Arbitration CAS 2017/A/5248 World Anti-Doping Agency (WADA) v. Africa Zone V RADO & Anti-Doping Agency of Kenya (ADAK) & Eliud Musumba Ayiro, award of 14 December 2017

Panel: Mr Markus Manninen (Finland), Sole Arbitrator

Bodybuilding
Doping (trenbolone, epitrenbolone, tamoxifen)
Commission of an ADRV for presence of prohibited substances under the applicable ADR
Duty to establish route of ingestion in order to establish lack of intention

1. **Pursuant to Article 2.1.2 of the regional anti-doping organization Anti-Doping Rules (ADR), the presence of trenbolone and its metabolite epitrenbolone as well as tamoxifen metabolite 3-hydroxy-4-methoxy-tamoxifen i.e. prohibited substances, in the athlete's A sample shall be deemed sufficient proof of an anti-doping rule violation (ADRV) in the circumstances of the case: the athlete waived his right to B sample analysis and the B sample was not analysed.**

2. **An athlete must in principle establish how the prohibited substance(s) entered his or her system in order to discharge the burden of establishing the lack of intention. To establish the origin of the prohibited substance, it is not sufficient for an athlete to merely protest his or her innocence and suggest that the substance must have entered his or her body inadvertently from a supplement, medicine, or other product. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete has taken has contained the substance in question. For example, details about the date of intake, the location and route of intake, or any other details about the ingestion are necessary. An ADRV may only be deemed unintentional even if an athlete has failed to prove the source of a prohibited substance in extremely rare cases. An athlete should then establish lack of intention with other robust evidence, such as the possibility that the prohibited substance came from a specific product, the athlete's credible testimony, evidence by the athlete's doctors that the athlete had no intent to use a prohibited substance, or the implausibility of a scenario that the athlete intentionally used prohibited substances. If none of such elements is present, thus, it follows that the matter is not one of these extremely rare cases.**

I. THE PARTIES

1. The World Anti-Doping Agency (*"WADA"* or the *"Appellant"*) is the independent international anti-doping agency constituted as a private law foundation under Swiss law with its seat in Lausanne, Switzerland and headquarters in Montreal, Canada. Its aim is to promote and coordinate the fight against doping in sport internationally.

2. Africa Zone V RADO (*"RADO"* or the *"First Respondent"*) is a regional anti-doping organization in East Africa. Its participating countries are Burundi, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda. RADO has its headquarters in Nairobi, Kenya. The purpose of RADO is to coordinate and manage delegated areas of the anti-doping programs of its participating countries. The areas may include i.a. the adoption and implementation of anti-doping rules, the planning and collection of samples, and the management of results.

3. The Anti-Doping Agency of Kenya (*"ADAK"* or the *"Second Respondent"*) was established by the Anti-Doping Act of Kenya, No. 5 of 2016 with the objective of acting as the only organization permitted to carry out anti-doping activities in Kenya. ADAK has its registered seat and headquarters in Nairobi, Kenya.

4. Mr Eliud Musumba Ayiro (the *"Athlete"* or the *"Third Respondent"*, together with the First and Second Respondents, the *"Respondents"*), born in 1974, is a national level Kenyan bodybuilder.

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, and evidence adduced. Additional facts and allegations found in the Parties' written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 30 July 2016, RADO undertook an in-competition doping control on the Athlete in a competition at Kenya Utalii College (the *"Competition"*). The analysis of the A sample revealed the presence of trenbolone and its metabolite epitrenbolone as well as the tamoxifen metabolite 3-hydroxy-4-methoxy-tamoxifen. Trenbolone and its metabolite epitrenbolone are exogenous anabolic androgenic steroids prohibited under S1.1.a of the 2016 Prohibited List. Tamoxifen is a hormone and metabolic modulator prohibited under S4.2 of the 2016 Prohibited List.

7. The Athlete did not request that his B sample be tested and was therefore deemed to have waived such right.

8. On 27 April 2017, the Sports Disputes Tribunal of Kenya (the *"Sports Disputes Tribunal"*) rendered a decision pursuant to the Africa Zone V RADO Anti-Doping Rules (the *"RADO*

ADR") imposing a two-year period of ineligibility and disqualifying the Athlete's results at the Competition and any subsequent events pursuant to Articles 9 and 10 of the WADA Code (the *"Appealed Decision"*).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

9. On 20 July 2017, WADA filed a Statement of Appeal considered as its Appeal Brief with the CAS in accordance with Article R48 of the CAS Code of Sports-related Arbitration (2017 edition) (the *"CAS Code"*). WADA requested that the matter be submitted to a sole arbitrator. The Statement of Appeal contained a statement of facts and legal arguments and included a request for relief.

10. On 24 July 2017, the CAS Court Office initiated the present arbitration and specified that it had been assigned to the CAS Appeals Arbitration Division and shall therefore be dealt with in accordance with Articles R47 *et seq.* of the CAS Code. The CAS Court Office invited the Respondents to submit an Answer to the CAS containing a statement of defence, any defence of lack of jurisdiction, any exhibits or specification of other evidence upon which the Respondents intended to rely as well as the names of any witnesses and experts whom they intend to call. The CAS Court Office advised that if the Respondents failed to submit an Answer by the given time limit, the Panel or the Sole Arbitrator could nevertheless proceed with the arbitration and deliver an award. Finally, the Respondents were invited to inform the CAS Court Office whether they agreed to the appointment of a sole arbitrator as requested by the Appellant.

11. On 7 August 2017, the CAS Court Office informed the Parties that the Respondents did not object to the case being referred to a sole arbitrator.

12. On 16 August 2017, the CAS Court Office informed the Parties that, pursuant to Article R50 of the CAS Code, the President of the CAS Appeals Arbitration Division had decided to submit the present case to a sole arbitrator. Furthermore, the First and Second Respondents were requested to provide the CAS Court Office with any contact information that they may possess for the Third Respondent.

13. On 17 August 2017, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had appointed Mr Markus Manninen to act as the sole arbitrator (the *"Sole Arbitrator"*).

14. On 1 September 2017, the CAS Court Office noted that no challenge had been filed against the appointment of the Sole Arbitrator. In addition, the CAS Court Office advised the Parties that the deadline to file an Answer had expired on 15 August 2017 and that the CAS Court Office had not received the Respondents' Answers, or any communication from the Respondents in this regard. The Parties were reminded that unless the Parties agree or the Sole Arbitrator orders otherwise on the basis of exceptional circumstances, the Parties shall not be authorized to supplement or amend their requests or their argument, produce new exhibits, nor to specify

further evidence on which they intend to rely. Finally, the Parties were invited to inform the CAS Court Office whether they preferred a hearing to be held in the matter.

15. On 4 September 2017, the Appellant noted that as none of the Respondents had submitted an Answer and there was no expert or witness testimony, the Appellant's preference was that the matter be decided on the basis of the written record.

16. On 8 September 2017, the CAS Court Office informed the Parties that it had received the First and Second Respondents' joint Answer dated 30 August 2017. The CAS Court Office noted that it had been filed by courier on 4 September 2017 and received at the CAS Court Office on 6 September 2017. Additionally, the CAS Court Office invited the Appellant to comment on the admissibility of the First and Second Respondents' joint Answer.

17. On 12 September 2017, the Appellant informed the CAS Court Office that notwithstanding the late filing, the Appellant did not object to the admission of the joint Answer of the First and Second Respondents to the record. On the same day, the CAS Court Office invited the Third Respondent to provide his comments with respect to the admissibility of the First and Second Respondents' joint Answer on or before 15 September 2017. The CAS Court Office noted that the Third Respondent's silence will be considered an agreement with the late filing of the First and Second Respondents' joint Answer.

18. On 20 September 2017, the CAS Court Office informed the Parties that the Third Respondent did not object to the admissibility of the First and Second Respondents' joint Answer within the prescribed deadline.

19. On 26 September 2017, the CAS Court Office informed the Parties that the Sole Arbitrator deems himself sufficiently well informed to decide the present matter based solely on the Parties' written submissions without the need to hold a hearing. In addition, the CAS Court Office sent an Order of Procedure to the Parties. The Appellant's counsel signed and returned the Order of Procedure to the CAS Court Office on 26 September 2017. The First and Second Respondents returned a duly signed copy of the Order of Procedure on 10 October 2017. The Third Respondent failed to return a signed copy of the Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

20. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in his deliberation all of the evidence and arguments submitted by the parties, even if no specific or detailed reference has been made to these arguments in the following outline of their positions and the ensuing discussion on the merits.

21. WADA submits, in essence, the following:

- Pursuant to Article 2.1 of the RADO ADR, the presence of a prohibited substance or its metabolites or markers in an athlete's sample constitutes an anti-doping rule violation

(*"ADRV"*). Sufficient proof of an ADRV under Article 2.1.2 of the RADO ADR is established by the *"presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed"*.

- The analysis of the Athlete's A sample revealed the presence of trenbolone and its metabolite epitrenbolone as well as the tamoxifen metabolite 3-hydroxy-4-methoxy-tamoxifen.
- As the Athlete has waived his right to the analysis of the B sample and the B sample has not been analysed, the Athlete has breached Article 2.1 of the RADO ADR.
- According to Article 10.2.1.1 of the RADO ADR, the period of ineligibility shall be four years where the ADRV does not involve a specified substance, unless the athlete can establish, on the balance of probability, that the ADRV has not been intentional.
- As the athlete bears the burden of establishing that the violation has not been intentional, a series of CAS cases have held that it follows that the athlete must establish how the substance had entered his/her body. Only in extremely rare cases, an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. However, there are no exceptional circumstances in this case which show to the relevant standard of proof that the violation has not been intentional (without the Athlete having to establish the origin of the prohibited substance).
- With respect to establishing the origin of a prohibited substance, it is not sufficient for an athlete to merely make protestations of innocence and suggest that the prohibited substance must have entered his/her body inadvertently from some supplement, medicine, or other product. An athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that he/she has taken had in fact contained the substance in question.
- With regard to the origin of the prohibited substances, when the Athlete was originally confronted with the adverse analytical finding, he wrote to Ms Mugera of RADO in a letter dated 2 October 2016 and requested for more time in order to be able to respond appropriately. He admitted that he had had a medical condition, which had necessitated him to use a product that contains a prohibited substance.
- On 15 November 2016, the Athlete wrote a further letter to Ms Mugera and stated that he did not deliberately use the substances in question. He reported that he had been having low testosterone whose remedy required testosterone replacement therapy. In addition, the Athlete declared that he *"was prescribed for Nolvadex D which has a tamoxifen metabolite"*. The Athlete continued that *"Following my ignorant approach in getting the right medication, I ended up using the substances in question. I do request for your consideration by dropping the charges as the use was not for the purpose of enhancing performance"*.
- In his witness statement signed on 25 January 2017, the Athlete stated that on or before August 2015, he had suffered the symptoms of malaise, decreased virility, low energy levels, and infertility. He added that *"My financial predicament and fear for my reproductive and general health prompted me to seek for products to counter the then prevailing conditions. The lab costs for the aforementioned conditions were forbidding and I opted to get myself products which could be remedial. It is noteworthy that these products were not prescribed to me by any medical practitioner"*.

- WADA acknowledges that there is a medical note dated 13 February 2017 from Dr Henry Alube, which sets out that the Athlete consulted him in 2015 complaining of low libido, low energy, tiredness as well as sleep and memory disturbances. Dr Alube had suggested a full biochemical evaluation of the Athlete's hormones with a view of establishing whether he had a hormonal deficiency. Dr Alube added that they still awaited the results of such tests.
- WADA puts forth that there are various inconsistencies in the Athlete's explanations. By way of example, WADA's attention was drawn to the following facts: (1) The Athlete did not declare Nolvadex on the Doping Control Form. (2) Whereas the Athlete initially claimed that he was taking Nolvadex on prescription, he subsequently conceded that he had decided to self-medicate. (3) Whereas the Athlete claims in his witness statement that he initially sought medical advice in February 2016, Dr Alube claims to have been treating him since 2015.
- Even ignoring the inconsistencies, the Athlete has provided no evidence that he ever bought or used Nolvadex D. It was not mentioned on the Doping Control Form or in the Athlete's initial letter to RADO and it was not mentioned by Dr Alube. Moreover, there is no evidence of purchase or ingestion of Nolvadex on record.
- Even assuming that the Athlete had taken Nolvadex D, it would not explain the positive finding for trenbolone because Nolvadex D only contains tamoxifen.
- The Athlete has failed to satisfy the burden of proving how the substances, at least trenbolone, had entered his body. As there are no exceptional circumstances that might otherwise negate the presumed intentionality of the violation, the Athlete must be sanctioned with a four-year ineligibility period.

22. In light of the above, WADA submits the following prayers for relief in its Statement of Appeal and Appeal Brief:

"1. The Appeal of WADA is admissible.

2. The decision rendered by the Sports Disputes Tribunal on 27 April 2017 in the matter of Eliud Musumba Ayiro is set aside.

3. Eliud Musumba Ayiro is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Eliud Musumba Ayiro before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

4. All competitive results obtained by Eliud Musumba Ayiro from and including 30 July 2016 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

5. The arbitration costs shall be borne by ADAK and RADO jointly and severally or, in the alternative, by all the Respondents jointly and severally.

6. ADAK and RADO jointly and severally or, in the alternative, all the Respondents jointly and severally, shall be ordered to pay WADA a significant contribution to its legal and other costs in connection with these appeal proceedings".

23. The First and Second Respondents filed a joint Answer after the expiration of the prescribed deadline. However, considering that the Appellant and the Athlete did not object to the admission of the joint Answer to the file, the Sole Arbitrator has, pursuant to Article R56 of the CAS Code, decided to accept it to the records of the case.

24. The First and Second Respondents submit, in essence, the following:

- Prior to the enactment of the Anti-Doping Act No. 5 of 2016, ADAK had given its anti-doping responsibilities to RADO. ADAK has agreed to abide by the decisions made pursuant to RADO ADR, in particular the decisions of the Sports Disputes Tribunal in relation to Kenyan athletes.
- RADO and ADAK admit the facts as set out by WADA in part 1 of its Statement of Appeal. RADO and ADAK further note that RADO prepared and served a charge document in respect of the Athlete's ADRV. The Athlete engaged an advocate who filed a response to the charge, in which he admitted the charges and requested a hearing on sanctions. The Athlete actively participated in the proceedings.
- The Sports Disputes Tribunal found that the Athlete had committed an ADRV but erred in fact and in law by failing to appreciate that according to Article 10.2.1.1 of RADO ADR, the period of ineligibility shall be four years where the ADRV does not involve a specified substance, unless the athlete can establish that the ADRV was not intentional. Thus, the burden of establishing that the violation was not intentional rests with the Athlete and not with the anti-doping organization.
- Therefore, the Sports Disputes Tribunal made an erroneous finding on the applicable sanction. It erred in finding that the explanation given by the Athlete was to their comfortable satisfaction notwithstanding the inconsistencies in the documentation and evidence.
- RADO reiterates that it diligently discharged its responsibilities as delegated by ADAK. The judgment was an error of the Sports Disputes Tribunal, which is a creation of law, and cannot be attributable to RADO or ADAK.
- The participation of RADO is in line with its role in supporting national anti-doping organizations and ensuring that doping is stamped out and that individuals involved in doping face the prescribed penalties. RADO submits that it was an agent of ADAK and offered services to aid and support ADAK while it was not operational. RADO has no budgetary provision for payment of costs and any such award would be prejudicial.
- ADAK submits that it is a statutory semi-autonomous government agency and does not have budgetary provision for legal costs for third parties. ADAK adds that it will be impossible for it to make a contribution of any legal costs to WADA.
- RADO or ADAK have not performed any act they ought not to have performed, nor have they failed to do anything that they ought to have done with regard to these proceedings. There is no basis for the CAS to find them liable for costs at all.
- RADO and ADAK aver that the Appealed Decision is offensive, as it does not reflect the fight against doping. Therefore, RADO and ADAK fully support the appeal except

for WADA seeking that RADO and ADAK be ordered to bear any proportion of the arbitration costs or to pay any significant contribution to WADA's legal and other costs.

25. In light of the above, RADO and ADAK submit the following prayers for relief in their joint Answer:

"I. The appeal herein be allowed but only to the extent that no order of costs should be made as against them.

II. The decision rendered by the Sports Disputes Tribunal on 27th April, 2017 in the matter of Eliud Musumba Ayiro on SDT Anti-Doping case no 52 of 2016 be set aside.

III. The results attained by the Athlete Eliud Musumba Ayiro in the 'Body building Competition at Kenya Utalii College – Nairobi.' on 30th July, 2016 be disqualified. And all competitive results obtained by the Athlete Eliud Musumba Ayiro from 30th July, 2016 be disqualified with all resultant consequences.

IV. Eliud Musumba Ayiro be sanctioned to a term of 4 years.

V. All parties to bear their own legal and other costs in connection with these appeal proceedings".

26. Although duly invited, the Athlete did not file an Answer to WADA's Statement of Appeal and Appeal Brief within the prescribed time limit or thereafter. Pursuant to Article R55 of the CAS Code, the Sole Arbitrator can nevertheless proceed to make an award in relation to WADA's claims.

27. The CAS panel adjudicating the matter has the power to decide whether a hearing is necessary. Considering that none of the Parties requested a hearing and, in addition, that there is no witness or expert testimony, the Sole Arbitrator deems himself sufficiently well informed to render an award without a hearing.

28. Despite the lack of any formal Answer from the Athlete, the legal analysis below will take into account all available relevant information and is not restricted to the submissions of WADA, RADO, and ADAK.

V. JURISDICTION

29. WADA maintains that the jurisdiction of the CAS derives from Articles 13.1.3, 13.2.2, and 13.2.3 of the RADO ADR, effective from 1 January 2015. The Respondents have not challenged the jurisdiction of the CAS. In fact, RADO and ADAK have expressly admitted that WADA has had the right to appeal to the CAS and that the CAS has jurisdiction. Furthermore, WADA, RADO, and ADAK have confirmed the jurisdiction of the CAS by signing the Order of Procedure.

30. Paragraph 1 of Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

31. The Sole Arbitrator observes that the relevant parts of Articles 13.1.3, 13.2.2, and 13.2.3 of the RADO ADR provide as follows:

"13.1.3 WADA Not Required to Exhaust Internal Remedies

Where WADA has a right to appeal under Article 13 and no other party has appealed a final decision within the RADO-Member Signatory or its Delegate Organization's process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the RADO-Member Signatory or its Delegate Organization's process.

13.2.2 Appeals Involving Other Athletes or Other Persons

In cases where Article 13.2.1 is not applicable, the decision may be appealed to an independent and impartial Anti-Doping Appeal Panel established by the RADO-Member Signatory or its Delegate Organization. (…)

13.2.3 Persons Entitled to Appeal

(…) In cases under Article 13.2.2, the following parties shall have the right to appeal: (…) (f) WADA".

32. The Sole Arbitrator finds that Articles 13.1.3, 13.2.2, and 13.2.3 of the RADO ADR contain clear provisions according to which WADA has the right to appeal against the decisions of the Sports Disputes Tribunal to the CAS. Therefore, the CAS has jurisdiction to adjudicate and decide the present matter.

33. The present case shall be dealt with in accordance with the Appeals Arbitration rules. Under Article R57 of the CAS Code and in line with the consistent jurisprudence of the CAS, the Sole Arbitrator has full power to review the facts and the law. The Sole Arbitrator has therefore dealt with the case *de novo*, evaluating all facts and legal issues involved in the dispute.

VI. ADMISSIBILITY

34. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".

35. Article 13.7.1 of the RADO ADR provides that *"the filing deadline for an appeal filed by WADA shall be the later of: (a) Twenty-one days after the last day on which any other party in the case could have appealed; or (b) Twenty-one days after WADA's receipt of the complete file relating to the decision".*

36. The Sports Disputes Tribunal rendered the Appealed Decision on 27 April 2017. WADA received a part of the case file relating to the Appealed Decision on 29 June 2017. WADA filed its Statement of Appeal and Appeal Brief on 20 July 2017, i.e. within the 21-day time limit set forth under Article 13.7 of the RADO ADR.

37. The Sole Arbitrator concludes that WADA has adhered to the applicable time limit. RADO and ADAK have expressly confirmed that the appeal has been filed within the stipulated timelines. The Athlete has not objected to the admissibility of WADA's appeal.

38. Based on the above, the Sole Arbitrator deems the appeal admissible.

VII. APPLICABLE LAW

39. WADA submits that the RADO ADR are applicable rules in this matter. RADO and ADAK concur with WADA with regard to the applicable rules. The Athlete has not put forward any specific position in respect of the applicable law.

40. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

41. This provision is in line with Article 187, paragraph 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected".*

42. Based on the above and considering that the Sports Disputes Tribunal of Kenya, the sports-related body who issued the Appealed Decision within the meaning of Article R58 of the CAS Code, applied the RADO ADR in adjudicating the present case, the Sole Arbitrator shall decide this dispute in accordance with the RADO ADR. To the extent necessary, the Sole Arbitrator shall apply Kenyan law.

VIII. MERITS

43. Considering all parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:

A. Did the Athlete violate Article 2.1 of the RADO ADR?

B. If the first question is answered in the affirmative, what is the appropriate sanction to be imposed on the Athlete?

A. Did the Athlete Commit an ADRV?

44. The Sole Arbitrator observes that the following general regulatory framework is relevant as to the merits of the case at hand.

45. The relevant parts of Article 2 of the RADO ADR read as follows:

"ARTICLE 2 DEFINITION OF DOPING – ANTI-DOPING RULE VIOLATIONS

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of these Anti-Doping Rules.

(…)

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. 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.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed (…)".

46. The essential parts of Articles 3.1 and 3.2 of the RADO ADR read as follows:

"3.1 Burdens and Standards of Proof

The RADO-Member Signatory or its Delegate Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the RADO-Member Signatory or its Delegate 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. Where these Anti-Doping Rules place the burden of proof 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.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. (…)".

47. The Sole Arbitrator observes that, in its attempt to establish the ADRV of the Athlete under Article 2.1 of the RADO ADR, WADA relies firstly on the adverse analytical finding in the

Athlete's A sample collected on 30 July 2016. Secondly, WADA relies on the fact that the Athlete has waived his right to the analysis of the B sample, and, thirdly, on the fact that the B sample was not analysed.

48. The Sole Arbitrator notes that pursuant to Article 2.1.2 of the RADO ADR, the presence of trenbolone and its metabolite epitrenbolone as well as tamoxifen metabolite 3-hydroxy-4-methoxy-tamoxifen in the Athlete's A sample shall be deemed sufficient proof of an ADRV in the circumstances of the case: the Athlete waived his right to B sample analysis and the B sample was not analysed. Consequently, the Sole Arbitrator finds that the Athlete has violated Article 2.1 of the RADO ADR and thus committed an ADRV. This finding is consistent with the finding of the Sports Disputes Tribunal.

49. The Sole Arbitrator also observes that the Athlete has admitted the use of a prohibited substance in his initial letter to RADO dated 2 October 2016 as follows: *"I have been having a medical condition which necessitated me to use a product that has a banned substance"*. He has repeated his confession i.a. in his second letter to RADO dated 15 November 2016 and in the hearing held before the Sports Disputes Tribunal on 27 April 2017. The Athlete's admission confirms the commission of an ADRV.

B. If an ADRV Has Been Committed, What Is the Sanction?

a) Duration of the Ineligibility Period

50. Article 10.2 of the RADO ADR reads, in the relevant parts, as follows:

"The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the RADO-Member Signatory or its Delegate Organization can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. (…)".

51. The Sole Arbitrator notes that the Athlete's A sample revealed the presence of a non-specified substance (trenbolone) and its metabolite (epitrenbolone) as well as the metabolite of a specified substance (tamoxifen). Because the ADRV involves a non-specified substance, Article 10.2.1.1 of the RADO ADR applies.

52. As stipulated in Article 10.2.1 of the RADO ADR, the basic duration of the ineligibility period is four years when the ADRV is based on a non-specified substance such as trenbolone. However, if an athlete is able to prove by a balance of probability that the ADRV was not intentional, the period of ineligibility shall be two years, subject to potential reduction or suspension.

53. The Athlete has not filed with the CAS any submissions with regard to the length of the ban or any other consequence for an ADRV governed by the RADO ADR. In particular, the Athlete has not submitted to the CAS that the period of ineligibility should be mitigated for some reason.

54. However, the Athlete has presented before the Sports Disputes Tribunal that the ADRV was not intentional. The Athlete's key defence is that he had a medical condition, i.e. low testosterone levels and possibly a tumour, both of which necessitated the use of medical products containing prohibited substances.

55. The Sole Arbitrator notes that pursuant to established CAS case law, apart from extremely rare cases (see CAS 2016/A/4534, CAS 2016/A/4676, and CAS 2016/A/4919), an athlete must establish how the prohibited substance entered their system in order to discharge the burden of establishing the lack of intention (e.g. CAS 2016/A/4377, paragraph 51). To establish the origin of the prohibited substance, it is not sufficient for an athlete to merely protest their innocence and suggest that the substance must have entered their body inadvertently from a supplement, medicine, or other product. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication, or other product that the athlete has taken has contained the substance in question. For example, details about the date of intake, the location and route of intake, or any other details about the ingestion are necessary.

56. Based on the above, the Sole Arbitrator has to first consider whether the Athlete has established, on the balance of probability, the origin of the prohibited substances found in his body.

57. To explain the origin of the prohibited substances in question, the Athlete has presented in his letter dated 15 November 2016 that he was prescribed for Nolvadex D but *"following [his] ignorant approach in getting the right medication, [he] ended up using the substances in question"*. In his Witness Statement dated 25 January 2017, the Athlete confessed that he *"opted to get [himself] products which could be remedial"* and that *"it is noteworthy that these products were not prescribed to [him] by any medical practitioner"*. At the hearing held on 27 April 2017, the Athlete stated that he purchased Nolvadex D over the counter at a pharmacy whose name he could not remember.

58. The Sole Arbitrator finds the Athlete's statements unconvincing and insufficient to discharge his burden of establishing the source of trenbolone, epitrenbolone, and tamoxifen metabolite.

59. First, as shown above, the Athlete's statements have varied over the course of the disciplinary proceedings. Indeed, his narrative has changed from using other substances than Nolvadex D to the administration of said medicine. However, because Nolvadex D does not contain

trenbolone but tamoxifen only, it could not explain the finding of trenbolone and its metabolite epitrenbolone in the Athlete's system even if the Athlete had succeeded in establishing that he did administer Nolvadex D.

60. Second, the Athlete did not report the names of any specific products containing prohibited substances in the Doping Control Form, although he reported various products and substances (*"anti-malaria, pain killer, supplements, glutamine, whey protein, amino acids, creatine – no 3, fat burners"*). In fact, he has altogether failed to identify the potential other products than Nolvadex D with which he allegedly medicated himself. In addition, the Athlete has failed to specify when and how he used the prohibited substances to treat his medical condition.

61. Third, there is no compelling evidence that the Athlete ever purchased Nolvadex D from a pharmacy or elsewhere or used said medication. In fact, there is no persuasive evidence that the Athlete even suffered from a medical condition requiring the use of prohibited substances. According to Dr Alube's medical report dated 13 February 2017, the Athlete had consulted him in 2015 but had not completed the full biochemical evaluation requested by Dr Alube.

62. For the above reasons, the Sole Arbitrator finds that the Athlete has failed to establish the source of the prohibited substances found in his system.

63. As noted above, pursuant to CAS case law, an ADRV may be deemed unintentional even if an athlete has failed to prove the source of a prohibited substance. However, such finding can take place only in extremely rare cases. According to CAS praxis, an athlete should then establish lack of intention with other robust evidence, such as the possibility that the prohibited substance came from a specific product, the athlete's credible testimony, evidence by the athlete's doctors that the athlete had no intent to use a prohibited substance, and the implausibility of a scenario that the athlete intentionally used prohibited substances. None of such elements is present in the current proceedings. Thus, it follows that the current matter is not one of the extremely rare cases in which a finding of no intent can be made without proof of the origin of the prohibited substances.

64. In conclusion, the Athlete has not met his burden of proof with regard to the unintentional ADRV. It follows that the ADRV must be deemed intentional and the Athlete shall be sanctioned with a four-year period of ineligibility under the RADO ADR.

b) Commencement of the Ineligibility Period and Credit for Period of Ineligibility Served

65. With respect to the sanction start date, WADA has requested that the ineligibility period commence on the date on which the CAS award enters into force. RADO and ADAK have concurred with WADA in this respect. The Athlete has not addressed the matter during the CAS proceedings.

66. The Sole Arbitrator is guided by Article 10.11 of the RADO ADR titled *"Commencement of Ineligibility Period"* which stipulates as follows:

"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed".

67. The Sole Arbitrator notes that none of the Parties has put forth that the ineligibility period should be backdated due to delays not attributable to the Athlete or timely admission. It follows that the period of ineligibility shall, in principle, start on the date of this award.

68. However, the ban served by the Athlete shall be credited to him. This is stipulated in the second sentence of Article 10.11.3.1 of the RADO ADR as follows:

"If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal".

69. The Sole Arbitrator takes note that, according to the Appealed Decision and the RADO letter dated 19 September 2016, the Athlete has been suspended from 3 October 2016 onwards. Consequently, the period of ineligibility of four (4) years shall start on 3 October 2016.

c) Disqualification of Results

70. WADA has requested that all competitive results obtained by the Athlete from and including 30 July 2016, i.e. the date of the positive sample, be disqualified. WADA has not elaborated its request further. RADO and ADAK have concurred with WADA. The Athlete has not submitted any claims or arguments with respect to the disqualification of results during the CAS proceedings.

71. Article 10.8 of the RADO ADR reads as follows:

"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".

72. As noted above, the Athlete has failed to establish by a balance of probability that the ADRV was not intentional. Additionally, considering that the period from which the results should be disqualified is not particularly long (30 July 2016 – 3 October 2016) and that there is no evidence (or even an argument) that the disqualification of results would cause significant harm to the Athlete, the Sole Arbitrator does not find fairness to require a deviation from the main rule of Article 10.8 of the RADO ADR.

73. Based on the above, the Sole Arbitrator considers it justified to disqualify all of the Athlete's results obtained from and including 30 July 2016.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency against Africa Zone V RADO, Anti-Doping Agency of Kenya, and Mr Eliud Musumba Ayiro on 20 July 2017 is upheld.

2. The decision rendered by the Sports Disputes Tribunal of Kenya on 27 April 2017 is set aside.

3. Mr Eliud Musumba Ayiro is sanctioned with a four-year (4) period of ineligibility starting from 3 October 2016.

4. All competitive results of Mr Eliud Musumba Ayiro from and including 30 July 2016 to the date of this award are disqualified, with all resulting consequences (including forfeiture of medals, points, and prizes).

5. (…).

6. (…).

7. All other motions or prayers for relief are dismissed.