

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL

ANTI- DOPING CASE NO 16. OF 2022

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

-VERSUS-

MICHAEL SARUNI.....RESPONDENT

DECISION

PANEL:

MRS. ELYNAH SIFUNA-SHIVEKA - PANEL CHAIR

MRS. NJERI ONYANGO FCIArb - MEMBER

MR. PETER OCHIENG -MEMBER

APPEARANCE:

Mr. Bildad Rogoncho-Advocate, for the Anti-Doping Agency of Kenya the Applicant.;

Ms. Nchoe: Advocate instructed by the firm of Nchoe and Co Advocates for the Respondent

DEFINITIONS

ADAK- Anti -Doping Agency of Kenya

ADR- Anti-Doping Rule

**ADRV- Anti Doping Rule Violation**

**WA - World Athletics**

**AK- Athletics Kenya**

**SDT- Sports Dispute Tribunal**

**WADA- World Anti-Doping Agency**

**ADAK ADR- Anti-Doping Rules 2016**

**WADA Code- World Anti-Doping Agency Code**

**DCO- Doping Control Officer**

**IAAF- International Association of Athletes Federation**

**A. PARTIES**

1. The Applicant is a state corporation established under section 5 of the Anti-Doping Act no. 5 of 2016 whose address of service is Anti-Doping Agency of Kenya, Parkland Plaza, 2<sup>nd</sup> Floor, Muthithi Road/Chiromo Lane Junction, P.O Box 66458-80100, Nairobi.
2. The Respondent is a male adult of presumed sound mind an elite and National level athlete of P.O Box 66458-80100, Nairobi (hereinafter referred to as 'the Athlete').

**B. FACTUAL BACKGROUND**

3. The Athlete is a national level athlete hence the IAAF competition rules, IAAF Anti-Doping Regulations, the WADA Code and the ADAK Anti-Doping (ADR) apply to him.
4. On 25th June 2022, during the Athletics Kenya 2022 World Championship Trials, held at the Kasarani Stadium, it is alleged that an ADAK Doping Control Officer (DCO) notified the Respondent that he was to undergo a doping control process and was thus required to provide a blood and urine sample. However, it is further alleged, that the athlete adamantly, evaded, refused and failed to give a sample or submit to sample collection and by collusion or trickery escaped or left the venue. The same is set out in the report found in the Supplementary Report Form dated 25th June 2022 by Karen Wairimu the Chaperone, attached at page 6 of the Charge Document Serial Number 703 MSI.
5. The position was communicated to the Respondent Athlete by Sarah I. Shibusse E.B.S, the ADAK Chief Executive Officer through a notice of Charge and mandatory suspension dated 25th July 2022. In the said communication, the Athlete was offered an opportunity

to provide an explanation of the same by 14th August 2022 (attached to the Charge Document as MS 2)

6. The same letter also informed the Athlete of his right of admission of the ADRV; and other avenues for sanction reduction including elimination of the period of ineligibility where there is no fault or negligence, Substantial Assistance in Discovering or Establishing Code Violation Results Management Agreement and Case Resolution Agreements. The athlete was given until 14th August 2022 to respond and request for a hearing if need be.
7. The Athlete denied the Charges and stated through a letter to ADAK that it's officials had arrested his friend thinking it was him. It was his position that the whole matter arose out of mistaken identity and that he has at all times been available for sample collection.
8. A Notice to Charge dated 12th August 2022 was filed by ADAK at the Tribunal.
9. The following Directions were issued by the Tribunal under Directions NO. 1 dated 29th August, 2022.

**Upon Reading the Notice to Charge dated 12<sup>th</sup> August 2022 and presented to Tribunal by Mr. Bildad Rogoncho, on behalf of the Applicant, the Tribunal hereby directs, and orders 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 Respondent by 16<sup>th</sup> September ,2022;**
  - II. **The Panel constituted to hear this matter shall be:**
    - a. **Elynah Sifuna- Shiveka (Mrs.);**
    - b. **J Njeri Onyango;( Mrs), FCIarb**
    - c. **Peter Ochieng;**
  - III. **The matter shall be mentioned on the 22<sup>nd</sup> of September, 2022 to confirm compliance and for further directions.**
10. On 29th September 2022 the matter came up for Mention via Microsoft Teams before the panel. Mr. Rogoncho appeared for the Applicant. There was no Appearance by the Athlete. The panel issued the following directions;

**UPON MENTION of this matter by the Tribunal on the 29<sup>th</sup> of September 2022, the Tribunal hereby directs, and orders as follows:**

1. **The matter is listed for mention on 19<sup>th</sup> October 2022, at 2:30 p.m. via Microsoft Teams or such other medium as the Tribunal may direct.**

11. On 19th October 2022, the matter was mentioned before the panel via Microsoft teams. Once again Mr. Rogoncho appeared for the Applicant while the Athlete was absent. The panel was notified that the Athlete had requested for pro bono counsel. The following directions were issued;

**UPON MENTION of this matter by the Tribunal on the 19<sup>th</sup> of October 2022, the Tribunal hereby directs, and orders as follows:**

**1. The Matter shall be further mentioned on 3<sup>rd</sup> November 2022 to confirm if the secretariat has facilitated the athlete with a pro-bono counsel.**

12. At the mention on 3rd November 2022 via Microsoft teams, Mr. Rogoncho appeared for the Applicant while Ms. Nchoe appeared as counsel appointed for the Athlete. Ms. Nchoe requested for time to enable her engage the Athlete and file Responses to the Charge. The panel issued the following directions

**UPON MENTION of this matter by the Tribunal on the 3<sup>rd</sup> of November 2022, the Tribunal hereby directs, and orders as follows:**

**1. The Athlete has 14days to file a response to the Charge;**

**2. The Matter is listed for mention on 17<sup>th</sup> November 2022 at 2:30p.m. via Microsoft Teams or such other medium as the Tribunal may direct.**

13. At the Mention on 17th November 2022; the parties were represented by their respective counsel. The Respondent had not yet filed the statement of response to the Charge and requested for a further Seven (7) days. The panel directed the Respondent to file and serve the statement of response and Witness Statement within 7 days (on or before 24th November 2022) and directed that the hearing will proceed on 15th December 2022 via Microsoft teams.

14. On 15<sup>th</sup> December 2022, both parties were present. Mr. Rogoncho then indicated that he was not ready to proceed as he had not yet filed and served the Witness Statement, he had informed Counsel for the Respondent who was not opposed to the request for adjournment. The Panel then allowed the adjournment and set the matter for hearing on 26th January 2023. Mr. Rogoncho was directed to file and serve the Witness Statement by 19th January 2023.

15. On 26th January, 2023, the matter came up for hearing. Mr. Rogoncho was present but there was no appearance for the Athlete. Mr. Rogoncho informed the panel that Ms. Nchoe had got in touch with him and informed him that she had a family emergency that she had to attend to. She also informed him that the Athlete was due to travel to the USA the next day and would not be available to attend any hearing for about 3 weeks. She

thus requested for a date in late March 2023. As Mr. Rogoncho was not opposed to the request the panel directed as follows

**UPON MENTION of this matter by the Tribunal on the 26th January 2023, the Tribunal hereby directs, and orders as follows:**

1. **Mr. Rogoncho to serve Ms. Nchoe with a hearing notice.**
  2. **This is the last adjournment of the matter for both sides;**
  3. **The Matter is listed for mention 23<sup>rd</sup> March 2023 at 2:30 p.m. via Microsoft Teams.**
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16. This matter finally proceeded for Hearing on 13th April 2023 and the Applicant's witnesses testified.
  17. The Athlete Statement of Defence filed on 13 December 2022 together with the Athlete's Witness Statement dated 5th December 2022. The Witness Statement was attached the Respondent Athlete's Response to the Charge and a copy of the Athlete's Statement to the Police recorded on 26th June 2022.
  18. On the Applicant's part, apart from the Charge Document with various annexures filed on 8th November 2022, the Applicant, on 22nd March 2023, filed an Amended List of Witnesses together with Witness Statements of the four (4) listed Witnesses namely:
    - i. Karen Wairimu-ADAK Chaperone
    - ii. Antony Kamau-ADAK Chaperone
    - iii. Fredrick Makale-ADAK DCO
    - iv. Michael Omollo-ADAK DCO

### **C. THE HEARING**

19. The hearing was conducted on 13th April 2023, when the Applicant's Witnesses testified and 27<sup>th</sup> April 2023 when the Respondent testified.

### **THE APPLICANT'S WITNESSES**

20. The Applicant's first witness was Karen Wairimu. She was sworn in and she stated that she is a senior clerical officer at ADAK within The Standard and Compliance Department. She adopted the written Witness Statement as filed.

21. The relevant portion of her evidence is as follows;

**"On 25<sup>th</sup> June 2022, I was assigned as a chaperone at Kasarani Safaricom Stadium for the Athletics Kenya Trials for World Champions and Commonwealth Games. I was assigned by the lead of DCO to notify an athlete by the name Michael Saruni who was participating in the 800 meters' race. I did a quick google search using his name to find out the athlete's facial identity. The athlete finished the race as the sixth position with Bib Number 044. I approached the athlete at 1424hrs and identified myself as chaperone from ADAK and that he had been selected for doping control to provide his urine and blood sample. He acknowledged that he would comply with the process and requested that we go and collect his bag.**

**We walked to where he had put his bag just near the media area where most athletes had put their bags and he changed his clothes into a blue hoodie jacket and black trousers with white stripes on the side. While changing, he told me that he tested positive for COVID 19 the previous week. I informed the lead DCO via text message at 1446hrs that Saruni has said he has tested positive for COVID 19.**

**He requested to leave his bag with his friend before he proceeds to the Doping Control Station (DCS). I acknowledged his request and walked to gate 20 where we waited for his friend at the entrance. Shortly after, two male individuals showed up and they started talking with Saruni. A few minutes later, another male individual joined us and he handed over his bag to the third individual.**

**We then proceeded to gate 10 where DCS was located. At 1455hrs, we arrived at the DCS common entrance, and he started coughing persistently as he hurriedly made his way to the washroom which was just near the DCS main entrance. I followed him towards the washroom trying to catch up with him. He entered the male washroom which I followed him into, and saw him entering the first washroom stall which he locked while still coughing. Immediately a male ADAK chaperone by the name Anthony Kamau walked in and I showed which stall Saruni was in and requested him to continue chaperoning him. Then I walked away.**

**That is all I have to state at the moment."**

22. The Witness was cross-examined by Ms. Nchoe. She stated that when she got the person to be tested, she did not ask to see an identification document. She however denied that

she summoned the wrong Athlete as she picked the Athlete that had already been pre - selected and she had even in advance done a Google search, she had his image before the race started. Further, that before the start of the race each athlete was called out following the start list, the athlete called would then wave to the crowd. The image of the athlete called out would be projected on the large screens in the stadium. This was the process in all the races. The athlete herein was so called out before the 800 M race and she saw him wave on the screen. She was certain that the Athlete in issue had a Bib Number 044.

23. The Applicant 's second Witness was Mr. Antony Kamau Mathiaka. He previously was engaged as a chaperone at ADAK, but as at January 2023 he was promoted to the role of a DCO. He stated that on the 25<sup>th</sup> June 2022, he was at Kasarani Stadium on duty as a chaperone. In regard to this matter he adopted his written Witness Statement which in part stated;

**“On 25<sup>th</sup> June 2022, I was assigned as a chaperone at Kasarani Safaricom Stadium for the Athletics Kenya Trials for World Champions and Commonwealth Games. I remember as I was outside the DCS, I saw an athlete wearing a blue jacket with black trousers rushing towards the male toilets and he was coughing. He was being chaperoned by a female ADAK chaperone known as Karen Wairimu who followed the athlete inside the male toilet. Since I noticed that it is a female chaperone inside male toilet I rushed to assist. After entering the toilet, Karen informed me that the athlete by the name Michael Saruni had locked himself in the first toilet stall. She left the toilet after that. I could hear someone in the stall coughing and flushing the toilet. I requested for the stall door to be opened. A male individual stepped out wearing the same outfit as the person I saw rushing to the toilets. I notice however, that the individual did not look like an athlete who had just finished a race and was also not coughing. I called ADAK chaperone by the name Michael Omollo who was just outside the DCS. He came inside the washroom and I told him that the individual looked suspicious because we are looking for an athlete known as Michel Saruni as I confirm whether there might be someone else in the washroom. This would have allowed us to call Karen to identify Saruni if there was someone else in the stalls to the next one. As I was going back to the toilet stalls, I saw someone switching from the first stall to the next door. I followed the individual and found a male behind the door. He was wearing black hooded top and black trousers. I requested him to step out of the stall. I asked him to leave the washroom with me so that Karen can identify the athlete known as Saruni. He was in front of me as we left the washroom. As we approached the DCS, he immediately started running and jumped over a grilled perimeter wall. As he started running, I took out**

**my mobile phone and took a picture of him as he was running away. I then went back to the DCS."**

24. On cross examination by Ms. Nchoe, he stated that he noted the clothes the Athlete was wearing as his colleague Karen (PWI) escorted him for Sample Collection. That he did not see his face, Karen did. He also saw the male athlete under Karen's escort cough and dash into the male washroom so he followed. He knocked on the door the person had entered.
25. On re-examination by Mr. Rogoncho, he stated that on following the Athlete to the toilet he was with Karen, they found the door locked and knocked it asking for it to be opened. Karen left to wait outside as this was a male washroom. A person came out of that toilet who looked fresh and different from the one who went in coughing. He held that person and called out to another colleague Michael Omollo. The person he held looked suspicious. Another person emerged from the same toilet and he made a dash to go into another toilet. He then noticed that there were two persons dressed in a similar manner and while trying to get the second person, they both took off in haste. He ran after them as he took off his phone and took a photo as the 2nd person was running away. The first person he had got hold of who was also running away was captured and detained at Kasarani police station. The captured individual turned out to be Dennis Mwangi who admitted that the other person who had run away was Michael Saruni.
26. The third witness for the Applicant was Michael Onyango Omollo. He adopted his written Witness Statement as his evidence in chief. He is a DCO at ADAK. He was at Kasarani Stadium on the day in question his short-written statement was as follows

**"On 25<sup>th</sup> June 2022, I was assigned as a chaperone at Kasarani Safaricom Stadium for the Athletics Kenya Trials for World Champions and Commonwealth Games. I clearly remember that as I was standing next to the door of the DCS, while the athlete that I was monitoring was sitting inside. At this time, I was called by another chaperone by the name Anthony Kamau. I approached Kamau who was inside the men's washroom, and I found him standing with a male individual who was wearing a blue jacket and a black trouser. Kamau requested that I observe that individual as Kamau was trying to look for an athlete by the name Michael Saruni who he says was in the first toilet stall and that the individual who I was observing was wearing the same clothes as Michael Saruni. When the individual heard me confirm to Kamau that he was not Michael Saruni, he started walking towards the exit and escaped from the washroom. I ran after him and as I was doing so, I noticed a DCO nearby called Fredrick and called out to him to help me catch the individual. As he was running, he dropped some notes of money to ground, and he stopped to**



**pick them. He then continued running. Together with Fredrick we caught up with the individual. We tried questioning him on why he was running and what were his intentions. He failed to explain his reasons for acting the way he did, so we took him back to the DCS."**

27. On cross-examination by Ms. Nchoe, Omollo confirmed that the person he helped pursue and they got hold of was not Michael Saruni but turned out to be Dennis Mwangi and he took that individual to the lead DCO and later to the Kasarani police station on account of impersonation.

28. The fourth witness was Frederick Makale Sultani. He is a DCO at ADAK. He adopted his written Witness Statement dated 20th March 2023 as evidence in chief. The brief relevant part of his statement is;

**"On 25<sup>th</sup> June 2022, I was assigned as a chaperone at Kasarani Safaricom Stadium for the Athletics Kenya Trials for World Champions and Commonwealth Games. I clearly remember as I was standing near the DCS facing towards Kasarani Stadium, I was called by an ADAK chaperone by the name Michael Omollo to assist him catch an individual. As I turned to his call, I saw the individual wearing a blue jacket and a black trouser running away from the chaperone. I hastily followed them as we were running after him, he dropped some notes which he hurriedly picked up and continued running. After about less than a minute, we caught up with him after he started slowing down. He stated that he is not an athlete so why are we after him. We told him that we would verify whether he is an athlete or not but first we need to report back to the DCS. I asked him to identify himself, and he told me his name was Peter Kamau. I asked for identification documents, and he showed a picture of his ID on his phone, which reads as Dennis Mwangi Mburu, after which he acknowledged that he had lied about his name. I took a picture of the ID on his phone. After convincing him for some time to report to the DCS he agreed, and we went back to the DCS. When we reached the DCS, Dennis registered on the DCS register as Serial Number 51 at 1537hrs."**

29. Upon cross-examination by Ms. Nchoe, Mr Makale confirmed that upon taking into custody of the person they got hold of, they asked for his National Identification Card and the name thereof was Dennis Mwangi Mburu. This was not Michael Saruni. That while he has not met Michael Saruni in person, he had seen on the Stadium Screen earlier the same day when the Athletes in this race had been called out and introduced before

the start of the race. Each Athlete called out would be shown on the screen for the benefit of spectators. The person shown on screen was not the person in their custody.

### **THE RESPONDENT'S EVIDENCE**

30. The Respondent testified before the panel on 27th April 2023. He gave sworn testimony online. He stated that he has been a professional athlete for 5 years now but has been in athletics for 7 years. He confirmed that he attended the National Trials on 25<sup>th</sup> June, 2022.
31. The Athlete adopted his written Witness Statement dated 5th December 2022. His position is simple; that he did participate in the AK trials on the day in question. He completed his day with no incidents, no one notified him of any requirements to go for sample collection. He later on received a notice dated 25th July 2022 regarding an ADRV.
32. The Athlete's written statement is that;

**I am baffled by the issuance of the Charge Document as I have been cooperating in submitting my sample since I became an athlete and under no circumstances have I ever evaded sample collection.**

**One day after I finished my race, I looked for one Mr. Dennis Mwangi Mburu who had accompanied me to the stadium and was holding my money amounting to Kenya Shillings Seventy Thousand (Kshs. 70, 000) however, I could not locate him and I left to TRM as I was feeling tired.**

**Later I learnt that Mr. Dennis Mwangi Mburu had been arrested I went back to Kasarani Stadium to pick my car and the money but could not get help as it was already late. The following morning, I went to the stadium to record my statement to that effect.**

**I received a call from Mr. Dennis Mwangi Mburu informing me that he was mistakenly arrested by the ADAK officer thinking that it was me, I went down to the cells to record a statement to free him.**

**I have never received any calls from the officers informing me that they needed me to submit samples for testing.**

**The DCOS who are mandated to conduct thorough investigation did not ask or affirm the person they notified was me by asking for identification documents to confirm that it was me that they summoned for testing.**

**The DCOs do not have any photograph taken by them at Kasarani Stadium to support their allegations.**

**The officers did not retain any of my identity documents or photograph to show that the person who evaded testing was actually me.**

**I wishes to firmly state that I did not intentionally evade the sample collection after the race.**

33. His further oral evidence was that on the day he had walked to the stadium from his hotel which is behind Thika Road Mall (known as TRM) not far from the stadium. That he has known Dennis Mwangi Mburu for long. Dennis according to him is 5'9 tall, slender, dark-skinned and has dreadlocks just like him-he is in fact a look-alike.
34. His position is that after his race he looked for his friend Dennis Mburu who had his personal belongings, car keys and cash, Kshs 70,000, which he had earlier sent to him via M-Pesa on his cell phone to withdraw as he (Michael) did not have his national identity card which is required to withdraw cash.
35. That not finding his friend, he walked back to his hotel and it is only later that evening that Dennis Mburu called him and requested him to go to the Kasarani police station as Dennis had been arrested for impersonation. The call was about 7:30 p.m. or thereabout he went to the station about 9 p.m. as his friend Dennis was under pressure. He later paid Ksh. 50,000 for his friends for his release on bond.
36. On cross-examination by Mr. Rogoncho, he stated that his friend Dennis told him he had been arrested for impersonation, he was not aware as to what time Dennis was arrested as he got his call between 7:30 and 8 p.m. while at his hotel room near TRM. He got to Kasarani Police Station between 8:30 and 9 p.m. He had switch off his phone at 2 p.m. in order to rest.
37. The Athlete stated that his race was about 1 p.m., he had sent money via M-Pesa to Dennis before that. He was to withdraw the cash and keep it for him he said he could not remember the line he used (Safaricom) as it was a new line and he stopped use thereof thereafter. The money was for use to fuel the car and settle his hotel bills and other personal use. He did not collect the money from his friend when he saw him at the police station. According to him that money had nothing to do with the alleged impersonation and in any event, Dennis was released and to the best of his knowledge was not charged with any criminal offence.
38. The Athlete stated that he never went to ADAK to present himself and no one called him that day or any other day thereafter for sample collection.

## **PARTIES SUBMISSION**

Below is a summary of the main relevant facts and allegations based on the parties' written submissions.

### **APPLICANT'S SUBMISSION**

39. Mr. Rogoncho, Counsel for the Applicant filed Written Submissions dated 12th June 2023. Having set out the facts of the matter he dealt with the legal position under ADAK ADR and WADC. It is noted that ADAK has the burden of proving the ADRV to "the comfortable satisfaction of the Hearing Panel"

40. While setting out the presumptions set out in Article 3.2 on the methods of establishing facts, Mr. Rogoncho emphasized Sub-Article (e) thereof being

*"The hearing panel in hearing an Anti-Doping rule violation may draw an inference adverse to the athlete or other person who is asserted to have committed an anti-doping violation based on the athlete or other person refusal, after request has been made in a reasonable time in advance and the hearing, appear at the hearing (either in person or telephonically as directed buy a hearing panel or the agency).*

41. The Applicant also relied on the provisions of Article 22.1 on the Responsibilities of the Athlete, especially Sub-Articles 22(a) (b) and (f)

*a) To be knowledgeable of and comply with anti-doping rules*

*b) To be available for sample collection only*

*f) To cooperate with anti-doping organizations investigating anti-doping rule violation.*

42. According to the Applicant, the Athlete had made the following admissions and denials

**a) He admitted to being present during the Athletics Kenya 2022, World Championships Trials at Kasarani.**

**b) He admitted to being acquainted with Mr. Mburu.**

**c) He admitted to sending Kshs. 70,000/= to Mr. Mburu's M-Pesa number to withdraw for him urgently.**

**d) He admitted to going home immediately after the event without looking for Mr. Mburu to collect his Kshs. 70,000/= from him.**

**e) He denied being notified that he was required for a sample collection exercise by an ADAK Chaperone.**

**f) He admitted that there was confusion because Mr. Mburu was selected in his place.**

**g) He admitted to walking away from the venue without complying to the request of sample collection.**

43. The Applicant submitted that it had discharged its duty under Article 3 of the ADAK Rules and WADC through its witnesses, and had proved the Charge of **Evading, Refusing or Failing to Submit to Sample Collection**. Therefore, in terms of Article 10.2.1, the burden of proof shifts to the Athlete to demonstrate **no fault, or intention** to entitle him to a reduction of sanction.
44. On Intention, the Applicant's position is that for an ADRV to be committed non-intentionally, the Athlete has to prove on a **balance of probabilities that she/he did not know that his conduct constituted ADRV or that there was no significant risk of an ADRV**. On this the applicant placed reliance on CAF 2014/A/3820, Paragraph 77 that to prove on a balance of probability require that **one's explanation is more probable than the other possible explanation**. Therefore, it was submitted, the athlete should have provided actual evidence as opposed to mere speculation.
45. The Applicant further submitted that in this matter, the Athlete admitted walking away from the venue; he did not provide the reason for the Kshs. 70,000 sent to Mr. Dennis Mburu, and that the Respondent and Mr. Mburu's explanation of the events of that day did not corroborate. Thus, the Applicant submitted, that the Respondent Athlete had made prior plans to have Mr. Mburu impersonate him and give a sample on his behalf. For that reason, he could not prove lack of intention.
46. As regards Fault/Negligence, the Applicant submitted that it was the responsibility of the Athlete to be knowledgeable of and comply with the ADR but failed to do so in terms of Rules 22.1.1 and 22.1.3 of ADAK ADR. Further that the Athlete was under a personal duty to comply with ADR and to avail himself for sample collection, and the investigation of non-compliance in terms of Rule 22.1.2 and 22.1.6.
47. The Applicant further submitted that the athlete was bound by the principle of strict liability to be knowledgeable of the ADR and that any ADRV committed is a breach whether or not the athlete does so intentionally or unintentionally, and in this case, the athlete has had a long career in athletics and from his responses he was aware of the rules.
48. On the applicable sanctions, the Applicant referred the Panel to Article 2.3 on the ADRV for evading sample collection or without justification or compelling reason refusal or failing to submit the sample collection after notification called for sanction of 4 years of ineligibility. In conclusion the applicant's position is that;

- A. The ADRV has been established as against the athlete.**
- B. The failure by the athlete to establish no intention to commit an ADRV.**
- C. Failure by the athlete to take caution by failing to submit to sample collection upon notification.**
- D. 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.**
- E. The maximum sanction of 4 years' ineligibility ought to be imposed as no plausible explanation has been advanced for the Anti-Doping Rule Violation of evading, refusing, or failing to submit to sample collection.**

Thus, the panel is urged to render a sanction of 4 years or intelligibility against the respondent athlete in terms of Article 10.12.3 ADAK ADR.

### **RESPONDENT'S SUBMISSION**

The Respondent through his Counsel filed Written Submission dated 8<sup>th</sup> June 2023.

49. The Athlete's position remains that on the day in issue, he completed his race, and he looked for his friend Dennis Mwangi Mburu but did not find him. He thus walked to his hotel room. He was later called by his friend and later saw him at the police station. He never got any request to provide a sample either on that day or any other day soon afterwards until he received the ADRV Notice on 25<sup>TH</sup> July, 2022.

50. According to counsel for the Respondent, the issue for determination are

- a. Whether the Athlete committed the Charged Anti-Doping rule violation.**
- b. Whether the Athlete was present at the doping Control Station at the time of the incident.**
- c. Whether ADAK has met the threshold by providing the case beyond reasonable doubt.**
- d. Whether introduction of new issues in re-examination of the applicant is warranted.**

51. On the first issue set by the Respondent as to whether the Athlete committed the charged ADRV, the Panel was invited to review the evidence and explanation tendered by the Athlete as to the events of 25th of June 2022. Particularly, the issue of the alleged manner of identifying the Athlete, it is stated that;

**“Looking for pictures of the Athlete on the internet or seeing as testified by the first witness would not normally comply with “criminal” standards required in a court for positive identification the same give use for possible error. The identification evidence was less compelling than might have been the case”**

52. The above position is informed by the Athletes reliance on the case **“International Association of Athletes Federation (IAAF) Vs. Jacob Kibet Cheruyo Kendagor (2019)”**.
53. The Athlete faults the ADAK officials for failure to observe the required form of notification and that they failed to ask for identification document of the person they notified or to take photographs of that person. That the evidence of PW 2, 3 and 4 was hearsay and further that at all times the ADAK officials had the wrong person Dennis Mwangi Mburu whose only connection to the Athlete is the allegation that he wearing clothes similar to those worn by the Athlete.
54. The Athlete thus submits that from the testimony of the Applicant’s witnesses, there was a clear case of mistaken identity and therefore as regards the Charge against the Athlete, the Applicant has failed to prove to a comfortable satisfaction that the Athlete was notified of the intended sample collection.
55. The Athlete further submits that the Applicant’s personnel did not act in accordance with the requirements of Article 5.4.8 ADAK ADR, as they did not follow up to obtain a sample from the Athlete at any other time after the alleged incident or investigate the incident further, and that the Applicant’s first witness (Karen) did not notify the DCO of any matter compromising sample collection. It is the Athletes position, that Rule 2, 3 of ADAK ADR would only come to effect if it were established that the Athlete deliberately avoided a DCO to evade notification or testing. That in this case, the Athlete did not intentionally evade the sample collection after the race, and besides he “did not expect the ADAK official as he appeared among the last” in the race
56. On the question of the presence of the Athlete at the Doping Control Station (hereafter DCS) Counsel for the Athlete submits that there is no tangible evidence of his presence at the DCS or anywhere near as the Applicant’s witnesses raise mere speculation on the same. The Applicant’s witnesses are faulted for failure to ask the Athlete to provide COVID documentation when he alleged to have COVID-19 and also that they failed to follow the National COVID 19 Protocols on handling the person they claimed was the Athlete.
57. Placing reliance on rule 33 (1)(2) of the IAAF Rules and WADC 2015 Article 3, the Athlete’s Counsel submitted that the burden of proof doping matters lies with the

Applicant and that the same is beyond reasonable doubt. Therefore, the Applicant ought to have provided proof “beyond reasonable doubt” that the person (individual) they summoned for testing was the Respondent herein. In this instance it is submitted, the Applicant’s evidence falls short of the required standard. The Athlete relied on the case of *Kioko Vs. Republic (1988)KLR 289 KAR 157* where it was held that

*“That the law does not require the accused to prove his innocence and therefore it is erroneous for a court to refer to certain acts of omission of accused as being, inconsistency with his innocence. This is founded on the maxim that “he who alleged must prove”*

58. The Athlete also decries the alleged introduction of new issues into the matter during re-examination. This is on regard to the money send by the Athlete to his friend Denies Mwangi. The basis thereof is that it was not in their Witness Statement. On this reliance is placed on section 146 (3) of the Kenya evidence Act Cap 80, as well as Articles 50(1) and 159(2) of the Kenya constitution 2010.

59. The Athlete therefore submits that the Applicant failed to submit any or sufficient evidence to support and prove its allegations against the Athlete and thus asks that the Charge be dismissed.

#### **D. ANALYSIS AND DETERMINATION**

##### **JURISDICTION**

60. The Sport Dispute Tribunal has Jurisdiction under Sections 55,58 AND 59 of the Sports Act No 25 of 2013 and sections 31 and 32 of the Anti-Doping Act, NO 5 of 2016 (as amended) to hear and determine this case.

##### **APPLICABLE LAW**

61. Article 2 of the ADAK ADR 2016 stipulates the definition of doping and ADRV as follows:-

The following constitutes anti-doping rule violation:

*2.3 Evading, Refusing or Failing to submit to sample collection.*

**Evading sample collection, or without compelling justification, refusing or failing to submit to sample collection after notification as authorized in applicable anti-doping rules.**



*[Comment to article 2.3: For example, it would be an anti-doping rule violation of “evading sample collection” if it were established that the Athlete was deliberately avoiding a doping control official to evade notification or testing. A violation of “failing to submit to sample collection” may be based on either intentional or negligence conduct of the Athlete, while “evading” or “refusing” sample collection contemplates intentional conduct by the Athlete.]*

## **MERITS**

62. In the following discussion, additional facts, Witness Statements, Parties’ submissions and allegations may be set out where relevant in connection with the legal discussion that follows.

63. The Tribunal will address the issue as follows: -

- a. Whether there was an occurrence of an ADRV, the Burden and Standard of proof?
- b. Whether, if the finding in (a) is in the affirmative, the Athlete’s ADRV was intentional?
- c. Reduction based on No fault;
- d. The standard sanction and what sanction to impose in the circumstance.?

### **I. Whether there was an occurrence of an ADRV, the Burden and Standard of proof**

64. WADC Article 3.1 is set out as follows

*“The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. (emphasis added)*

*Where the code places the burden upon the Athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*

65. The Charge facing the Athlete is one of “Evading, Refusing or Failing to submit to Sample Collection”. The burden in the first instance is upon the Applicant to establish that

Charge to the “Comfortable Satisfaction” of the panel, and not” beyond reasonable doubt” as submitted by the Athlete.

66. According to the supplementary report form by Karen Wairimu dated 25<sup>th</sup> June 2022, it is stated that on that day, she “identified and notified” athlete Michael Saruni of “Bib No 044” on providing his urine and blood sample for doping control, just after the finish of his race of 800M men. That he was notified at 14.24Hrs. He changed his clothes into a blue sweat hoodie jacket and wore the hoodie and a black white striped (to the side) sweat trouser. The Chaperone further statement is as follows;

**“While changing he told me he tested positive for Covid-19 just last week and I informed lead DCO KUSA & Barwecho via text message at 1446hrs. He requested I accompany him to leave his bag with his friends before he reports to the Doping Control Station (DCS). I accompanied him to gate 20 where we waited at the entrance and shortly after two of his male friends showed up few minutes later another male friend joined us and he handed over his bag to him. We proceeded to the DCS at gate 10 following the outside route of the Stadium since he insisted it is shorter which it was. When we arrived at the DCS area at around 1455hrs, he started to cough persistently while vomiting as he made his way to the washroom. I was behind him trying to catch up with his fast pace when he entered the 1<sup>st</sup> washroom door locked himself up vomiting. Immediately, male chaperone Antony Kamau walked in and him being a male I requested him to chaperone Athlete Saruni who had locked himself up.”**

67. The point to note from the above narration is that the Athlete was identified at the finish of the 800m men’s race which the Athlete concedes he participated in. The Chaperone states that she notified the Athlete of the purpose for which he was required to present himself for sample collection. Also, to note, is that the chaperone had sight of the Athlete identified up to the moment he went into the male washroom in a hurry. She took note of his clothing and went with him to meet up with his friend at gate 20 of the stadium before walking to gate 10 area where the DCS was located.
68. The Chaperone spent at least 30-31 minutes with the person identified that is from 1424 Hrs. to 14.55 Hrs. She stated that she identified the person she notified and who she says is the Respondent at the end of the race and identified him as the athlete introduced at the race star and shown on the screen, she also used the Bib No. 044, walked with him to gate 20 to hand over his bag to a friend, then walked to gate 10 towards the DCS area around 1455Hrs when the person hurried into the male washroom. They appeared to

have been in discussion as he requested to be allowed to go give his bag to a friend and also discuss which route to follow to get to the DCS at gate 10.

69. The Athlete states variously in his statement that no identification was asked from the person notified by the chaperone or photos taken of that person and puts in down to a case of mistaken identity as the friend Dennis Mwangi looks so much like him. The Athlete however does not deny that he wore a Bib No 044 during the 800m race. He does not deny the time of the finish of the race; though in his statement he claims it was 1 pm, the same was not tested in any manner through cross examination or the race schedule for the day, nor is it claimed that in any way Dennis Mwangi was a participant in that race, such that he could have been present at the finish point of that race or be wearing the Bib No 044.
70. The Panel notes that during the hearing a request was made by the panel for the attendance of Dennis Mwangi so as to have the Panel see the alleged resemblance. The panel was informed that he was not available.
71. There are few sticky issues that have bothered the panel. The Athlete in his statement at the Police narrated how he got his friend to drive his car from Eldoret so that he could use it for his movement in Nairobi. The friend picked him up from the airport and took him to his hotel near the stadium. He also picked him up to drive him to the stadium for his race on the day of competition. He then sent him a sum of Kshs. 70,000/= through his phone to withdraw through M-Pesa as he stated he did not have his national identification card. The funds were for his use, he stated, inclusive of settling his hotel bills.
72. However, the Athlete stated, that upon completing his race, he looked for his friend and did not find him so he decided to walk to his hotel. He had his phone, he however did not call his friend Dennis which would under the circumstances have been the easier and logical thing to do. He stated that when he learnt later that his friend has been arrested, he first went to Kasarani Stadium on a mission to retrieve his car and money (see page 16 of the Charge Document).
73. Now the Athlete having given his car and a fairly substantial sum of money to his friend, states he could not find him after the race, elects to walk to his hotel and as he says, switched off his phone for a considerable period of time; till or after 8.30 pm? Those are circumstances that the panel consider to be out of norm.
74. The question that the Panel needs to ask itself and answer is whether it has been shown to the Panel's "comfortable satisfaction" that the chaperone properly identified and

notified the Respondent Athlete. The Respondent in the submissions has suggested that the degree of proof is “beyond reasonable doubt”. This is not the Panels interpretation of Article 3.1 of WADC.

75. The panel has taken notice of the following facts

- I. The Athlete (Respondent) was a participant in the 800m race held on 25<sup>th</sup> June 2022 at about 1400 Hrs.
- II. It has not been disputed that the Athlete was assigned Bib No. 044 for the said race.
- III. It is not disputed that before the race the participants were called out by name and introduced to the spectators and would each wave as they were introduced. Their photo/image was projected on the big screens in the stadium.
- IV. That the Applicant’s witnesses were in the stadium at the time and testified that they saw the photos of the athletes in the race including the respondents projected on the screen.
- V. Dennis Mwangi was not a participant in the said race and had no reason to be within the race track start or finish area.

76. Based on the foregoing, it is the panel’s position that it has been shown to its comfortable satisfaction that the chaperone, Karen Wairimu was able to identify, contract and notify the respondent athlete that he had to undergo Doping Control exercise.

77. The Respondent Athlete seems to believe or present the position that since he did not perform well in the race, he could not possibly have been of interest to ADAK for purposes of testing. This position cannot be further from the correct position. ADAK, like any other Doping Control Organization can test any Athlete at any race in or out of competition as per its own testing plan. The position taken by any athlete in a race is not the determinant. PW1 Karen was clear that she had been assigned to chaperone Athlete Bib NO 044 and the decision was pre-race as per ADAK’S testing determination and plan, this was not and need not be based on position posted in the race.

78. This panel therefore determines that based on the evidence presented, on a balance of probabilities, it is satisfied that the Respondent was properly identified and Notified of the requirement to undergo a doping control procedure on 25<sup>th</sup> June, 2022 at about 14.24 Hrs.

## II. WHETHER THE ATHLETE'S ADRV WAS INTENTIONAL

79. WADC'S and ADAK, ADR Article 10.3 "ineligibility for other Anti-Doping Rule Violation provides;

*10.3 The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.6 or 10.7 are applicable:*

*10.3.1 For violations of Article 2.3 or 2.5, the period of Ineligibility shall be four (4) years except:*

*(i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years;*

*(ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person's degree of Fault; or*

*(iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility shall be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault.*

80. The WADA Anti-Doping Organization Reference Guide under Section 10.1 provides that:

*"INTENTIONAL" means an athlete or other person engaged in conduct he/she knew constituted on ADRV or knew there was significant risk that the conduct might constitute on ADRV and manifestly disregarded the risk"*

81. The specific comment at Article 2.3 very clearly elucidates the position as follows;

*(comment to Article 2.3: For example, it would be an Anti-Doping rule violation of "evading sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or testing a violation of "failing to submit to sample collection contemplates Intentional conduct by the athlete").*

82. As a consequence, in determining whether there was intention to commit the violation, there was intentional to commit the violation, there are two aspects to consider.

- i. *Whether the Athlete knew the action constituted an ADRV or knew there was significant risk of committing an ADRV and,*

ii. *Whether he manifestly disregarded the risk.*

83. The Athlete's position has simply been; "it wasn't me", "I was not notified", "I was not anywhere near the DCS", "It was Dennis my look alike."
84. On the other hand, the narration by the Applicant's four (4) witnesses whose statement have been set out herein point to actions that are deliberate and well-orchestrated to achieve a specific outcome.
85. The Panel has held above that the Athlete was well identified and notified. He then changed clothes and in the company of the chaperone went towards the DCS before hurriedly going into the male washroom on the run. Thereafter two people emerged from that washroom who were dressed in a similar manner. One was held who turned out to be Dennis Mwangi, but the Athlete Respondent was nowhere to be found. Dennis Mwangi was dressed exactly in the same or similar manner as had been described by the Chaperone Karen- "a blue hoodie jacket and black trousers with white stripes on the side".
86. Dennis Mwangi was a friend of the Athlete. He was present at the stadium that day not as an athlete but on errands and by invitation of the Athlete. He was not there to race. That he therefore ends up being detained in place of the Athlete/ Respondent without other cogent explanation against the evidence by the four witness, in the panel's view can only point to an intentional act of evading or avoiding to submit to sample collection. The Athlete, duly notified, consciously chose to walk/ run away from the Chaperone and other DCOs instead of cooperating as required by the WADC. That action is commensurate with "evasion" which per WADC comment to Article 3.2 in regard to sample collection "contemplates intentional conduct by the Athlete".
87. The Athlete's response to the Charge Notice dated 25<sup>th</sup> July, 2022, which is however not dated, but is attached to the Charge Document, gives an indication of someone well versed with the Doping Control Process. He confirms that he has been tested previously. He easily refers to what he considers to be relevant provisions of the ADAK ADR and also points to procedural requirements. This familiarity puts him in good stead to comply with that which he well understands. Thus, anything to the contrary, as happened can only be deliberate and intentional.
88. In the circumstances as presented and supported by the Applicant's four (4) witnesses in this case, it is the considered view of this panel that the Athlete was evading / or refusing to submit to his sample collection and therefore committed the ADRV intentionally. That being the panel's position, the panel does not deem it necessary to assess whether the

Athlete may have No Fault or Negligence in committing the ADRV, the rationale being that the threshold of establishing that an ADRV was not committed intentionally being lower than proving that an Athlete has no Fault or Negligence in committing the ADRV. This reasoning also applies to the issue of NO significant Fault or Negligence.

#### **E. SANCTIONS**

89. The Applicant prayed for the regular ban to be imposed on the Athlete stating thus:

**“For an ADRV under article 2.3, evading Sample collection, or without compelling justification, refusing, or failing to submit to Sample collection after notification as authorized in these Anti-Doping Rules or other applicable Anti- Doping rules provides for a regular sanction of a four-year period of ineligibility.**

**In the circumstances, the Respondent has not adduced evidence in support of the intention not to evade sample collection. Bearing this in mind, we are convinced 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.”**

90. The WADC & ADAK ADR provides under Article 10.3 Ineligibility for Other Anti-Doping Rule Violations; that the period of *Ineligibility* for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.6 or 10.7 are applicable:

*Article 10.3.1 For violations of Article 2.3 or 2.5, the period of Ineligibility shall be four (4) years except:*

- (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years;*
- (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person’s degree of Fault; or*
- (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility shall be in a range between a maximum of two*

*(2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault.*

91. Article 10.6 provides that:

*10.6 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence  
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*

92. Further Article 10.7 provides:

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

93. Suffice it to state here that the Athlete did not meet any of the provisions essential for mitigating the available sanction.

94. 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.<sup>73</sup>*

95. In the course of the proceedings it was established that the ADRV was occasioned at an *in-Competition* testing.

**Credit for time served under the provisional suspension**

96. 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.

97. The aforementioned notwithstanding, WADC's Article 3.2.5 stipulates:



*The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation.*

98. The Panel makes the following specific findings in regard to this matter: -

- a) The Panel is satisfied that the Athlete was properly identified by the Chaperone. On the material day, PW1 had identified and notified the Athlete of Bib No.0 44. PW1 had his image before the race through a Google Search. Further, before the start of the race each athlete was called out following the start list, and the person notified was the same person seen on the Stadium Screens earlier the same day when the Athletes in this race had been called out and introduced before the start of the race. Further, the Athlete does not deny the Bib No. 044, which PW1 further used to identify him. The Chaperone contacted the athlete at the end of the race in question.
- b) Proper contact was established by the chaperone, PW-1, who properly notified the Athlete. The Athlete changed clothes and in the company of the chaperone went towards the DCS before hurriedly going into the male washroom on the run. The fact that another individual, who had no business being in the race, ends up being detained in place of the Athlete/ Respondent without other cogent explanation points to the Athlete evading / or refusing to submit to his sample collection and therefore committing the ADRV intentionally.
- c) Having found as above, the Panel holds that the Athlete intentionally committed the ADRV in question by willfully and intentionally absconding the intended testing process in terms of WADC's Article 10.13.2.
- d) A notice of charge was remitted to the Respondent dated 25<sup>th</sup> July 2022 and the Respondent replied thereto timeously. He did not admit the offence nor taken any other action set out in the WDAC or ADAK ADR that go into reduction of the period of ineligibility

## **A. DECISION**

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

- i. The applicable period of ineligibility of four (4) years is hereby upheld.
- ii. The period of ineligibility shall be from the date of this decision for a period of four (4) years. (31st August, 2023 to 30<sup>th</sup> August 2027).

- iii. Disqualification of any and/or all of the Athlete's competitive results from 25<sup>th</sup> June, 2022.
- iv. Each party shall bear its own costs.
- v. The right of appeal is provided for under Article 13 of the ADAK ADR and the WADA Code.

Dated at Nairobi this 31st day of August 2023



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**Mrs. Elynah Sifuna-Shiveka, Panel Chair**



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**Mr. Peter Ochieng, Member**



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**Mrs. J Njeri Onyango, FCI Arb, Member**