**EGBELE AUSTIN EROMOSELE**

**v.**

**FEDERAL REPUBLIC OF NIGERIA**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 2ND DAY OF FEBRUARY, 2018

SUIT NO: SC. 529/2016

**LEX (2018) - SC. 529/2016**

OTHER CITATIONS:

3PLR/2018/05 (SC)

(2018) LPELR-SC.529/2016

**BEFORE THEIR LORDSHIPS:**

OLUKAYODE ARIWOOLA, JSC

KUMAI BAYANG AKA'AHS, JSC

AMINA ADAMU AUGIE, JSC

EJEMBI EKO, JSC

PAUL ADAMU GALINJE, JSC

**BETWEEN:**

EGBELE AUSTIN EROMOSELE- Appellants

AND

FEDERAL REPUBLIC OF NIGERIA – Respondents

**ORIGINATING COURT**

1. IN THE COURT OF APPEAL HOLDEN AT LAGOS

2. FEDERAL HIGH COURT, LAGOS DIVISION (Okeke J., Presiding)

**REPRESENTATION**

Mr. OGHENERO E.L. IDEH - For the Appellants

AND

MIKE OZEKHOME, SAN with him, GODWIN IYINBOR, Esq., KASIEMOBI ORAMIGO, Esq., HARRISON OBI, Esq. and Miss UCHE OLUCHI VIVIAN - For the Respondents

**MAIN ISSUES**

HEALTHCARE AND LAW - OFFENCE OF DEALING IN COUNTERFEIT AND FAKE DRUGS: “My Pikin” drug case - Burden of proof that the prosecution must discharge to establish the offence of dealing in counterfeit and fake drugs

HEALTHCARE AND LAW:- Production and distribution of drug products – Duty of manufacturers – Liability for negligence and breach of duty – How rebutted

HEALTHCARE AND LAW:- Section 1(18)(b)(i) of the Act, Miscellaneous Offences Act, Cap M17 LFN 2004– Offence of selling adulterated products to the public - Burden of proof of lack of intention thereto – On whom placed

CRIMINAL LAW AND PROCEDURE - OFFENCE OF DEALING IN COUNTERFEIT AND FAKE DRUGS: What the prosecution must prove to establish the offence – Effect of failure thereto

CRIMINAL LAW AND PROCEDURE - OFFENCE OF DEALING IN COUNTERFEIT AND FAKE DRUGS:- Intention to commit an offence - Whether is one of the elements of the offence of dealing in counterfeit and fake drugs under Section 1(18)(a)(ii) of the Miscellaneous Offences Act, Cap M17 LFN 2004 – Relevant consideration

CRIMINAL LAW AND PROCEDURE - SENTENCING:- Sentence imposed by trial court on a convicted accused person – Basis of – Attitude of appellate Court to invitation to interfere therewith

CRIMINAL LAW AND PROCEDURE - INTENTION:- Meaning of -  How intention to commit the offence under Section 1(18)(b)(i) of the Miscellaneous Offences Act is inferred - Whether places the burden of proof of lack of intention on the person that is charged with the offence

CRIMINAL LAW AND PROCEDURE - SENTENCING:- Discretion of trial court over sentencing of an accused person – How exercised – Attitude of appellate Court to invitation to interfere therewith - Section 1(18)(a)(ii) of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004 in review

SCIENCE AND TECHNOLOGY LAW:- Proof of liability requiring scientific knowledge and experience outside that of a judge – Where an opinion of an expert required - Nature of opinion deemed an ‘expert opinion – Implication for justice administration

INTELLECTUAL PROPERTY – PRODUCT LIABILITY:- Brand name of a product – Relevance of in proof of liability for negligent manufacture and sell of defective product – Proof that brand name is registered trade name – Burden of proving that others had appropriated that brand name beside the registered owner – On whom lies

TORT AND PERSONAL INJURIY LAW – NEGLIGENCE AND PRODUCT LAIBILITY:- Manufacturer of healthcare product – Duty to ensure proper quality and safety of product offered for sale – What defendant must show to avoid liability for negligence

FOOD AND AGRICULTURE LAW:- Section 1(18)(b)(i) of the Miscellaneous Offences Act – Intention to sell adulterated products to the public – Industrial goods offered by a corporate entity - How proved -“ Section 1(18)(b)(i) of the Miscellaneous Offences Act in r eview

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - REPLY BRIEF: Essence of a reply brief – Whether an opportunity for appellant to react to new issues in the Respondent's brief of argument

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S):- Attitude of the Supreme Court to invitation to interfere with concurrent finding(s) of fact(s) of Lower Courts

COURT - RECORD(S) OF COURT:- Duty of court - Whether entitled to look at its file or record and make use of the contents relevant in determining issues before it

COURT - POWER OF COURT:- Power of Court of Appeal to draw inferences of facts from evidence placed before the trial court - Basis of – Attitude of Supreme Court to interfere therewith

EVIDENCE - CONTRADICTION IN EVIDENCE: Position of the law as regards contradictions in evidence – Tutored witnesses – How determined - Contradiction that will be deemed to have affected the credibility of a case – What must be shown

EVIDENCE – CONTRADICTION:- Discrepancies which do not rise up to the level of a legal contradiction – When defence based on same may be evidence of pandering to technical justice at the expense of substantive justice

EVIDENCE - EXPERT OPINION/EVIDENCE:- Who qualifies as an expert before a court - When evidence of an expert necessary

JUDGMENT AND ORDERS - TECHNICAL JUSTICE: Attitude of Court to attempt to hide under legal technicality to evade justice – Principle that the law always aims at substantial justice – Legal effect of

**MAIN JUDGMENT**

**PAUL ADAMU GALINJE, J.S.C. (Delivering the Leading Judgment):**

The Appellant herein along with one other accused person and Barewa Pharmaceutical Limited were arraigned before the Federal High Court, Lagos on a six counts amended charge for various offences under Counterfeit and Fake Drugs And Unwholesome Processed Foods (Miscellaneous provisions) Act Cap C 34 Laws of the Federation of Nigeria 2004, and Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004. The Appellant and his co-accused pleaded not guilty to the charge. In order to prove its case the prosecution called seven witnesses and tendered several documents that were admitted in evidence.

The Appellant who was the 2nd accused person at the trial Court was the only witness called by the defence and he testified as DW1. At the end of the trial, and in a reserved and considered judgment, delivered on the 17th May, 2013, Okeke J found the Appellant and the two other accused persons guilty of the offence under counts 3 and 4 of the amended charge and they were all convicted accordingly. Appellant and the 2nd convict were sentenced to seven (7) years imprisonment on each of the two counts, and the sentences were ordered to run concurrently. The 3rd convict being a company was sentenced as charged and it was ordered to be wound up and its assets forfeited to the Federal Government of Nigeria. They were however acquitted and discharged from the remaining counts.

Being aggrieved with the decision of the trial Court, the Appellant appealed to the Court of Appeal. The Appeal was heard and in a reserved and considered judgment delivered on the 31st of May 2016, the conviction and sentence of the appellant on count 3 was set aside while the conviction and sentence on count 4 was affirmed. Once again the Appellant is dissatisfied with the affirmation of the conviction and sentence on count 4. Being aggrieved, he has brought this appeal. His notice of appeal at pages 815 to 826 dated 20th June, 2016 and filed on the 21st of June, 2016 contains 17 grounds of appeal.

Parties filed and exchanged briefs of argument.

The Appellant's amended brief of argument settled by OGHENERO E. L IDEH ESQ of counsel to the Appellant is dated and filed on the 16th January, 2017, but deemed filed on the 9th of February, 2017.

Learned Appellant’s counsel submitted six issues for determination of this appeal, and they read as follows:-

*(1) Whether the reliance of the lower Court on grounds other than those contained within the judgment of the trial Court in affirming the conviction of the Appellant for sale of dangerous drugs amounts to a denial of the Appellants’ right of fair hearing.*

*(2) Whether the lower Court relied an unproven assumptions and consequently misdirected itself in reaching the conclusion that any of the products in circulation in Nigeria with the brand name "my pikin" are the ones manufactured by the 3rd accused; thereby occasioning a miscarriage of justice.*

*(3) Whether the lower Court was right, in affirming the trial Court's exercise of discretion, imposing an excessive prison sentence on the Appellant, in the absence of any reason or basis for the discretion.*

*(4) Whether the lower Court failed to consider the issues properly canvassed before them, and thereby occasioned a miscarriage of justice.*

*(5) Whether the lower Court erred in arriving at the conclusion that the unsworn statement of DW1 amounted to an admission of guilt.*

*(6) Whether the lower Court erred in finding the Appellant liable for sale of dangerous drugs despites reversing the decision of the trial Court which found the Appellant guilty of conspiracy to sell dangerous drug.*

The Respondent's brief of argument settled by **Chief Mike Ozekhome, SAN OFR, FCIArb, LLD**, learned senior counsel for the Respondent is dated and filed on the 24th March, 2017, but deemed filed on the 6th April, 2017. Learned senior counsel equally formulated six issues for determination of this appeal. I reproduce these issues hereunder as follows:-

*1. Whether there were reliance on other grounds by the lower Court other than those contained in the judgment of the trial Court in affirming the conviction of the Appellant for sale of dangerous drugs, such as can be said to amount to a denial of fair hearing.*

*2. Whether from the facts and circumstances of the case the lower Court went beyond the scope of its jurisdiction to rely on the testimony of PW4 in reaching the conclusion that the products with the brand name “my pikin” were those manufactured by the 3rd accused.*

*3. Whether arising from the facts and circumstances of this case, the lower Court was right in affirming the trial Court's exercise of discretion in imposing a seven years sentence on the Appellant upon his conviction on count 4 of the charge sheet and if same was excessive, and the plea of mistake available to the Appellant.*

*4. Whether the lower Court failed to consider the issues properly canvassed before it to have occasioned a miscarriage of justice.*

*5. Whether the lower Court erred in arriving at the conclusion that the unsworn statement of DW1 amounted to an admission of guilt.*

*6. Whether the lower Court was right in finding the Appellant liable for sale of dangerous drugs despites reversing the decision of the trial Court which found the Appellant guilty of conspiracy to sell the same drugs.*

Learned counsel for the Appellant prepared a reply brief dated and filed on the 5th of April, 2017.

The issues distilled by both parties for determination of this appeal are similar. It is the Appellant who is complaining against the judgment of the lower Court. It is therefore proper that I consider this appeal on the basis of the issues submitted by the Appellant. Accordingly I will adopt the issues formulated for the Appellant in the determination of this appeal. Before I do that I will set out in brief the facts of this case in the context of the count 4 for which the Appellant stands convicted. That count 4 reads:-

*“That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1 - 5 Olugbo Close, Shasha Road Akuwonjo, Lagos State within the jurisdiction of this Honourable Court on or about October, 2008 sold dangerous drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos which did not represent the quality you represented it to be and you thereby committed an offence contrary to Section 1 (18) (a)(ii) of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004.”*

The Appellant who was the 2nd accused person at the trial Court is a management staff of Barewa Pharmaceutical Limited that was the 3rd accused at the trial Court. The Appellant and the remaining accused persons were accused of selling dangerous drugs called My Pikin to Roca Pharmacy for distribution to the public knowing fully well that the quality of the drugs did not represent what they claimed it to be. Section 1 (18)(a)(ii) under which the Appellant was convicted and sentenced to seven (7) years imprisonment provides as follows:-

*''Any person who deals in, sell, offers for sale or otherwise expose for sale any petroleum product, food, drink, drug, medical preparation or manufactured or processed product which is not of the quality, substance, nature or efficacy expected of the product or preparation, or is not of the quality or efficacy expected of the product or preparation, or is not of the quality, substance, nature or efficacy which the seller represents it to be, or has in any way been rendered or has become noxious, dangerous or unfit, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding ten(10) years.”*

For the prosecution to succeed in establishing the offence under the section referred to above, it must prove beyond reasonable doubt the following ingredients:-

***1. That the accused dealt in, sold, offered for sale or exposed any of the products mentioned in the section aforesaid which is not of the quality*** ***substance, nature or efficacy which he represents it to be.***

***2. That the accused compromised in the manufacture and/or processing those products which are represented by the sellers as the authentic products which they ought to be.***

***3. That because of the compromising attitude of the accused in the manufacturing or processing of the products, they have been rendered noxious, dangerous or unfit for human use.***

Count 4 under which the Appellant stands convicted and sentenced does not accuse the Appellant of manufacturing or processing of the drugs. The 2nd and 3rd ingredients of the offence for which the Appellant were arraigned before the trial Court as enumerated above are irrelevant in the circumstance of this appeal.

The Respondent neither cross appealed against the decision of the trial Court when it discharged the Appellant from all other charges except counts 3 and 4 nor did it appeal against the decision of the lower Court. The narrow issue left for this Court to determine is whether the conviction of the Appellant on count 4 as confirmed by the lower Court is proper in the circumstance.

On the first issue for determination of this appeal, learned counsel’s quarrel is against the finding of the lower Court at pages 788 of the printed record of this appeal where it held thus:-

*“I read carefully the cross examination of PW1 which is at pages 140 to 151 of the printed record. Her evidence was unchallenged. The genesis of the problems of the Appellant and his co-accused are consequently as set out in the evidence of PW1. With that background information we can now go on to consider whether the finding of fact by the lower Court that the drug My Pikin Baby Teething Mixture batch 02008 was indeed dangerous can be faulted.”*

According to the learned counsel, the lower Court fell into a grave error in relying on the evidence of PW1 in considering the decision of the trial Court when the trial Court declined to rely on the evidence of PW1 in arriving at its decision. It is learned counsel’s contention that the lower Court’s reliance on the evidence that was not relied upon by the trial Court was a new issue which was raised by the lower Court *suo motu*and parties were required to address the Court on the new issue. In aid learned counsel cited **Bhojsons Plc vs Daniel Kalio (2006) 5 NWLR (Pt.973) 330 at 351; Aermacchi S.P.A vs A.I.C. Ltd(1986) 2 NWLR (pt.23) 443 at 449; Kuti vs Balogun (1978) 1 SC 53 at 60; Iriri vs Erhurhobara(1991) 2 NWLR (Pt.173) 252 at 265; Ndiwe vs Okocha (1992) 7 NWLR (Pt.252) 129 at 139; Iyaji vs Eyigebe (1987) NWLR (pt.61) 523; Victino Fixed Odds Ltd vs Ojo (2010) 8 NWLR (Pt.1197) 487.**

Finally learned counsel urged this Court to hold that the Appellant was denied fair hearing by the lower Court, when he was not invited to address the Court on its reliance on the evidence of PW1.

In reply, learned senior counsel for the Respondent submitted that there was no reliance on other grounds by the lower Court in affirming the conviction of the Appellant for the sale of dangerous drugs other than those contained in the judgment of the trial Court. Learned senior counsel on the authorities of **Ado Ibrahim & Company Ltd vs Bendel Cement Co. Ltd (2007) 7 LPELR 188 (SC) and Estisione Nig. Ltd & Anor vs Osun State Government & Anor (2012) LPELR 7938(CA)** submitted that the evidence of PW1 was part of the record of the lower Court and as such it was entitled to look into its record and make use of any document it considers relevant in determining the issue before it.

The reply brief is a repeat of the Appellant's argument in his brief of argument. It is therefore needless to consider it as the essence of a reply brief to give the appellant an opportunity to react to new issues in the Respondent's brief of argument.

I wish to start by saying that there is nowhere in the judgment of the lower Court where reliance was placed on the evidence of in PW1 in considering the findings/decision of the trial Court. The lower Court merely stated that the evidence of PW1 was unchallenged and it was a background information to the problems of the appellant. This comment did not amount to placing reliance on the evidence of PW1. The fact that the lower Court made reference to the evidence of PW1 is part of its responsibility to look into any document in its record in order to support established facts. The lower Court's consideration as to whether the finding of fact by the trial Court that the drug, “My Pikin Baby Teething Mixture batch 020008" was indeed dangerous was based on the lower Court's assessment of the evidence of PW4, PW5, PW6 and PW7. This is clearly demonstrated in the judgment of the lower Court at page 788 of the record in the following words:-

“With that background information we can now go on to consider whether the finding of fact by the lower Court, that the drug "My Pikin Teething Mixture batch 02008 was indeed dangerous can be faulted. It was argued for the Appellant that the lower Court in convicting the Appellant on count 3 and 4 relied on the evidence of PW4, PW5, PW6 and PW7 when their evidence failed to meet the required scientific standard for such conviction."

The testimonies of PW4-PW7 were reproduced and after a thorough consideration, the lower Court came to conclusion that the sample of batch 02008 of the drug "MY Pikin Teething Mixture,” was contaminated with the contaminant Diethylene Glycol. I therefore agree with learned senior counsel for the Respondent that there was no reliance on other grounds or the evidence of PW1 by the lower Court in affirming the conviction of the Appellant for sale of dangerous drugs other than those contained in the judgment of the lower Court and the issues raised before it.

The lower Court was entitled to look into any document in its record and make use of it in order to arrive at a just decision. When a document is in the record of the Court, it cannot be a new issue on which a judge is precluded from looking at. This Court has in a number of decided cases held that a Court of law is entitled to look into its record and make use of any document it considers relevant in determining issues before it. See **Fumodoh vs. Aboro (1991) 9 NWLR (Pt.214) 2010 at 229; Agbareh & Anor vs Mimra & 2 Ors (2008) 2 NWLR (Pt.1011) 378 at 411 - 412; Badejo vs Minister of Education(1996) 9 -10 SCNJ 51.**

The pagination of the record of appeal is so disjointed. The testimony of PW1 is found at pages 134 - 151. It is therefore part of the record of appeal and the lower Court only made use of it to support the fact of the case. The first issue is accordingly resolved against the Appellant. The 1st 2nd, 3rd and 16th grounds of appeal upon which the issue is formulated are hereby dismissed.

The 2nd issue is whether the lower Court relied on unproven assumptions and consequently misdirected itself in reaching the conclusion that any of the products in circulation in Nigeria with the brand name "MY PIKIN” are the ones manufactured by the 3rd accused, thereby occasioning a miscarriage of justice. In arguing this issue, learned counsel for the Appellant made reference to several extracts from the judgment of the lower Court and concluded as follows:-

*(1) That the lower Court acted as a trial Court.*

*(2) That the lower Court misdirected itself with respect to Exhibit M, which was a letter written by Barewa Pharmaceuticals Ltd in which it instructed Roca Pharmacy to stop the sale of my Pikin baby teething mixture.*

*(3) That the lower Court's finding that the Appellant did not deny manufacturing and sale of the drug runs contrary to the record of appeal, where the trial Court never considered the evidence of DW1.*

*(4) That the lower Court had erred first of all in speculating and affirming the integrity of the products retrieved from wholesalers around in the absence of any pronouncement or finding to that effect by the learned trial judge.*

*(5) That there was mistaken identity of “My Pikin”.*

*(6) That the holding of the Court that the accused persons did not present their own set of drug sample to contradict or disprove the authenticity and accuracy of Exhibit R is contrary to the records before it.*

Finally on this issue learned counsel submitted; That the learned Justices of the Court of Appeal failed to avert their minds to the fact that they are bound by the records of appeal, and where an issue was not in contest between the parties at the lower Court, the Appellate Court cannot open a new issue in its judgment, particularly where the parties were not given an opportunity to address the Court on such issue.

The passages quoted by learned counsel for the Appellant have to do with the analysis of the evidence of PW4, where the lower Court made the following observations at pages 789 - 790 of the record as follows:-

*"Five cartons of batch 02008 were amongst the drugs retrieved by PW4 from wholesalers around to whom they had supplied the drug. It is obviously unlikely that PW4 will collect what he did not supply, and equally unlikely that the wholesalers would release to PW4 goods not* *purchased from him. There is no reason for a trader to offer up to PW4 drugs not purchased from PW4; the company alone manufactures products with the brand name; no other pharmaceutical company in Nigeria manufactures products bearing that brand name.  
  
The identities of the wholesalers and individual sampling of what was retrieved from them are consequently irrelevant under the circumstances."*

These are the passages which learned counsel for the Appellant accused the lower Court of acting as a trial Court and delved into needless speculation. I do not agree with the learned counsel that the lower Court went beyond the scope of its jurisdiction. By Section 15 of the Court of Appeal Act, the lower Court had full jurisdiction over the whole proceedings in this matter as if the proceedings had been instituted before it as a Court of first instance, and by doing so, a conclusion arrived at on the strength of the evidence before the trial Court, cannot be said to be a new case. In the course of evaluation of evidence, a Court of law is entitled to make deductions from the evidence before the Court which deduction may result in conclusions based on proper appraisal of that evidence. Where deductions are based on the evidence before the trial Court by the lower Court this Court has no reasons to interfere with such deductions. See **Cypiacus Nnadozie & Ors vs Nze Ogbunelu Mbagwu (2008) 3 NWLR (Pt.1074) 363 at 387.** The deduction by the lower Court that PW4 could only collect what he had supplied to the distributors accord with common sense and was based on the evidence before the Court. I am therefore of the firm view that the lower Court was right in its pronouncements as highlighted at pages 788 - 789 of the record.

On Exhibit M, the fact that Barewa Pharmaceutical Ltd had given instruction through Exhibit M for the withdrawal of the drug "My Pikin" is a clear admission that there was something wrong with the drug. The inference by the lower Court to that effect was well founded as the letter Exhibit M was written and dispatched before the instruction from PW2.

The contradiction highlighted in the testimony of PW7 and the actual drug that was presented for analysis is human. In absence of any discrepancies in the testimonies of witnesses it will be presumed that the witnesses are tutored to give such evidence.

For such contradiction to affect the credibility of a case, it must be shown that it is weighty and same has occasioned a miscarriage of justice.

The overwhelming evidence has clearly shown that the drug that was packaged and sent for analysis was “My Pikin Teething Mixture.” Learned counsel in presentation of the appellant's case seem to rely on pieces of extracts from the decision of the lower Court. I am of the firm view that the procedure adopted by the learned counsel cannot help his client. The case before the trial Court that has rolled up to this Court is that the Appellant sold drug that was dangerous to the public. No amount of hiding under legal technicality, by finding fault with the discrepancies in the procedure before the lower Court can change the course of this case. The dictates of justice command that the guilty be punished and the innocent be set free after a fair hearing under procedural regularity which does not permit the acquittal of an otherwise guilty person upon fanciful errors contained in the proceedings. The law always aims at substantial justice. The Court is more interested in substance than in form.

Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice. See **Ogbomor vs State (1985) 1 NWLR (Pt.2) 223; State vs Gwonto (1983) 1 SCNLR 142; Bature vs State (1994) 1 NWLR (Pt.320) 267; State vs Salawu (2011) 1 NWLR (pt.1279).**

Finally on this issue, the overwhelming evidence before the trial Court showed that the drug “MY Pikin Teething Mixture" is a product manufactured by Barewa Pharmaceutical Ltd, which had sole ownership of the name.

The responsibility to establish that other companies or individuals can share in the brand name of the drug rested with the Appellant and his co-accused. Appellant's failure to do so, had removed any unwarranted speculation that the drug received at NAFDAC laboratory was a counterfeited version of the 3rd Respondent's product. I am also of the view that the lower Court never made a case for the parties. The 2nd issue is therefore resolved against the Appellant and in favour of the Respondent.

The next issue I wish to consider is the 6th issue for determination of this appeal. Learned counsel for the  appellant submitted that the appellant and the other persons that were charged along with him had no intention to sell dangerous drug to the public. According to the learned counsel for an accused to be found liable under Section 1(18)(a)(ii) of the Miscellaneous Offences Act, it must be shown that he intended to commit the offences enumerated under that section.  
  
  
In reply, learned senior counsel for the Respondent enumerated the ingredients of the offence for which the appellant was charged, tried and convicted and submitted that intention to sell the drug, subject matter of this case is not an ingredient of the substantive offence for which the Appellant was convicted. The three ingredients as enumerated by learned counsel are:

***1. Proof that the drug was contaminated.***

***2. Proof that the Appellant sold the adulterated drug.***

***3. Proof that the product is not of the quality, expected of the producer or is not of the quality, substance, nature or efficacy which the seller represents it to be, or has in any way been rendered or has become noxious, dangerous or unfit.***

It is learned senior counsel's contention that the prosecution has proved all the ingredients of the offence and the lower Court was right when it affirmed the decision of the trial Court with respect to the charge of selling dangerous drug to the public. Learned senior counsel urged this Court to dismiss the appeal.  
  
  
  
The evidence before the trial Court clearly shows that Barewa Pharmaceutical Company Ltd did sell the drug ''My Pikin Teething Mixture" to Roca Pharmacy for consumption by the public. Laboratory analysis shows that the drug contained Diethylene Gloycol which according to expert is dangerous.

Laboratory analysis were carried out by PW6 and PW7 who gave their qualifications and their pieces of evidence were believed by the trial Judge and such belief was confirmed by the Court of Appeal. PW6 and PW7 were called as expert witnesses. An expert is a person who is specially skilled in the field which he is giving evidence, and whether or not a witness can be regarded as an expert is a question of law for the judge to decide. Expert opinion is only necessary where the expert can furnish the Court with scientific or other information of a technical nature that is likely to be outside the experience and knowledge of the Judge. The evidence of PW6 and PW7 is very clear. The drug, My Pikin Teething Mixture is dangerous.

In selling the drug to Roca Pharmacy, was the Appellant under any duty of care at all to observe the quality of the product it was selling? If he was under a duty of care did he observe the standard required in the circumstances of the case? Was there evidence of trial of the drug before releasing same to the public for consumption? In the instant case the Appellant's failure to state the kind of precautions it took to avoid selling contaminated drug to Roca Pharmacy amount to a breach of duty.

The Appellant has failed to show that he had no intention to sell adulterated drug for public consumption.  
  
  
  
Learned counsel for the Appellant cited Section 1(18)(b)(i) of the Miscellaneous Offences Act and submitted that there was no proof that the Appellant had any intention to sell adulterated drugs to the public. Section 1(18)(b)(i) of the Act provides as follows:-

*“When ever any person is charged under the preceding paragraph (a)(ii), it shall be a defence if he can establish that he did not know or had no reason to know or believe that the petroleum, petroleum product, food, drink, drug, medical preparation or manufactured or processed product has been adulterated or otherwise rendered noxious dangerous or unfit".*

Intention is defined by the Black's Law Dictionary 6th Edition as a determination to act in a certain way or to do a certain thing. A state of mind in which a person seeks to accomplish a given result through a course of action. Intention therefore is a mental attitude which can seldom be proved by direct evidence but can be proved by circumstances from which it may be inferred. Section 1(18)(b)(i) of the Act places the burden of proof of lack of intention on the person that is charged with the offence. The Appellant throughout has failed to show that he had no intention to sell adulterated drug to Roca Pharmacy for public consumption. The lower Court in my view rightly upheld the decision of the trial Court on the grounds that the prosecution proved its case beyond reasonable doubt. This issue is resolved in favour of the Respondent and against the Appellant.

On issue three, learned counsel for the Appellant's quarrel is that the sentence imposed on the Appellants is excessive. According to the learned counsel, the facts on record clearly show:-

*1. There were no wholly exceptional circumstances demanding the imposition of an almost maximum sentence prescribed by the applicable statute.*

*2. There were substantial mitigating circumstances which ought to, but which appeared not to have been taken into consideration in the exercise of the Court's discretion.*

Learned counsel insists that the discharge of the Appellant by the trial Court and the Court of Appeal from more serious charges of manufacturing the drug My Pikin and causing death, is enough mitigating factor that would have brought about the reduction in the number of years of imprisonment the appellant is sentenced to. In **Omokuwajo vs FRN (2013) LPELR 20184** which was cited and relied upon by learned counsel for the Respondent, this Court said:-

**“...the general rule is that sentencing is a matter completely at the discretion of the trial Court provided the discretion is exercised judicially and judiciously within the law.**

**An appellate Court consequently will not interfere with** **the exercise of discretion by the lower Court unless the sentence imposed is manifestly excessive in the circumstances or wrong in principle.”**

The charge for which the Appellant was convicted carries a sentence of not more than 10 years. The trial Court imposed a sentence that is less than 10 years imprisonment. This sentence is surely within the provision of the law. It is on the basis of the fact that the sentence is within the law, that the lower Court upheld same in the following words: -

**"Learned counsel for the Appellant has raised no valid point as to why we should interfere with the lower Court's discretion in imposing a sentence of seven years on count 4. The fact that the Appellant is a first offender may be one of the reasons taken into consideration by the lower Court in the exercise of its discretion to impose the sentence of seven years instead of the maximum ten years. I find no reasons whatsoever to interfere with the lower Court's exercise of discretion in imposing a sentence of seven years with respect to count 4.”**

The law is settled that where the decision of a trial Court is substantially based on the exercise of discretion, an appellate Court will not interfere with the discretion unless the trial Court failed to exercise its discretion judiciously or judicially.

In the instant case, the exercise of trial Court's discretion with regard to the sentence it passed was neither frivolous nor arbitrary. Since discretion is always unfettered, this Court cannot take steps to fetter such discretion, except for good and substantial reasons. See **ACME Builders Ltd vs. K.S.W.B (1999) 2 NWLR (Pt.590) 288; Chigbu vs Tonimas (Nig) Ltd (1999) 3 NWLR (Pt.593) 115; University of Lagos vs Olaniyan (No.1) (1985) 1 NWLR (Pt.1) 156; Hamza vs Kure (2010) 10 NWLR (Pt.1203) 630.** For the reasons I have alluded to herein, I decline to interfere with the sentence imposed on the appellant.

The appeal herein is against the concurrent findings of the trial Court and the Court of Appeal with respect to the 4th count of the charge upon which the appellant was tried and convicted. It is therefore not in the character of this Court to interfere with such findings. Issues 4 and 5 have been subsumed into my consideration of other issues and I do not need to repeat myself.

Having resolved the vital issues against the Appellant, this appeal shall be and it is hereby dismissed. The judgment of the trial Court with respect to the 4th count of the charge, as affirmed by the Court of Appeal is further affirmed by me.

Appeal dismissed.

**OLUKAYODE ARIWOOLA, J.S.C.:**

I had the privilege of reading in draft the lead judgment of my learned brother Galinje, JSC just delivered. I agree entirely with the reasoning and conclusion that the appeal is unmeritorious and should be dismissed. I too will dismiss the appeal.

Appeal dismissed.

**KUMAI BAYANG AKA'AHS, J.S.C.:**

I had the privilege of reading before now the judgment in draft of my learned brother Galinje JSC affirming the judgment of the Court of Appeal and dismissing the appeal. I entirely agree with his reasoning and conclusion that the appeal lacks merit. I only wish to add a few words for emphasis.

The two accused persons namely Adeyemo Abiodun, Egbele Austin Eromosele together with Barewa Pharmaceutical Limited were arraigned before the Federal High Court Lagos on a six counts amended charge for various offences under the counterfeit and Fake Drugs and unwholesome Processed Foods (Miscellaneous Provisions) Act Cap 34 Laws of the Federation of Nigeria 2004 and Miscellaneous offences Act Cap M17 Laws of the Federation of Nigeria 2004 in Charge No. FHC/L/71c/2009. The appellant herein was the 2nd accused while Adeyemo Abiodun who separately appealed and was assigned Appeal No. SC.531/2016 was the 1st accused and Barewa Pharmaceutical Limited was the 3rd accused. The accused pleaded not guilty to the amended charge. The prosecution called seven witnesses and tendered several exhibits. The appellant testified in his defence as DW2 while the 1st accused also testified as DW1. At the end of the trial the learned trial Judge, Okeke J delivered judgment on 17 May, 2013 and found the accused persons guilty of the offence in counts 3 and 4 of the amended charge and convicted them accordingly. The 1st and 2nd accused were sentenced to seven years imprisonment on each of the two counts and the sentences were to run concurrently. The 3rd convict being a Company and therefore an artificial person was sentenced as charged and ordered to be wound up and its assets forfeited to the Federal Government of Nigeria. They were acquitted on counts 1,2,5, and 6 discharged from trial on those counts. Being dissatisfied with the conviction and sentence they appeal to the Court of Appeal. On 31 May, 2016 their conviction on count 3 was set aside while affirming the conviction on count 4. This is a further appeal from the judgment of the Court of Appeal. My brother, Galinje JSC has set out the issues in the appeal and the arguments advanced thereon. He found no merit in the appeal and accordingly dismissed it.

Most of the arguments of learned counsel for the appellant were centred on issue 2 which is:

Whether the lower Court relied on unproven assumption and consequently misdirected itself in reaching the conclusion that any of the products in circulation in Nigeria with the brand name “My Pikin” are the ones manufactured by the 3rd accused; thereby occasioning a carriage of justice. Grounds 5, 6, 7, 8, 9, 10, 11, 15.

Count 4 in the amended charge alleged as follows:-

"That you Adeyemo Abiodun, Egbele Austin Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akuwonjo, Lagos State within the jurisdiction of this Honourable Court on or about October, 2008 sold dangerous drug to wit: My Pikin BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos with the intent to cause death or grievous bodily harm to members of the public and thereby committed an offence contrary to Section 1 (18) (a) of the Miscellaneous Offences Act No. 20 of 1984 (as amended) and punishable under Sections 1 (18)(a)(ii); 1 (18)(b)(ii) and 3 of the same Act"

The said Section 1(18)(a)(ii) of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004 states:-

“Any person who deals in, sells or offers for sale or otherwise for sale any drug, medical preparation or manufactured or processed product or preparation, or is not of the quality, substance, nature or efficacy which the seller represents it to be, or has in any way been rendered or has become noxious, dangerous or unfit, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 10 years"

The available evidence showed that the appellant not only dealt in, but he offered for sale and sold a chemical preparation, a pediatric syrup called “My PIKIN BABY TEETHING MIXTURE BATCH 02008” and the drug was found to have been contaminated with diethylene glycol, a chemical substance that rendered the said My PINKIN BABY TEETHING MIXTURE dangerous for human beings. The mixture was intended for toddlers and infants. Since by Exhibit M, Barewa Pharmaceutical Limited had given instructions for the withdrawal of the drug “MY PIKIN” this is a clear admission that there was something dangerous with the drug. The lower Court's inference to that effect was therefore well founded. The appellant was consequently liable to be punishable in Sections 1(18) (a)(ii) 1 (18)(b)(ii) and 3 of the Act.

Having found the accused person guilty of the offence, they were liable to be sentenced to a term of imprisonment not exceeding 10 years. The learned trial Judge in exercise of his discretion imposed a 7years term of imprisonment. Since he did not exceed the limit prescribed by law, an appeal against the exercise of discretion cannot succeed unless the appellant is able to prove that the trial Judge did not  exercise his discretion judiciously and judicially or took extraneous factors into consideration in imposing the sentence of 7 years imprisonment. The appeal is completely devoid of merit. It is on account of this and the more elaborate reasons contained in the judgment of my learned brother Galinje JSC that I dismissed the appeal and affirmed the sentence of 7 years imprisonment handed down by learned trial Judge and upheld by the Court below.

Appeal dismissed.

**AMINA ADAMU AUGIE, J.S.C.:**

I have had the privilege of reading in draft the judgment handed out by my learned brother - Galinje, JSC. For the above reasons and of course the detailed ones clearly adumbrated in the lead judgment, I too, feel that the appeal lacks merit. I hereby join in dismissing same.

**EJEMBI EKO, J.S.C.:**

My learned brother, Paul Adamu Galinje, JSC, had before now graciously availed me, in draft, a copy of the Judgment just delivered. On all the issues resolved therein in this appeal I am in complete agreement with him. Accordingly, I adopt the Judgment.

I wish, for emphasis only, to add that the intention to commit the offence is not one of the elements of the offence created by Section 1(18)(a)(ii) of the Miscellaneous Offences Act, Cap M17 LFN 2004, the offence which the Appellant was tried, convicted and sentenced. Such intent to commit the offence, the *mens rea*or guilty mind, cannot be read into the penal statute without doing damage of placing a gloss on the express letters of the statute. The Provisions of Section 1(18)(a)(ii) of the Act Cap M17 LFN 2004 being very clear and unambiguous the words used therein or the language of the statutory provisions must be given their natural, simple and ordinary meaning without venturing to introduce into the provisions extraneous matters. Doing so leads to circumventing the provisions, and the legislative intent of the lawmakers: **UNIPETROL v. E.S.B.I.R. (2006) ALL FWLR (pt.317) 413 at 423.**The legislative intent of Section 1(18)(a)(ii) of the Act Cap M17 LFN 2004 is to punish any person who sells products that are substandard, unfit or injurious. Ours, as the Judex, is only to identify the legitimate object or purpose of the legislation and give effect to it: **RABIU v. KANO STATE (1980) LPELR 2936**(SC).

The intent to commit that offence is conspiously absent in the wordings of the provision.

Section 1(18)(a)(ii) of the Act Cap M17, 2004, the subject of Count 4 the Appellant stands convicted and sentenced, provides inter alia:

*Any Person who deals in, sells, any drug, medical preparation or manufactured or processed product which is not of the quality, substance, nature or efficacy expected of the product or preparation, or is not of the quality, substance, nature or efficacy which the seller represents it to be, or has in any way been rendered or has become noxious, dangerous or unfit, shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding ten (10) years.*[underlinings supplied for emphasis]

The available evidence proved beyond reasonable that the Appellant not only dealt in, he offered for sale and indeed sold a chemical preparation, a pediatric syrup called “MY PIKIN BABY MIXTURE” to Roca Pharmacy for distribution and sale to ultimate consumers. The prosecution called PW's 4 - 7, experts in their own rights. They testified that upon their thorough analyses of MY PIKIN BABY TEETHING MIXTURE BATCH 02008", the drug MY PIKIN TEETHING MIXTURE was found to have been contaminated with "diethylene glycol", a chemical substance that renders the said MY PIKIN BABY TEETHING MIXTURE dangerous for human beings, the toddler,s the infant teething mixture was intended.

The prosecution had proved beyond reasonable doubt the elements of the offence, the subject of Count 4 the Appellant was tried, convicted and duly sentenced for. I have no cause therefore to disturb the conviction and sentence of the Appellant imposed by the trial Court and duly affirmed by the Court of Appeal. I find no substance in the appeal, which I hereby dismiss.