

4. The learned trial Magistrate erred in law and fact when he acquitted the respondent.

The appellant then sought for orders from this court that:

- (1) The appeal be allowed and acquittal be quashed.
- (2) The respondent be convicted as charged and sentenced.

Before I can delve into the merits of the appeal it is important to review the evidence adduced at the trial in order to get the picture of the nature of evidence that was before the learned trial Magistrate.

At the trial, the evidence adduced by the prosecution was that PW.1, **Paul Murombo** went to Novo Enterprises along Manafwa road to buy 250 boxes of blueband. He went with 34,600,200/= which he handed to the respondent. The latter issued him with a receipt and directed him to go to the store and get the blueband. Thereat he found one **Ayite Mike** who gave him the blueband. He took the blueband to Butaleja where he got his first customer. The customer wanted 4 dozens of the same but he discovered that the blueband was expired. It appears PW.1 gave some blueband to his children. When he went back home he found them vomiting and having diarrhea. PW.1 went back to the accused but the latter rebuked him that he was a thief. He chased PW1 away.

PW.1 further testified that he reported to police who advised him to report to the National Bureau of Standards. They went to see the respondent. That it was one **Ayite** who allowed them into the store wherein they found 20 boxes of expired blueband which was taken to UNBS. The blueband PW.1 had bought was left at

the police. That he took his children to the doctor for examination. The latter told PW.1 that the children had eaten poisoned food.

However police did not arrest the respondent. They instead arrested **Ayite** who PW.1 alleged was the storekeeper.

In cross-examination, PW.1 said he did not mention the respondent's name to police. That it was **Mike Ayite** who supplied him with the blueband. That after investigations police arrested and charged **Ayite**. **Ayite** was tried and acquitted. That whereas the UNBS took the blueband recovered from the store, they did not take the one PW.1 had bought which was deposited at the police. That after eating the blueband one of the children died after 2 months. PW.1 however did not know what the child died of. The child died from home.

PW.2 Phillip Charles Kalule testified that he works with UNBOS. He led the group which visited Novo Enterprises at Plot 30 Cathedral Avenue and seized 20 boxes of expired blueband. That they did not subject the product to further testing. He filled exhibit P.1.

In cross-examination PW.1 said that they found **Mike Gayi** at the shop and told PW.2 that he was the one in charge of the shop. **Mike Gayi** was prosecuted. That from the shop he was in charge of, they retrieved 25 Sackets of 25 grams of blueband. That it was Mike and PW.2 who signed Exhibit P.1. The blueband was not referred to a laboratory for tests. He did not know the meaning of the word "noxious."

PW.3 was **Dr. Twinomuhangi John William** attached to Mbale Referral Hospital. PW.3 is the one who examined the victims starting with **Masolo Emma** using

palpation and touch feeling and found tenderness in his lower abdomen. He was told the patient was vomiting. He made a report basing on history concluding that the 9 year old had possible bacterial food poisoning.

The second form was in respect of **Tom Morombo**. **PW.3** used the same method of examination and found that he had tenderness in lower abdomen and a history of diarrhea and vomiting which had stopped at the time. He concluded that this 4 year old had possible bacterial food poisoning. The medical documents were exhibited as P.II and P.III respectively.

In cross-examination, the doctor said that the patients were taken to him on 12.6.2008 but the date of suspected poisoning was not mentioned to him. That his diagnosis was based on his construction of the history and touch examination. He never tested the sample stool of the victims. He did not treat the victims. That the victims' conditions could have been due to elements like allergy or plant poisoning.

PW.IV D.C. Okiror John Nicholas No.18669 visited the scene as the investigating officer. He issued PW.1 with PF.3 for medical examination. He testified that the sales representative **Ayita Michael** took responsibility of the sales complained of as the one who sold the blue band.

PW.V was **No.23441 D/WC Driwaru Emile** the one who opened up the file in respect of this case. The complainant was **Murombo Paul**. She received the receipt on which the Blueband was bought headed Novo Enterprises. She exhibited the Blueband at police and filed the exhibit slip but none of these was put in evidence.

PW.V received a photocopy of the receipt on which the complainant bought the blueband but returned the original to the complainant.

PW.VI was **No. 34379 D/C Ocen Peter Enoch** who conducted the search at Novo enterprises in which 20 cartons of Blueband which was expired on 12.5.2008. He filled a search certificate and all witnesses signed.

PW.VI did not investigate the case. At the store along Taxi Park Road he found one **Okoth**. While there one **Michael Ayita** came and told them that he is the one who supplies Novo Enterprises with Blueband. The accused person/respondent did not sign the search certificate.

This was the close of the prosecution case.

In his defence, the accused respondent who is not named denied selling expired blueband. He said he had never sold blueband in Mbale. That Novo Enterprises has two shops and one store. The first shop is opposite UBA Bank. This is the main branch. The 2nd shop is near Bank of Africa. The store is located on Manafwa Road opposite BCU Flats. That the ground shop deals in Hardware. The store has mattresses and chairs. The respondent further testified that he had never heard of the blueband case. That UNBS arrested one called **Michael Ayita** who deals in Unilever products. That **Ayita** worked for Unilever and not Novo Enterprises. He denied owning Novo Enterprises.

This was the defence case.

It is trite law that in all criminal trials, the burden of proof lies onto the prosecution throughout the trial. The standard of proof is beyond any reasonable doubt.

The burden of proof remains on the prosecution throughout the trial. At no one time does it shift to the accused person. It is my duty now to re-evaluate the above

summarized evidence and determine if prosecution discharged its duty as required by the law and whether the finding of the learned trial magistrate can be upheld or not.

I will handle the grounds concurrently.

After considering the evidence on both sides, I am inclined to uphold the submission by learned defence counsel **Mr. Madaba** that the learned trial magistrate was right to acquit the respondent. There was no evidence or proof that it was the respondent who sold the alleged noxious food to the complainant. The defence evidence created a lot of doubt in mind of as to whether the respondent sold the blueband or not. Although the complainant alleged that he bought the blueband from Novo Enterprises and was issued with a receipt and the same was given to the police together with the blueband which was expired, no exhibits were brought and tendered in court during the trial.

PW.5 said she only retained a copy of the said receipt and returned the original to the complainant. She retained the blueband. However, PW.1 told court in cross-examination that he left the receipt with police.

Neither the receipt, samples of the blueband nor the exhibit slip were tendered in evidence during the trial. No reason was given for this omission.

In his judgment at P.5, the learned trial Magistrate held that the storekeeper did not testify and no exhibits were tendered in court. He was right. The evidence by PW.2, an official from the UNBS was not helpful. He did not know what noxious meant. PW.2 was called by police to conduct a search at Novo Enterprise Limited but he did not see the expired blueband the complainant lodged with police. He

was only informed by police. The role of PW.2 was confined to the search but did not subject the blueband to a laboratory test to find if the same was noxious or not.

PW.3 Dr. Twinomuhangi who examined the victims based his findings on the history given by the complainant and touching the victims' stomachs. He did not carry out any tests. He did not with certainty find that the vomiting or diarrhea was caused by the blueband. He however opined that these conditions could be caused by an allergy or plant poisoning. The findings of the doctor were therefore inconclusive.

In his defence, the respondent categorically denied dealing in blueband or having sold the same to the complainant. He said he works at Novo Enterprises an exclusively Hardware shop. This denial corroborates the evidence of PW.2 that it was a man called **Mike Gayi** who was found in the shop where the blueband was found. Whereas that man signed the surveillance form, the respondent did not. Infact the said Mike was prosecuted but was acquitted of the offence. The respondent was arrested long after the failed trial of Mike. The investigating officer **PW.4 Olukor James** said it was one **Ayita Michael** who took responsibility of the sales complained of. **Ayite** admitted selling the blueband. However PW.4 did not visit the scene at all.

Although the complainant said he knew the person who sold to him the blueband he never gave any name to the police. When he gave the names later he gave wrong names which do not refer to the respondent. It was not challenged when learned counsel for the respondent revealed the correct names of the respondent to be **Jignesh Patel** not **Jighar**.

When I considered the respondent's evidence vis-à-vis that of the prosecution, the said brief evidence created substantial doubt in mind if indeed the respondent committed this offence at all. It was not refuted sufficiently that Novo Enterprises deals in Hardware and that it has two shops and one store as explained. That it was one **Ayita Michael** who dealt in Unilever products which include blueband.

No wonder **Ayita** admitted liability and the assertion by the respondent that **Ayita** worked for Unilever and not Novo Enterprises was not refuted.

I agree with the submission by **Mr. Madaba** that the prosecution evidence did not prove that the respondent sold the blueband to the complainant. The learned trial magistrate rightly dismissed the case against the respondent.

Consequently, for the reasons outlined in this judgment I will order that this appeal be and is hereby dismissed.

Stephen Musota

JUDGE

7.03.2013