Relays in Bahamas in April 2017.
- 5.11. He stated that while participating in the National Relay Team, he started experiencing pains at his back.
- 5.12. His training schedule was 6 days a week, 2 sessions at different places including Gym sessions. The type of training and intensity was dictated by the Schedule and time of year and depending on what he was scheduled to work on e.g. speed or strength etc.



- 5.13. He was in good health until his back problem developed while in Bahamas. On return, he went to see a physiotherapist Alice. These once or twice sessions just managed the pain.
- 5.14. In April and most of May 2017, he went on with the sessions without medication but there was no improvement. In fact, before the National trials due in June, while practising block starts with the Kenya Prisons team which he had joined, he got severe lower back pain. The Prisons team Coach told his Coach Ayiamba to take him to the Prisons Team Physiotherapist Mr Peter Nduhiu. At the time, he could hardly walk due to the pain at his lower back right side.
- 5.15. Ferdinand stopped training and attended physiotherapy sessions, again he got some relief for a while and it removed the numbness on his leg. But while he was at the Students Hostel, the pain and numbness returned. So he called his coach to inform him (3<sup>rd</sup> June 2017). The pain persisted into the weekend of 4<sup>th</sup> June, when the Coach called him, he updated him and the coach promised to look up for treatment. The Coach later called him and informed him that he had a reference to a Doctor in the city centre who could treat him. He thus left the University Hostel and went into town where he linked up with the Coach.
- 5.16. He stated that the coach had a small business card in his hand which he was told had been given to him by a chemist where he had gone to seek assistance, the Coach called the number on the card and they were given directions to the clinic at Information House near Afya Centre on 1<sup>st</sup> floor. Then they went to the receptionist who confirmed that the Doctor was available, they were ushered to the Doctor's Consulting room.
- 5.17. The doctor examined him and he narrated his complaint. He recalls his coach asking the Doctor if an X- ray would help as he was in much pain, but the Doctor declined stating that it was not necessary since she had noted what the matter was and medication would suffice.
- 5.18. At this stage, he says, he clearly notified the Doctor that he was an athlete, that there was due a competition coming in a few days' time and he hoped to participate in it. He stated that he notified the Doctor that they would be testing for banned substances at the competition and he would not wish to have any banned substance.
- 5.19. He stated that the Doctor assured them that what she had prescribed was safe. It was used generally to treat patients as it was mild and treats inflammations. She in fact picked up a book and referred to it. He saw the book which appeared to be by U.S.N, a company that sells supplements. After Perusing it, the Doctor reassured him that the medications she had prescribed, Tramadol and Diprofos was very mild and would not offend the ADR for prohibited substances. She gave him the two medicines by injection.
- 5.20. He insisted that he reminded the Doctor severally that he was an athlete and got reassurance each time that all was well. He got the injection on the 1<sup>st</sup> visit and again when he went to see the Doctor later in early June at around 6pm.
- 5.21. He stated that for the treatment the Doctor charged Kshs. 4000 but he did not have money. His Coach bargained to 3,800 and paid via M-Pesa.
- 5.22. After the injections, he felt much better and even went back to training and thus participated in the National Championships where his sample was taken, he felt some pain again and went for the second dose before the sample was taken. He did not perform well in the Championships which he attributes to the period of layoff due to injury. His times were far slower from his previous performances.

- 5.23. He ran the finals on Saturday 9th June when his sample was taken and at the time he had no pain. He later also participated in the World Championship Trials and was 2<sup>nd</sup> in 100m and 3<sup>rd</sup> in 200m with times of 10.75 seconds and 20.9 seconds respectively, this times were way slower than his previous best times of 10.24 seconds and 20.65 seconds.
- 5.24. He stated that he was aware of anti-doping rules. He had read about it in 2015 form an article and also when ADAK was created in 2016. The Agency had circulated some materials during AK events and while he had not received any specific training on doping, he had been subjected to Sample Collection at least 5 times in local events, for instance during the trials for Bahamas, the testing was both out and in competition. All the tests were in 2017.
- 5.25. He stated that he was in a Whatsapp group with other athletes where there was exchange of ideas or news on the subject of doping.
- 5.26. At the time of Sample Collection at the Trials, there was a WADA prohibited list available, though he did not have time to refer to it. He thus heard about Glucocorticoids/ Betamethasone when he received the letter of Notification from ADAK.
- 5.27. He stated that the reason he went to see the Doctor was to heal his back pain which was too much. He had no intention to cheat or enhance his performance. He agreed to the medication only after the doctor assured him that it would not offend the WADC, he trusted and relied on her assurance.
- 5.28. On cross-examination by Mr Omariba, he agreed that he had taken injections 6 days or so before the test day but did not indicate on the form as he did not have his phone with him and could not recall the names and he still believed that what had been prescribed to him was fine.
- 5.29. He also on cross-examination denied that he was exhausted or fatigued nor that he was anxious to perform for his Prisons Team as he had already done several relays for them. That when he went to see the Doctor, he was limping, so he knew he was seeking healing. He was of the view that whereas pain eased, his times were very poor. He also reiterated that he was called by his Coach while he was at the Student's hostel. He saw or met the Doctor for the first time that day.
- 5.30. He stated that he was in the ADAK testing poll. He was registered after return from Taiwan September 2016. On his own, he would have goggled as he did before to find out what he was eating or taking but since he had a doctor who had prescribed the medication, he did not worry to check as he relied on her expertise, and believed that she was qualified in the area.

## **6. WITNESSES**

- 6.1. Ferdinand called two witnesses, Dr. Jerita Mkaluma Mshilla and his Coach, Duncan Ayiemba.
- 6.2. Dr. Mshilla is a G.P No. 14678 admitted to the medical profession in 2014. She is a graduate of the Muhimbili Medical School (Dar- Es- Salaam University Tanzania) where she studied between 2008 and 2013.
- 6.3. Dr. Mshilla stated that she is employed as a Medical Practitioner at the Mama Lucy Kibaki Hospital , a public Medical Facility but she together with other practitioners have a private practice called Clinicare at Information House opposite Afya Centre in the C.B.D. She has been in the practice for 2<sup>1/2</sup> years.

- 6.4. She mostly relies on walk in general patients but also gets some referrals from pharmacies near her clinic where she had issued her business cards.
- 6.5. That particular day, the patient she saw had a card given to them by one of the chemists. They had called to ask for directions to the clinic.
- 6.6. She says the two, the Coach and Ferdinand were taken to her from the clinic reception. She then did a physical examination on Ferdinand in the absence of the Coach. There were no physical features such as wounds or fracture. He was in good, fit physical shape save for the pain and raised temperature, which she determined arose from inflammation. Her diagnosis was “induced arthritis secondary to rigorous physical exertion”
- 6.7. According to Dr, Mshilla, for such diagnosis, the mild steroid (non Steroids anti-inflammatory drug) is used for arthritis, cases of autoimmune conditions, such as for Ferdinand, arising from physical exertion. This comes in the Brand name Betamethasone- 5ml per 2ml vial liquid for administered intermuscular (injectable) and intraarticular to or near the point (intrication). For his case, she injected at upper arm, this steroid was to buffer (if there is loss of liquid or fluid) and correct any autoimmune cell destruction.
- 6.8. Dr Mshilla stated that this is the most common form of treatment in medical use. The alternative available takes long using pills and the patient was in pain and limping so she elected the method that would give faster relief.
- 6.9. Dr Mshilla confirmed that the patient and his escort did notify her that he was an athlete and that he intended to compete in a few days. They also indicated to her that he would be tested and asked if it could affect him since it was a mild steroid which would deal with the inflammation and pain and wore off after 48 hours.
- 6.10. She stated that she informed Ferdinand that it was not an “illegal drug”. According to her understanding, illegal steroids are those used by athletes to enhance muscle bulk and performance. Those she said, are high dosage steroids e.g. about 5 times higher than what she had prescribed. She stated that she had no training on doping as a medic but had seen news on doping on Television and heard of WADA, more so in the run up to the 2016 Rio Olympics as Kenya had issues. She had heard of prohibited substances which she understood to be ‘something deliberately used to enhance performance under specialised doctors using drugs to aid athletes’. To her, she was not a specialised doctor, had no training on sports medicine but a general practitioner out to assist a patient. Since receiving of the AAF on her patient, she has paid keen attention to the matter and prohibited list. She had not known that most drugs ordinarily used for prevalent diseases are in fact banned. Diprofos which she used as a Brand name- not on the list but its components are- Betamethasone. She had a paper on the substances and components in this class and she knew from Medical School Learning. But as Doctors, they generally use the same in many instances. The most common glucocorticoids- Deprogena, depropar
- 6.11. Regarding Tramadol Injection, she used it as it is a strong pain killer, it had Tramadol suspension 400mg prescribed 100mg as a start close intramuscular.
- 6.12. When the patient saw her again after some days, she only administered Tramadol for pain. She did not see him thereafter or deal with him until this matter came up and investigations commenced. She said knowing now what she knows, she would not give similar treatment to any other athlete.
- 6.13. In answer to questions by Mr Omariba during cross-examination, she confirmed that she was notified that the patient was an athlete.

## **7. PARTIES SUBMISSIONS**

7.1. The Respondent's counsel filed their submissions on 18/4/2018. A summary of the submissions is as follows

- i.** The Respondent had no intention to cheat. The use of Betamethasone occurred entirely outside the context of sport performance, and there is no evidence that the Respondent did or could have possibly, enhanced his performance or could have distorted sporting competition.
- ii.** The Respondent was unfortunately unaware that the prescribed injection may contain prohibited substances as he was given assurance by and relied on the advice of a medical professional.
- iii.** As the prohibited substance falls under the category of specified substances it is the responsibility of ADAK as the Results Management Authority to prove that the Respondent used the substance intentionally for doping purposes.
- iv.** It is not enough for the Applicant to claim that proximity to date of competition or the need to seek relief for pain is a valid justification of intention to dope. The Applicant must prove to the comfortable satisfaction of the Panel that the Respondent not only knew that the substance he was taking was prohibited, but that he took the substance wilfully in order to enhance his performance.
- v.** In order to further support their claims the Applicants must also prove that the Respondent was not ill and that he did not require medication for his condition.
- vi.** The prohibited substance in question (Betamethasone), falls under the category of specified substances under the WADA prohibited list and as such the Respondent is entitled to consideration of reduction of standard sanction based on evidence proving credible non-doping reasons for its use.
- vii.** The following Authorities are relied upon in support of the prayers sought herein:
  - a)** The Cilic Award ( Reliance on assurance of pharmacist, Specified Substance -4 month period ineligibility)
  - b)** The Johaug Award (Reliance on assurance by medical doctor Non-specified substance -18 month period of ineligibility)
  - c)** The Mamdou Sakho Award (substance not specifically listed on WADA Prohibited List,Higenamine- Case dismissed)
  - d)** The Julio Cesar Nava Award (Specified Substance, Betamethasone – 8 month period of ineligibility)
  - e)** The Dario Rodriguez Award – (Doctor's negligence, Specified Substance, Betamethasone -2 month period of ineligibility)
  - f)** The Gwen Berry Award (Use of specified Substance in a therapeutic dose under supervision of medical doctor – 3 month period of ineligibility)



- 7.2. The Respondent denies international use of the prohibited substance for purposes of enhancing performance but rather it was a drug administered for Therapeutic use albeit without a Therapeutic use exemption (TUE). That the use occurred outside sports performance nor is there evidence that “he did, could have possibly”, enhance performance or could have distorted sports performance.
- 7.3. It is submitted that the Respondent provided a possible explanation for the presence of the prohibited substance leading to the AAF and that such explanation came by way of the letter of 14/9/2017 immediately upon receipt of the AAF notification. The failure on the part of the Athlete which is admitted is failing to note down the medication taken or administered to him at the time of sample collection thus it does not appear in the Doping Control form. He apologized for this. His explanation was that at the sample collection time he did not have his phone where from he could have obtained the names of the drugs and also at the time he was unaware of the process for seeking TUE.
- 7.4. On the burden and standard of proof the Respondent’s counsel submitted that the AAF being one of a specified substance, it was the responsibility of ADAK as the Result Management Authority to prove that the Athlete used the substance intentionally for doping purposes, which ADAK failed to do save for making allegations that the proximity of the intake of the substance to the competition pointed to an intention to dope.
- 7.5. The Respondent further submitted that based on evidence proving credible non-doping reasons for use of the specified substance leading to the AAF, the Respondent is entitled to a consideration of reduction of the applicable sanction. The Respondent’s counsel relied on the Arbitration case CAS 2015/A/3945 SIGFUS FOSSDAL VS INTERNATIONAL POWERLIFTING FEDERATION (IPF)
- 7.6. Regarding the athlete’s fault the Respondent’s counsel submitted that based on the provisions of WADC and CAS decisions, that whereas the athlete has a duty of “utmost care” to see that what he/she ingested was safe, such duty of care should not be extended by CAS or any Tribunal to a point of developing concepts that go beyond that which was intended by the WADC. And therefore proposes that this panel must assess the level of diligence required of the Respondent under “his specific circumstances,” that this subjective element brings into consideration what could have been reasonably expected from him, “ in light of his personal capacities”
- 7.7. The Respondent’s counsel calls upon this panel to consider that the Respondent
- a) Was honest and co-operated with the results management authorities
  - b) Admitted in a timely fashion that the prohibited substance arose from an injection which he did not disclose on the doping control form
  - c) Received the injection from a registered Doctor operating in a government approved medical facility which is a safe environment to seek treatment from
  - d) His Doctor was seemingly not conversant with the Anti-Doping Rules or the Prohibited list as evident from her description of Diprofos as a “mild legal steroid”.
- 7.8. Counsel for the Respondent also calls upon this panel to have in mind the principle of proportionality of sanctions such that there is what she terms as a reasonable balance between the kind of the misconduct and the sanction.
- 7.9. Based on the circumstances leading to the AAF and the provisions of the WADC, counsel for the Respondent urged this Tribunal to consider substantial reduction of the

period of ineligibility to a reprimand as opposed to the maximum period of 2years proposed by ADAK.

### ADAK'S SUBMISIONS

- 7.10. ADAK'S counsel filed his submissions on 17/5/018.
- 7.11. ADAK'S position is that their duty under Article 3 of ADAK ADR, is to prove the charge to the comfortable satisfaction of the hearing panel.
- 7.12. ADAK also relies on the presumptions under Article 3.2 of ADAK ADR in regard to analytical methods and inferences to be drawn from an AAF of an athlete's sample
- 7.13. In ADAK'S submissions, the role and responsibility of an athlete are
- a) To be acknowledgeable of and comply with the anti-doping rules.
  - b) To be available for sample collection at all times
- 7.14. ADAK also draws the panels' attention to matters which it deems unchallenged, these are
- a) He admitted the results of "sample A" and waived his right to "sample B" analysis. Thereby accepting the "sample A" results under Article 7.3.1.
  - b) By accepting the "sample A" results under Article 7.3.1, the Athlete thus admitted to the presence of a prohibited substance in his sample (Article 3.2 of ADAK ADR)
  - c) The athlete admitted having not declared treatment information on the Doping Control Form.
  - d) The athlete admitted having been administered medication containing a banned substance.
- 7.15. From the foregoing, ADAK, submitted that having admitted the presence of the prohibited substance, under the strict liability established by Article 2.1.1 and in accordance with Article 10.2.1 the burden shifts to the athlete to demonstrate to the comfortable satisfaction of the panel, "no fault negligence or intention" to entitle him to a reduction of sanction. ADAK also submitted that the athlete must demonstrate that the substance "was not intended to enhance" performance.

### **8. DECISION**

- 8.1. This panel is called upon to determine this matter. To do so the panel must examine and answer the following
- a) Whether the AAF has been proved to the required standards of proof.
  - b) Whether or not there was intent to violet the doping regulations
  - c) Depending on the answer to (b) above, the degree of fault and negligence in order to determine the period of ineligibility
  - d) What sentence is to be imposed in this matter.
- 8.2. It would appear to the panel that there are matters that were not contested by the parties which do not require elaborate review by this panel.
- 8.3. The parties in our view have at least agreed on or did not contested the following
- i. The Respondent has not contested the AAF of his 'A' sample in terms of the laboratory finding for the presence

of Glucocorticoids/Betamethasone in his sample collected on 9<sup>th</sup> June 2017.

- ii. The Respondent did not seek analysis of his 'B' sample
  - iii. The athlete's position is that the source of the AAF was the medication by injection of Diprofos administered by Dr J Mshilla prior to the date of sample collection which has not been contested by the ADAK.
  - iv. It is also agreed that the Respondent immediately upon notification of the AAF did respond and state how the prohibited substance got into his body. This position was at the hearing supported by Dr. Mshilla and the various documents relied upon by the Respondent. The Doctor admitted administering Diprofos and Tramadol injections upon the Respondent at her clinic as a treatment for injury.
  - v. The panel is also of the view that the fact of the existence of the injury on the athlete has not been denied or in any way contested by the Applicant ADAK.
- 8.4. The parties are however at variance on whether as claimed by ADAK the Respondent wilfully and/or negligently permitted the use of/or used a prohibited substance in contravention of the relevant anti-doping regulations. On the other hand the Respondent's position is that he did all that he could possibly do to ensure he adhered to the regulations but relied on Dr Mshilla's expertise and assurances that what she had prescribed was safe and not prohibited.
- 8.5. The Respondent's evidence is that he sustained an injury which led to severe pain in his lower back. His coach approached the prisons team who referred him to the physiotherapist. He went to the physiotherapist, had a number of sessions which gave some temporary relief, but the pain returned such that he was limping and stopped training. Thus when his coach called him to inform him that he had found or been referred to a doctor he went to him.

### INTENT

- 8.6. Upon review of the evidence adduced, and noting the unchallenged fact of the injury. We must address the question of intent to dope and enhance performance. Our position being that the fact of the AAF has not been denied or challenged, and therefore stands proved.
- 8.7. The source and /or origin of the substance and how it got to the Respondent's body is also not challenged. Under the circumstances stated can it be said that there is proof of intention to dope or a deliberate act of taking a prohibited substance?
- 8.8. The Athlete Respondent was called from his students halls of Residence at the University. He was to meet his coach in town to go see a doctor he had been referred to.
- 8.9. There is no doubt that the Respondent due to the injury went to the doctor and that the doctor prescribed Diprofos which is admittedly the source of the AAF. In our view the circumstances leading to the attendance at the clinic and the described interaction between the doctor on one hand, and the Respondent and his coach on the other, do not show any intent to cheat or to deliberately ingest a substance for purposes of enhancing performance. We are of the view that the intent to cheat or to enhance performance has been dispelled to the required comfortable satisfaction of the panel.

8.10. The Respondent has shown that the Doctor was unknown to him before the 4<sup>th</sup> of July when he first saw her, that she was well warned of the fact that he was an athlete who would be in competition in a few days where testing would be conducted. The Respondent was categorical that what he was seeking was treatment to his injury. The Respondent should however have in accordance to the rules applied for and obtained the relevant TUE. It is not satisfactory to say he did not know the procedures for seeking TUE exemptions. It is his obligation to know and to be familiar with doping regulations. The Respondent was also at fault in failing to disclose the fact of use of Diprofos in the Doping Control Form. (DCF)

8.11. The Respondent says that his failure to disclose the medication in the DCF was because he did not have his phone at the time of collection of sample. He however did not say where it was and that it would not have been possible to get it in order to ensure he records the substance in the DCF. He had undergone previous sample collection process by his own admission, therefore he was not a novice.

## **9. FAULT OR NEGLIGENCE**

- 9.1. The Applicant ADAK has submitted that the Respondent should be held to have been at fault and negligent. That, relying on the strict liability principle the Respondent is fully responsible to ensure no prohibited substance entered his body and that in this case he has not established circumstances for consideration for reduction of the period of ineligibility, thus the full period of 2 years must apply.
- 9.2. On the other hand the Respondent's counsel has submitted that the standard of proof to the "comfortable satisfaction" of the panel calls for the Respondent to show that he did not intentionally ingest the prohibited substance for purposes of doping and that he has shown that he took reasonable precaution to ensure that he did not offend the rules.
- 9.3. This panel must therefore look at the matters put before it in evidence and therefrom determine whether or not the Respondent has shown to its comfortable satisfaction, that he took such steps as necessary and available to him, so as to avoid the ADRV.
- 9.4. In the case of Maria Sharapova, which in various aspects gives guidance on the issue of degree of fault in this case, Ms Sharapova was on an Appeal to CAS, found to bear some fault in not personally ensuring and following up on the confirmation of the safety and acceptance of a substance she had used for a considerable period before it was prohibited under the 2016 WADA prohibited list.
- 9.5. In Sharapova's case, she had delegated the role of following upon her matters including anti-doping related matters to her agent Mr Max Eisenbud. It is notable that in her case the substance in question had been in use long before it went into the prohibited list. It had initially been prescribed to her by her medical expert Dr Skanly who had ceased to work with her. The medication was said to be important to her health. It was widely used in the eastern European countries. The mildronate used was a brand name of the substance Meldonium which was prohibited. M/S Sharapova entrusted the duty to her not highly qualified person (at least in anti-doping terms) and failed to instruct him properly on how to do checks on the prohibited list. The CAS panel found that
- "The relevant measure of fault here is whether the player was reasonable in selecting IMG to assist her in meeting her anti-doping obligations. The panel has already determined that the decision was reasonable. Where the player fell short however was in her failure to monitor or supervise in any way whether and how IMG was meeting the anti-doping obligations imposed on an athlete when IMG agreed to assist her. She failed

to discuss with Mr Eisenbud what needed to be done to check the continued availability of mildronate (as opposed to the procedures to check new substances she was prescribed), to put him in contact with Dr Skanly to understand the nature of the Skanly products, to understand whether mildronate was the name of the product or the substance, and whether he had made the necessary confirmation each year that the product had not been added to the prohibited list. It cannot be consistent with the relevant precedents and the WADC that an athlete can simply delegate her obligation to a third party and then not otherwise provide appropriate instructions, monitoring or supervision without hearing responsibly, **such a finding would render meaningless the obligation of an athlete to avoid doping.**”

- 9.6. Similar to the Respondent herein, MS Sharapova also did not disclose on the ADCF her use of the prohibited substance.
- 9.7. Based on the above the CAS panel found MS Sharapova’s fault to be greater than the minimum degree of fault, but less than significant fault. In the present case, the panel herein has noted that the Respondent made effort to inform the Doctor severally that he was an athlete and that she should not prescribe any substance that would offend the Anti-Doping Rules. He however failed to counter check once informed that the medication was ‘legal’ He would have taken time to refer to other personnel in his Prisons team who were more familiar with the substances and the prohibited list. He must bear some fault for entirely relying on a medical personnel whose expertise he did not know and acting in haste. However noting that the Doctor seemed to have referred to a book and thereafter reconfirmed that the product was legitimate, the Respondent’s fault cannot be so high or significant.
- 9.8. Further, and as observed earlier, it was clear to the panel that the Doctor (Dr Jerita Mshilla) and the Respondent did not understand each other’s point of concern in reference to the doping infringement worries of the Athlete. It was clear that this was in fact the one point of divergence that significantly led to the ADVR.
- 9.9. In view of the foregoing this panel determines that the Respondent had no intent to cheat but must be faulted in his decision to rely on the word of a medical doctor whose expertise he knew not and who did not fully understand or appreciate his concern not to offend the WADC. He must also be faulted in failing to use other means to first reconfirm the safety of medication prescribed before submitting to the prescribed treatment. For these reasons, the panel determines that the appropriate length of sanction in this matter is 14 months starting from 14<sup>th</sup> September 2017, being the date of notification of the ADVR when his provisional suspension commenced.

### **FINAL FINDING**

In this matter this panel finds:

1. The Appellant ADAK has presented sufficient proof of the ADVR which has not been denied, and the Respondent Ferdinand Omanyala is held to have contravened the provisions of the ADAK Anti-Doping Rules.
2. The Respondent Ferdinand Omanyala is suspended and is ineligible to compete for a period of 14 months with effect from 14<sup>th</sup> September, 2017




3. The Respondent's individual results obtained at the Safaricom National Athletics Championships on 9<sup>th</sup> June 2016 and thereafter, including any points gained and prizes, are disqualified.
4. The parties shall bear their own expenses (if any) sustained in connection with the case.
5. All other prayers or motions are dismissed.
6. The parties have a right of appeal against this decision in terms of Article 13.2.2 ADAK ADR

DATED AT NAIROBI THIS.....30<sup>th</sup>..... DAY OF .....August..... 2018

SIGNED BY:

ELYNAH SIFUNA (VICE CHAIR SDT) .....  .....

NJERI ONYANGO (SDT MEMBER) .....  .....

GMT OTIENO (SDT MEMBER).....  .....