

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CR-CN-0020-2011
(ARISING FROM MBALE CRIMINAL CASE NO. MBA-00-CR-CO-
390/2010)**

UGANDA.....APPELLANT

VERSUS

1. LUTOTI STEPHEN

2. MWIGO JOHN BANOBERE

3. NABULIME IMMACULATE.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal arising out of the Judgment and Orders of **Her Worship Cissy Mudhasi** (Chief Magistrate) of 13/05/2011 whereby she acquitted the Respondents of four counts under the National Drug Policy Act Cap.206(3). The Respondents had been charged jointly on the following particulars to wit;

Counter (i): Carrying on business of a Pharmacist without Licence c/s 14 (3) of the National Drug Policy Act .

Count (ii): Supply of restrict drugs without a general Limited Certificate c/s 16 (1) (a) and 60 (1) (a) (c) (d) and (e) of the National Drug Policy Act .

Count (iii): Possession of classified drugs c/s 27 (2) of the National Drug Policy Act .

Count (iv): Possession of Narcotics c/s 47 (1) and 60 (a) (c) (d) and (e) of the National Drug Policy Act.

In the lower court all accused denied the charge. A trial was conducted where the prosecution led evidence of three witnesses alongside a number of exhibits. The accused all testified on oath. The learned Chief Magistrate in her judgment found the accused persons not liable on the charge and acquitted them on all counts, hence this appeal.

The appellant raised three grounds of appeal namely:

1. That the trial Chief Magistrate erred in law and in fact when she failed to evaluate the evidence and hence reached a wrong conclusion.
2. That the learned Chief Magistrate erred in the application of legal principles relating to burden of proof.
3. That the learned trial Chief Magistrate erred in law and fact in acquitting the 3 accused persons.

In order to answer the grounds, above, appellant formulated four issues for determination as herebelow.

- (i) Whether Ambition Pharmacy Ltd was running a business of a Pharmacy.
- (ii) Whether Ambition Pharmacy Ltd had a valid licence authorising operation of a Pharmacy.
- (iii) Whether the respondent persons were permitted to dispense, restricted drugs without a special certificate.
- (iv) Whether the respondents were authorised to hold and sell without licence.
 - (1) Restricted drugs.
 - (2) Narcotics.
 - (3) Classified drugs.

It is settled law that a first appellate court has a duty to re-evaluate the evidence and come up with its own conclusions. See *PANDYA V. R (1957) E.A*, reconfirmed in *BAGUMA FRED V. UGANDA see APPEAL 7 OF 2004*.

I have carefully gone through the entire case in the lower court. I will now deal with the grounds of appeal in the order they were argued by the appellant and responded to by Respondents.

Issue 1: Whether Ambition Pharmacy Ltd was running business of a Pharmacy.

The evidence on record on this matter is as follows:

PW.1 Onen Solomon was the Eastern National Drug Authority Inspector of drugs. He told court that as an inspector he had the duty to carry out market surveillance, check on quality of drugs on the market, identify illegal drug outlets and check on outlets which do not meet the requirements of NDA. He identified A.1 as his former school mate, and a pharmacist by profession, and a former inspector of NDA for Eastern. A.2 was also a Pharmacist and former schoolmate; working by then for RENE, a drug manufacturing company. He identified A.3 as **Nabulime** who was a worker he came to know as a result of the case before court.

On 18.05.2010 he went for inspection on duty in Mbale. He was with **Arinaitwe Wycliff** a police detective and **Okello Simon** an Inspector of drugs with NDA Kampala. While at Ambition Pharmacy at Plot 9 Pallisa Road he found A.3 in the shop, and she introduced herself as the nurse in charge. When they checked the premises they found classified medicine. There was no licence on display, no Certificate of suitability of premises was on display, these two had to be displayed for identification purposes. He testified that the restricted drugs found included

class A, B and C drugs. For class 'B' they found metronidazole tablets and class 'A' codeine. The prosecution tendered in exhibits of the search certificate (for identification), boxes containing samples of drugs in five boxes marked serially as '1','2', '3' , '4' and '5'. The witness also identified a receipt book labelled 'Ambition Pharmacy Ltd' and received for identification in court as "C" for later the witness told court that at around 8:00p.m A.1 and A.2 came to the shop and when asked for the licence A.1 told him that "we are going to get the licence," but they never showed him the licence.

The witness told court that it was a legal requirement for one to display a licence or certificate and that a Pharmacy must be supervised by a named registered Pharmacist, and professional auxiliary staff to work under a Pharmacist. An enrolled nurse, comprehensive or a registered nurse. The witness denied knowledge whether A.1 and A.2 were registered Pharmacists. He also testified that A.3 failed to show them any documents to prove that she was a nurse as she claimed. The witness testified that it is him who issues licenses for Eastern region and had never issued licenses to Ambition Pharmacy.

In cross-examination, when shown documents, he confirmed that A.1 and A.2 are registered in Uganda as Pharmacists and hence can practice pharmacy in Uganda. They can also manage drug shops in Uganda. He also conceded that under Rule 16 (d) of NDA, A.1 and A.2 as registered pharmacists can supply drugs. Upon further cross-examination the witness insisted that even though A.1 and A.2 were registered Pharmacists and Ambition had a trading license from Mbale Municipal Council, they still needed a licence from NDA to operate the said pharmacy.

The witness was shown a receipt of payment which he confirmed was from NDA. He also saw and confirmed that the accused had a trading licence from Mbale

Municipal Council-Defence exhibited the two documents for evidence in rebuttal. He also identified a document from Secretary of NDA, which defence tendered in as evidence of irregular issuance of licences by the Secretary of NDA.

PW.2 D/AIP Arinaitwe confirmed that on 18/05/2010 he was with PW.1 and **Okello Simon**. They searched Ambition Pharmacy. They found two ladies in the shop. One lady searched for the licence but failed to trace it up to midday. On further questioning A.3 informed them that the owners of the premises were A.1 and A.2. When A.3 phoned A.1 and A.2, they told her they were in the process of getting the licence. They (witness) impounded the drugs and took the suspects to police.

PW.3 told court that he together with other policemen and a team from NDA went to Ambition Pharmacy with a purpose of establishing whether pharmacy was operating with a trading licence. When asked to produce the licence they had none. A.3 told them she was the nurse, while another lady said she was the cashier. Under a search certificate, the drugs were impounded and taken to police.

DW.1 Nabulime Mary Immaculate (A.3) said on 18/05/2010 she was at Ambition Pharmacy as an employee. She had not yet got the job she applied for so she could clean and organise the place but they had not began selling and dispensing drugs. She said that at around 10a.m four men went to the shop and asked for a licence but she didn't give them any. She confirmed she was in the shop with **Nyamwiza**, and **John** a nurse who was also waiting for a job; but applied as a cashier, but was also waiting.

DW.2 (A.1) stated that he ever worked as Regional Inspector of Drugs/Eastern. He told court that once fees are issued for licence the process of licensing is complete, the next stage is printing to get the paper form of the licence and calling the applicant to collect the licence. He further stated that registered pharmacists can carry on business without the NDA licence. However he applied for one on 12/4/2010. By 14/4/2010, the Ambition Pharmacy had been granted a licence subject to payment of fees. Fees were paid same day on 14/4/2010. (Receipt was exhibited). The onus was now upon the executive secretary to print the licence. He testified that from his experience the Secretary always took his time to sign. He referred to a licence signed in favour of **Mavid (D.3)** granted in 2008 to expire on 31/12/2008 but signed on 23/7/2009. He confirmed that in his opinion once one showed him a receipt he would confirm him licensed. He exhibited other documents and items bought from NDA as evidence of his registration. He explained that though pharmacists are exempted they had to get NDA licence because the business could be passed on to a non registered person by selling or inheritance.

During cross-examination the witness conceded that he had never come across a pharmacy owned by a registered pharmacist which was not licensed. He also denied knowledge of a letter from Ex-Secretary dated 07.05.2010. He also denied the photocopy of the receipt book.

DW.3 (A.2) said he is a registered pharmacist; working for Rena Industries and managing Director of Ambition Pharmacy. He confirmed they applied for a licence and were finally licensed and paid for the licence on 14/4/2010 when their licence began running. They also got a licence from Mbale Municipal Council. On 1/5/2010 Ambition Pharmacy was opened in preparation for opening the

pharmacy. He stated that between 1- 18th May 2010 they were in process of stocking, organising and selecting workers' when, their goods were impounded by PW.1 and his team. He insisted that when their premises were inspected PW.1 was present and was aware that licence was granted on condition that they pay. He (PW.1) however insisted on impounding their goods.

In cross-examination he conceded;

“We were never given the printed document called a licence. The licence was never printed and it was never issued to us.”

He insisted that they met their obligation and it was for NDA to print the licence. He insisted that they were not operating but were stocking and putting drugs on display, and he was not aware that **Immaculate** had began selling the drugs. All exhibits were noted.

With all that evidence it is clear from the record above that there was an entity in existence on Plot 9 Pallisa Road called “Ambition Pharma Ltd.” Its Managing Directors were A.1 and A.2. A.3 was an employee (in the waiting) according to defence, and an active salesperson according to prosecution. Both the State and defence conceded that the business for which trading licence from Mbale Municipal Council was obtained was for running a pharmacy. Also A.1 and A.2 confirmed that they were stocking and arranging drugs, and recruiting staff to manage their business of a pharmacy. The exhibited Receipt book contains receipts titled ‘Ambition Pharmacy Ltd’. There is no doubt in my mind therefore that “Ambition Pharmacy” was conducting the business of a pharmacy. The issue is found in the positive.

Issue 2 and 4: Whether Ambition Pharmacy had a valid licence to deal in Pharmaceuticals.

The prosecution raised arguments to conclude that the case for the prosecution in the lower court was that when PW.1 and PW.2 visited the pharmacy, they did not find any licence issued by NDA on display; which contravened the law. Defence however was premised on the following that;

- i) Being registered pharmacists A.1 and A.2 needed no licence from NDA,
- ii) They obtained a trading licence from Mbale Municipal Council.
- iii) They had paid for a licence from NDA, and NDA had delayed to issue the “print out” but they should have been deemed to be fully licensed by PW.1 and his team.

Prosecution argues that, when **Her Worship Mudhasi** agreed with the above, she grossly misdirected herself on the law, and shifted the burden of proof of “possession” of licence to the prosecution. This to the appellant was wrong and occasioned a miscarriage of justice; because the burden to prove that Respondents had a licence laid squarely on them.

Respondents’ counsel was in agreement with the court’s findings and insisted in reply that the prosecution failed to discharge the burden of proof. It was defence counsel’s submission that once the defence showed by evidence that Respondent had done all that was required to get a licence, the evidential burden shifted to the prosecution at that stage. The prosecution had the burden to prove that inspite of their applications to the Ex-Secretary, they were still not licensed. Defence insisted that the only way prosecution would have done that, would have been to call the Ex-Secretary which they opted not to do.

Relying on *Oketcho v. Uganda*, the defence insisted that the failure was fatal to the prosecution case. It was counsel's submission that the entire trial rested on the issue of burden of proof, standard of proof and shifting in the burden of proof. To him the trial court exercised its mind and reached a correct conclusion that the prosecution burden was not discharged.

The prosecution for purposes of this appeal and to contradict the above position, relied on section 101 and 103 of the Evidence Act and the case of *R. VS. S. Scot (1921) 86 P.69*) whose gist is that; “ *burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence.*”

Having all evidence, law and facts of this appeal in mind, and arguments above, the first question to be answered is whether by alleging that they had paid for the licence, and a receipt issued, the burden shifted to the prosecution to prove that the licence was indeed never issued.

The accused/respondents were charged for, “carrying on a business of a pharmacist without a licence c/s 14(3) of the NDPA Cap.206 on C.J.

The section provides;

“A person who carries on the business of a pharmacist without a licence issued under this section commits an offence and is liable to a fine.....”

For purposes of this section, the provisions of section 14 (1) (c) are informative providing thus:

“In the case of a body corporate that at least one of the directors is a pharmacist resident in Uganda.....”

It was shown by evidence that the Respondents A.1 and A.2 are registered pharmacists, and the directors of Ambition Pharmacy – a registered company; going by the exhibits on record. This means that by all means the Respondents could not be excused from getting a licence for whatever reasons since they were operating under a company name “Ambition Pharmacy” covered. Under section 14 (1) (c) of the Act. The requirements for obtaining the licence are listed in section 14 (d) of the Act, upon application, the authority “May” on payment of a prescribed fee issue a licence to the applicant to carry on the business required at the premises “ on conditions specified in the license.”

Two facts are worth of noting here:

- i. On application, the authority is given discretion to give the licence or not to give. See definition of “May” as given in Black’s Law Dictionary at page 979”. In construction of statutes and presumably also in construction of federal rules word “may” as opposed to “shall” is indicative of discretion or choice between two or more alternatives.”

This means that payment of fees does not mandatorily entitle one to a licence.

It just sets in place a further process of discretion whose exercise ends at the tail end with setting and communicating the “condition specified in the licence.”

- ii. Every licence issued in this Act is the discretion of the issuing authority and carries along with it conditions which are laid out specifically in the license.

With the above clarifications on the law in mind, the question now is who has the burden to show that such a licence was issued to the Respondents? Is it the prosecutor who is demanding for it? Or the Respondent from whom it was demanded? To answer the questions calls for an examination of the criminal law, regarding burden of proof.

In all criminal law trials, the prosecution has the burden to discharge the legal burden of proof as laid down in cases like *Woolmington v. DPP 1935 A.C.*

This is a burden fixed by law and is a fixed burden of proof. (See *Cross & Tapper on Evidence- 8th Edition page 121*). This standard in criminal cases is proof that an accused is guilty of the offence beyond all reasonable doubt.

On the other hand is the evidential burden of proof, which is the “burden of adducing evidence to prove a fact in one’s favour. (See *Phipson Law of Evidence (14th Edition)* as referred to in *Cross and Tapper*: Supra page 122.)

The only burden which keeps shifting is the evidential burden. The legal burden never shifts. See *Euchu Michael v. Uganda Criminal Appeal No.54/2000*), where the Supreme Court held that the burden of proof in a criminal case never shifts from the prosecution. The case has to be proved by the prosecution beyond doubt. See (*Nabajja & 2 Others v. Uganda HCT CR-CN-0030 of 2012*).

My findings therefore are that the evidence of PW.1, PW.2 and PW.3 conclusively shows that at the time of inspecting the business premises where A.1, A.2, A.3 were operating, there was no licence issued by NDA, in existence.

The accused persons A.1 and A.2 both told court that all they had were payment receipts, but not the “paper print of the licence.” Defence now claims the burden here shifts to appellant to call further evidence to show that a “receipt” is not a licence under the Act.

In my view that is a misunderstanding of the operation of evidential burden. If X enters a bus from Jinja to Kampala and pays the conductor shs. 2000/= but is not given a ticket. When an Inspector stops the bus and asks passengers for their tickets, and X gulps “but I paid 2000/= to the conductor and no receipt was yet given; but I have travelled anyway.” Is it the Inspector to call the conductor to clear the matter, or the passenger who alleges so? In my view section 101,102, 103 and 104 of the Evidence Act would operate here so as to inform us that he who asserts the existence of a set of facts must lead evidence to prove them to be so. Respondents had the burden to call evidence for themselves to prove that the payment of fees amounted to a licence. In absence of such evidence, the prosecution’s case is water tight that they had no licence.

Moreover PW.1 was an Inspector currently liable for the region whom even A.2 insisted had inspected the premises. He told court that even if one had paid fees it was not proof of the licence. The evidential burden and legal burden required to prove a charge under counts I in my view was discharged and the trial Magistrate erred when she held that prosecution failed in this burden. The issue is found in the positive.

3. Whether Respondents were permitted to dispense restricted drugs without a special certificate.

The appellant in arguing this issue referred to defence arguments that A.1 and A.2 being registered pharmacists did not require a licence. He referred to Regulation 16 of SI 206-1 which states that the authorisation is “*so far as necessary for the practice of their profession or employment.*”

Defence counsel did not specifically respond to these arguments but generally invited court to agree with all the reasoning of the trial court’s findings on this matter.

The reading of Regulation 16 of SI 206 I- in my view is specific to pharmacists who are registered and do access the said drugs within the scope of their practise or employment. This Rule was not meant to cater for pharmacists who were engaging in private business for profit as clearly shown in the evidence of A.1 and A.2. A.2 said he needed a licence because the business needed continuity and could be passed on to a third party.

A.1 said the business was set up by him as a personal business, when he resigned. Can the setting up of a pharmacy business be taken as “*a practice of their profession or employment.*” I don’t think the intention of the Act which aims at “safeguarding appropriate use of drugs” intended to allow pharmacists a blanket access to restricted drugs in their private businesses without licence or control. The prosecution through evidence of PW.1 and PW.2 showed that the actual practice at NDA, is to require the pharmacists who engage in private businesses of pharmacies to get a licence and requisite certificates even if they are registered by the Pharmacists Association. This evidence fits within the requirement of section

61 of the Act in that; since the drugs were found on premises of a limited company to which A.1 and A.2 were directors, they were vicariously liable for the actions of the people found on the premises and for all items found thereon including the restricted drugs.

I agree with the submissions by the appellant on this issue and do find that the trial Magistrate failed to correctly evaluate the evidence and thereby reached a wrong conclusion. All necessary ingredients to prove that respondents had no valid authority under the NDA Act, to supply, distribute and hold restricted and classified drugs and Narcotics at their Ambition Pharmacy, were dully proved.

I find the issue in the affirmative.

All in all, I find that this appeal succeeds on all the grounds that were stated for reasons stated above.

I will allow the appeal and I will accordingly reverse the orders of acquittal against each accused person on all counts; and replace them with a conviction as charged on each count by each of the accused. Lower court orders accordingly set aside. I so order.

Henry I. Kawesa

JUDGE

07.07.2014

08.07.2014

1. **Wamimbi Antony** for State.
2. **Mubiru** for the Respondents.

Respondents: R.1- present

R.2 - present

R.3- absent.

Court: Judgment communicated in open court in presence of all parties.

Henry I. Kawesa

JUDGE

08.07.2014

Court: The file be forwarded to the Chief Magistrate for appropriate orders under section 39.

Henry I. Kawesa

JUDGE

08.07.2014

20.08.2014

Jonathan Muwangaya for Appellant.

Mutembuli holding brief for **Counsel Mubiru**- represents Respondent. 2 and Respondent 3. Respondent 1 is representing himself.

Jonathan: They are for formal sentencing. They were found guilty on all the four counts on appeal and advised to go to chief Magistrate for further orders. Only Respondent 1 and Respondent 3 endeavoured to appear. Respondent 1 has since been on warrant of arrest. We now appear for formal sentencing orders.

On count I: of carrying out a business of a pharmacist without a licence, section 14 (3) is a fine of not exceeding 1 million or imprisonment not exceeding 5 years or both.

Count 2: Supplying restricted drugs without a certificate. Punishment is in section 60 of the Act- convict is liable to either a fine of not exceeding 1 million, or a withdraw of the licence or permit for a period not exceeding 5 years or to an order for the destruction, impounding or forfeiture of the items or imprisonment not exceeding 1 year. Under 60 (e) court can impose any two of the above punishments.

Count 3: Possession of classified drugs without a licence punishment is under section 27(2) a fine not exceeding 2 millions or imprisonment not exceeding 5 years or both.

Count 4: Possession of Narcotics without a licence the punishment is in section 60, same as count 2.

We pray for punitive sentence, business of a pharmacist is strictly regulated. It affects human life, and any unregulated conduct can cause great harm to society. A.1 and A.2 are qualified pharmacists. A.3 is a nurse and medical personnel. These professions take oath to protect and preserve the wellbeing of society. In effect they commit themselves to lawful acts. We pray for a sentence that will enable convicts to learn a lesson from their unlawful acts- and deterring other errant professionals in their category to deter a repeat of similar unlawful acts. We pray for a term of imprisonment.

For the event that court is not pleased to award a term of imprisonment we pray for maximum fines to be served consecutively A.2 and A.3 attended court. A.1 has been at large with impunity-under section 60 (b) an order of withdraw of licence for a period not exceeding 5 years can be passed in addition to the fine or imprisonment.

A licence under section 2 (5) refers to a licence envisaged under section 14 that is a practising licence to practise business of a pharmacist. This is the best way a professional can learn and feel the consequence of errant conduct. So we pray.

Henry I. Kawesa

JUDGE

20.08.2014

Mutembuli:

I am on brief for A.2 and A.3 on behalf of **Mubiru**. We pray for leniency for A.2 and A.3. They are first offenders. They are remorseful. A.2 is a professional Pharmacist- they are very few in the country. A.2 is married. Has 6 children looks after two orphans. Given the nature of this case there was frustration by NDA who delayed the licence. He thought he would carry on business while waiting he didn't know he was committing an offence. These are young man and lady whose services are still required- imprisonment will only prejudice them and deny society of their services. A.3 has a sickly young child. Imprisoning her would also be harming the innocent child. I agree with the law but the framers of the NDA were mindful that there are very few so each punishment starts with a fine. Section 14- (first consideration is fine). I pray for fine on count 1. On count 2 under section 60- emphasis under 60 (1) (a)-

“a fine not exceeding 1 million”. We pray that court orders for a fine of 100,000/=.

Count 3 is under section 27,

“Is liable to a fine not exceeding 2 million or 5 years”- this also first consider the option of fine.

No evidence that their business affected anybody in the public.

Regarding withdraw of licence. It does not apply because they were convicted on count 1 for having no licence; so no licence to withdraw exists.

We pray for leniency for A.2 and A.3 give a fine and sentences be concurrent. We humbly pray.

A.1: Am registered. I didn't refuse to appear. I was sick. I was in court on judgment day. I pray for a lenient sentence am first offender. This conviction was on technicalities. I am a father of a 2-year old son, have siblings to take care of, am one of the Pharmacists, in this court. If treated harshly my people will suffer. I pray for caution, or a fine of 50,000/= . I have lost business, drugs expired, incurred legal fees. I have lost a lot. I pray for leniency having gone through a lot. Pray for leniency.

Henry I. Kawesa

JUDGE

20.08.2014

Court: I have heard the submissions for Resident State Attorney on behalf of the prayer for sentence. **Mutembuli** for A.2 and A.3, made a case for leniency. A.1, for himself also made a case for leniency. Those convicts are convicted on four counts. The intention of the NDPA is to regulate the use, sell and handling of drugs in the country. Punishment of offenders must have that intention in mind.

A.1 and A.2 are trained pharmacists who themselves worked for NDA and knew these regulations well. A.3 is a trained nurse who also is assumed to know the dangers of illicit drug use, sell and abuse. Court's sentence will aim at deterrence of others, and reform of the convicts. Given the circumstances of this case the court will sentence them as here below. A.1 and A.2 who are pharmacists are sentenced as follows along with A.3- A nurse.

Count 1-

A.1 shall pay a fine of 500,000/= (five hundred thousands or 2 years imprisonment in default of the fine.

A.2:- shall pay a fine of shs. 500,000/= (five hundred thousands only) or 2 years imprisonment in default.

A.3- shall was an employee- she shall pay a fine of shs. 100,000/= or serve 6 months in prison in default.

Count 2:

A.1 a fine of shs.200,000/= and forfeiture of the drugs impounded to the State or 30 days imprisonment in default.

A.2 – a fine of shs.200,000/= and forfeiture of the drugs impounded to the State, in default of fine 30 days imprisonment.

A.3- A fine of shs. 100,000/= or in default 3 months imprisonment.

Count 3:

A.1- A fine of shs.500,000/= or imprisonment of 2 years in default.

A.2- A fine of shs.500,000/= or imprisonment of 2 years in default.

A.3- A fine of shs.200,000/= or imprisonment of 6 months.

Count 4:

A.1 is a fine of 200,000/= or imprisonment of 30 days in default; and forfeiture of the said impounded drugs to the Government.

A.2 – A fine of 200,000/= or imprisonment of 30 days in default and forfeiture of the said drugs to the State.

A.3- a fine of shs.100,000/= or 3 months imprisonment in default.

These sentences are consecutive given the nature of offences committed. I so order.

Henry I. Kawesa

JUDGE

20.08.2014