**EROMOSELE**

**V.**

**FEDERAL REPUBLIC OF NIGERIA**

IN THE COURT OF APPEAL HOLDEN AT LAGOS

31 MAY, 2016

CA/L/550A/2013

**LEX (2016) – CA/L/550A/2013**

**OTHER CITATIONS**

3PLR/2016/70 (CA)

**BEFORE THEIR LORDSHIPS:**

CHINWE EUGENIA IYIZOBA, JCA

JAMILU YAMMAMA TUKUR JCA.

YARGATA BYENCHIT NIMPAR, JCA

**BETWEEN**

EGBELE AUSTIN EROMOSELE - Appellant

AND

FEDERAL REPUBLIC OF NIGERIA – Respondent

**ORIGINATING COURT**

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

**REPRESENTATION**

O.E.L. IDEH ESQ. with O. AJETUNMOBI ESQ. FOR THE APPELLANT

-CHIEF MIKE OZEKHOME SAN with JEFF KADIRE ESQ., CHARLES OMOSOHWOFE ESQ., CHIMA ONUIGBO ESQ. AND KAMAL FAWEHINMI ESQ. for the RESPONDENT

**ISSUES FROM THE CAUSE(S) OF ACTION**

HEALTHCARE AND LAW – PHARMACEUTICALS - DRUG CONTAMINATION:- Charge of criminal conspiracy among leaders of a drug making company to sell dangerous drugs – Onus prosecution must discharge – Proof of negligence, laxity and non-adherence to standards and protocols – Whether suffices

HEALTHCARE AND LAW - PHARMACEUTICALS:- The My Pikin Teething Powder case – Burden of proof on prosecutor – Whether extends to establishing by direct evidence the description of persons along the distributorship chain of the defective pharmaceutical products – Brand name of the product – When proof of it on such product-packaging will suffice

HEALTHCARE AND LAW – PHARMACEUTICALS:- Charge of conspiracy and selling of dangerous drugs – Nature of evidence prosecution may produce to succeed thereto

HEALTHCARE ANDLAW – PHARMACEUTICALS:- Charge of conspiracy and selling of dangerous drugs – Defence that drug samples are not authentic and originating from accused manufacturer – Burden of proof of – On whom lies – Nature of evidence that would not suffice - Where accused persons did not present their own set of drug sample to contradict or disprove the authenticity and accuracy of exhibit – Duty of court thereto

HEALTHCARE AND LAW – PHARMACEUTICALS: Documents/Reports produced by a laboratory or multiple persons under one laboratory – How may be tendered – Person in charge of laboratory – Whether can validly tender such document in court proceedings - section 55 (1) (2) and (3) of the Evidence Act, 2011 in review

HEALTHCARE AND LAW:- S. 1 (18) (a) (ii) of the Miscellaneous Offences Act – Offence created thereunder for “any person who deals in, sells, offers for sale or otherwise exposes for sale any petroleum, 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, 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 - Ingredients of the offence which must be established - Intention to sell the drug' – Whether is not an ingredient of the substantive offence

CRIMINAL LAW AND PROCEDURE:- Charge of conspiracy and selling of dangerous drugs – Where act led to death – Whether prosecution needs to produce death certificates of deceased victim – Distinction from charge for murder – Legal implication

CRIMINAL LAW AND PROCEDURE:- Criminal conspiracy – Nature and essence of – What prosecution must show - Whether it is not necessary that it should be proved that the accused persons met to concoct the scheme which led to the underlying crime

CRIMINAL LAW AND PROCEDURE:- Criminal conspiracy – Proof of bare engagement and association to do an unlawful thing which is contrary to or forbidden by law, whether that thing be criminal or not, whether or not the accused persons had knowledge of its unlawfulness – Whether sufficient to ground the offence

CRIMINAL LAW AND PROCEDURE:- Criminal conspiracy – Proof of – Whether necessary in order to constitute the offence for the prosecution to prove a criminal purpose common to all the conspirators

CRIMINAL LAW AND PROCEDURE:- Unsworn statement to the police – When deemed to be in the nature of a confession – Where contradicted by statement on oath in oral evidence before the court – Whether court not bound to act on recanted confessional statements

CRIMINAL LAW AND PROCEDURE:- Recanted confessional statement – Duty of court thereto - Some evidence outside the confession which would make it probable that the confession was true – Legal effect

CRIMINAL LAW AND PROCEDURE – SENTENCING:- Discretion of court thereto – Attitude of appellate court to invitation to interfere therewith – Relevant considerations

ADMINISTRATIVE LAW – PRESUMPTION OF REGULARITY:- Act of an administrative body – Presumption of regularity thereto – Rebuttal of – Burden of - On whom lies

INTELELCTUAL PROPERTY:- Brand name of a product – Evidence of – When conclusive proof that product packaged within a get-up bearing the brand belongs to manufacturer connected with such brand

INTELLECTUAL PROPERTY:- Brand name – Discrepancy in the proper rendering thereof – When will be deemed a minor discrepancy – “My Pikin Paracetamol Syrup” used instead of “My Pikin Baby Teething Mixture” – Whether fatal – Relevant considerations

SCIENCE AND TECHNOLOGY LAW:- Testimony by an officer in charge of a laboratory established by an appropriate authority – Whether may be taken as sufficient evidence of facts stated in the document even if the officer was not the primarily or the only person involved in the development of the document - section 55 (1) (2) and (3) of the Evidence Act, 2011 in review

SCIENCE AND TECHNOLOGY:- Laboratory testing – Samples pursuant thereto – Attack on integrity of process – Burden of proof – On whom lies

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE:- Document produced by a laboratory established by an appropriate authority – Testimony of person in charge of laboratory regarding same – Whether deemed as sufficient evidence of facts stated in the document

EVIDENCE:- Discrepancy in evidence – Meaning of – When would be deemed not to have risen to the level of substantial and fundamental contradictions going to the main issues in question as to create doubts in the mind of the court – Legal effect

EVIDENCE:- Contradictions in evidence of prosecution – When can be of assistance to an accused person - Personal embellishments in evidence of witness – When will be discountenanced by court

EVIDENCE:- Forensic expert who analysed a sample central to an alleged crime and produced a report thereto – Where did not appear in court to tender the document for it to be admitted – Where another co-signatory to the report tendered same - Whether fatal to the admissibility of the document

EVIDENCE:- Admissibility of document – Rule that what governs admissibility is relevance – Document produced or co-signed by multiple persons – Where pleaded and properly tendered in the correct form – Whether suffices

EVIDENCE:- Document produced by multiple persons or within a unit – Where tendered by only one of its makers or co-signatories – Rule that it is the maker of a document that should tender the document in any legal proceedings in court – Whether satisfied – Whether such evidence can be impeached as hearsay evidence

INTERPREATTION OF STATUTE:- section 55 (1) (2) and (3) of the Evidence Act, 2011 – Meaning of

WORDS AND PHRASES:- “Discrepancy” – “Inconsistency”

**JUDGMENT (Delivered By CHINWE EUGENIA IYIZOBA, JCA)**

The appellant and two others were arraigned in the lower court on an amended charge which read as follows:

COUNT ONE:

That you Adeyemo Abiodun, Egbeie Austine Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of the Honourable court on or about October, 2008 manufactured an adulterated drug to wit: MY PIKIN BABY TEETHING MIXTURE AND YOU THEREBY COMMITED AN OFFENCE CONTRARY TO Section 1(a) of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C34 Laws of the Federation of Nigeria, 2004 and punishable under Section 3 of the same Act.

COUNT TWO

That you Adeyemo Abiodun, Egbeie Austine Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of the Honourable court on or about October, 2008 distributed an adulterated drug to wit: MY PIKIN BABY TEETHING MIXTURE to Roca Pharmacy of 34 Balogun Road, Agege, Lagos and you thereby committed an offence contrary to Section 1(a) of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act Cap C34 Laws of the Federation of Nigeria, 2004 and punishable under Section 3 of the same Act.

COUNT THREE

That you Adeyemo Abiodun, Egbeie Austine Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of the Honourable court on or about October, 2008 did conspire among yourselves to sell 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 and punishable under Section 1(18) (a)(ii); 1(18) (b)(ii) and 3 of the same Act.

COUNT FOUR:  
That you Adeyemo Abiodun, Egbeie Austine Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of the 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 and punishable under Section 1(18) (a)(ii); 1(18) (b)(ii) and 3 of the same Act.

COUNT FIVE:

That you Adeyemo Abiodun, Egbeie Austine Eromosele and Barewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of the Honourable court on or about October, 2008 did conspire among yourselves to adulterate a drug to wit: MY PIKIN BABY TEETHING MIXTURE and you thereby committed an offence contrary to Section 3(6) of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria, 2004 and punishable under Section 1(18) (a) (i) and 3 of the same Act.

COUNT SIX:

That you Adeyemo Abiodun, Egbeie Austine Eromosele and Sarewa Pharmaceutical Limited of 1-5 Olugbo Close, Shasha Road Akowonjo, Lagos State within the jurisdiction of the Honourable court on or about October, 2008 adulterated a drug to wit: MY PIKIN BABY TEETHING MIXTURE so as to change materially the quality or efficacy of the same without notice to the purchasers, knowing that same will be sold as a drug and you thereby committed an offence contrary to Section 1(18) (a) (i) of the Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria, 2004 and punishable under Section 1(18) (a)(i) and 3 of the same Act.

Trial proceeded before Okeke J of the Federal High Court, Lagos Division. The Prosecution called seven witnesses. The Appellant as the 2nd accused person testified as DW1 and is the only witness for the Defence; exhibits were tendered and admitted in evidence. Final addresses were filed and duly adopted. In its judgment delivered on 17/05/13, the lower Court discharged and acquitted the Appellant and the two other accused persons on Counts 1, 2, 5 and 6 but convicted them on Counts 3 and 4. They were sentenced to seven years imprisonment on each of counts 3 and 4, the terms to run concurrently. The Court ordered that the assets of the 3rd accused Barewa Pharmaceuticals Ltd be wound up and forfeited to the Federal Government of Nigeria.

Dissatisfied with the judgment, the Appellant and his co-accused filed separate notices of appeal on 3/7/13. It is pertinent at this point to mention that judgment had earlier been delivered by this court in this appeal on the 31st day of December, 2013 coram S.D. Bage, S.J Ikyegh and Tijjani Abubakar JJCA affirming the judgment of the lower court. All the Appellants appealed to the Supreme Court. It turned out that the judgment was based on an abandoned Notice of Appeal filed on 26/6/13 instead of the valid Notice of Appeal filed on 3/7/13. The Supreme Court consequently declared the judgment a nullity and remitted the appeal back to this Court for hearing de novo on the valid Notice of Appeal filed on 3/7/13.

The Notice of appeal of 3/7/13 has 13 grounds of appeal. Briefs of argument were filed and exchanged. The Appellant's brief of argument da-fed and filed 5/7/13 was settled by O.E.L Ideh Esq. From the 13 grounds of appeal they distilled the following 7 issues for determination.

1. Whether the Appellant can be convicted in the absence of strict scientific evidence that the drug "My Pikin Baby Teething Mixture" was dangerous: Ground 10.

2. Whether the learned trial Judge was right in convicting the Appellant on the basis of unsubstantiated, unreliable and contradictory evidence. Grounds 3, 5, 6, 7 and 9

3. Whether the learned trial Judge was right in failing to consider and evaluate the evidence of the defence tendered by DWI. Grounds I and 2

4. Whether the learned trial Judge was right in failing to consider relevant evidence that could establish the innocence of the Appellants. Ground 4

5. Whether the iearned trial Judge was right in convicting and sentencing the Appellant upon a finding of failure to follow proper test procedures when the charge before the Court was for manufacture and sale of adulterated/dangerous drugs. Grounds 8, 11, and 14

6. Whether there was any evidence of conspiracy to sell dangerous drugs. Ground 12

7. Whether the sentence of seven years imprisonment against the Appellant was justif ied in the circumstance of the case. Ground 13

The Respondent's brief of argument dated 28/10/13 and filed on 29/10/13 was settled by Charles Omosohwofa Esq of Chief Mike Ozekhome SAN's Chambers and therein they formulated three issues for determination as follows:

1. Whether the lower Court made a finding, based on scientific evidence that the drug "My Pikin Baby Teething Mixture" with Batch No 02008 was dangerous which therefore support the conviction of the appellants.

2. Whether the argument canvassed vis-a-vis the evidence adduced by the Respondent was not credible enough to support the conviction of the Appellants.

3. Whether the trial Court was right in convicting the 3rd Appellant and consequently ordering that it be wound up and its asset forfeited to the Federal Republic of Nigeria.

The Appellant's Reply brief is dated 7/11/13 and filed on 8/11/13.

At the hearing of the appeal on 13/4/16, O.E.L. Ideh Esq learned counsel for the appellant in adopting the Appellant's briefs urged the Court to allow the appeal while Chief Mike Ozekhome SAN for the Respondent in adopting the Respondent's brief urged us to dismiss the appeal.

I shall in the determination of this appeal adopt the Respondent's issues 1 and 2 and the Appellant's issue 7 as the 3rd issue. Respondent's issue 3 is not relevant in the instant appeal. The Appellant's issue one is basically same as the Respondent's issue one. Appellant's issues 2, 3, 4, 5 and 6 will be subsumed under the Respondent's issue 2. Appellant's issue 7 will be the 3rd issue.

APPELLANTS ARGUMENTS:

ISSUE ONE;

Whether the lower Court made a finding, based on scientific evidence that the drug "My Pikin Baby Teething Mixture" with Batch No 02008 was dangerous which therefore support the conviction of the appellants.

Learned counsel for the appellant on their issue one, relying on the cases of Adisa v. The State (1991)1 NWLR (Pt.168) 490 at 504. paras. G-H; 510. paras.B-O; Inspector-General of Police v. Oguntade (1971) 2 All N.L.R. 11; Yanor v. State CI965) NMLR 337 and Akinfe v. State (1988)3 NWLR (Pt.85) 729 submitted that the burden  is on the Prosecution to prove the guilt of the accused person beyond reasonable doubt; that the burden does not shift and where there is any doubt in the evidential chain of proof as to the guilt of the accused person, the trial Judge is under a duty to hold that the Prosecution has not proved its case and to discharge and acquit the accused person. Counsel submitted that in the case of scientific evidence the task of the prosecution is even more onerous. He argued that the Prosecution must lead strict scientific evidence that the drug "My Pikin Baby Teething Mixture" was indeed dangerous  as that is the offence with which the Appellant was charged; and that no other type of evidence; not even a confession will suffice. He relied on Federal Republic of Nigeria v. Daniel (2012) All FWLR (Pt. 627) 687.

Learned counsel further submitted that the Prosecution must establish an unbroken link in the chain beginning from the collection of the alleged offensive substance or article from the accused person's possession to the point of scientific/laboratory analysis and to the point of presenting the result of the analysis in Court. In other words, the Prosecution must guarantee the integrity of the entire process in order to secure a conviction. He cited Sunmola Ishola v. The State NMLR (1) 1969; CAW/25/67; Sunday Sosimi v. Commissioner of Police reported in (1975) (6/CCHCJ 881 at 883. Learned counsel submitted that the case against the Appellant (and other accused persons) was that the drug "My Pikin Baby Teething Mixture" (Batch 02008) manufactured by the accused persons, was adulterated/contaminated with Diethylene Glycol; the alleged adulterant and that the drug was dangerous. Counsel argued that in convicting the Appellant (and the other accused persons), the lower Court placed reliance on the evidence of PW4, PW5, PW6 and PW7 without analyzing same. He set out the evidence of PW4 and submitted that the testimony was fraught with legion of unexplained gaps and as such, most unreliable to use as a basis for the conviction of the accused persons on Counts 3 and 4 of the amended Charge. Counsel submitted that:

i. There was no evidence showing that what PW4 collected from "wholesalers around" was indeed what he had actually sold to them. The "wholesalers around" could probably have purchased the product from sources other than Roca Pharmacy Limited (PW4's company);

ii. Also, there was no scintilla of evidence as to the identity of these "wholesalers around" from whom PW4 had retrieved various Batches of "My Pikin Baby Teething Mixture"; their names, their addresses etc.

iii. More importantly, there was no Collection identification and sampling of the drugs against the "wholesalers around" to whom Roca had sold the drugs. In other words, PW4 could have collected any drug from anywhere and simply claimed that it was the same drug he sold to the "wholesalers around".

Counsel submitted that the Police was under a duty to investigate the chain between Roca Pharmacy and the "wholesalers around" and in return, between "wholesalers around" and Roca Pharmacy; and that the "wholesalers around" ought to have been called to give evidence of what Roca Pharmacy sold to them and what in turn Roca Pharmacy collected from them.

Counsel impugned the evidence of PW5 on the basis that he admitted that no investigation was carried out on receiving information about the death of some infants after taking the suspected adulterated product. Counsel contended that PW5 confirmed receiving the samples on 28/11/08 but the packaging and sampling was not done until 14/01/09; 44 days after the products were received without any explanation for the delay. This he submitted undermined the integrity of the entire process and raised doubt as to whether it is the same sample that was taken or collected from the accused person that was eventually analyzed.

Learned counsel complained that PW6 did not conduct the analysis himself and could not say how the product arrived in the laboratory of NAFDAC at Oshodi for further analysis. He contended that the evidence given by PW6 was hearsay as he admitted under cross-examination that he was not responsible for the conduct of the laboratory analysis but merely signed the laboratory report Exhibit T when it was forwarded to him for signing. Counsel submitted that one Adekunle Segun Olawale who conducted the analysis was not called to give evidence and no explanation was given for the failure to call him. He also found fault with the evidence of PW7 Anikoh Musa Ibrahim, an analyst in the Oshodi Laboratory of NAFDAC. He had confirmed the presence of a contaminant called Diethylene glycol in the sample of "My Pikin baby teething Mixture Syrup Batch 02008 but he was not sure as to who received the products in his laboratory and what was in fact received. Counsel submitted that this is a fundamental gap in the case of the prosecution. He further contended that the lower Court erred in law in finding the Appellant (and other accused persons) guilty on Counts 3 and 4 on the strength of the confirmation by the Appellant (2nd accused person) of the five cartons of My Pikin Baby Teething Mixture" (Batch 02008) recovered from Roca Pharmacy. Counsel submitted that the prosecution did not achieve even the minimum standard of proof that the drug "My Pikin Baby Teething Mixture" was dangerous and ought not to have convicted the appellant on counts 3 and 4.  
 

ISSUE TWO:

Whether the argument canvassed vis-a-vis the evidence adduced by the Respondent was not credible enough to support the conviction of the Appellants.

On their issue two, whether the learned trial Judge was right in convicting the Appellants on the basis of unsubstantiated, unreliable and contradictory evidence, learned counsel pointed out the contradictions in the evidence of the prosecution witnesses and submitted that the learned trial Judge ought to have considered these contradictions and resolved same in favour of the Appellant. Counsel referred to the cases of Harb v F.R.N (2008) ALL FWLR (Pt 430) 705 and Ikemson v. State (1989) 3 NWLR (PL 110 455 at 466.

On issue three, whether the learned trial Judge was right in failing to consider and evaluate the evidence of the defence tendered by DWI. Counsel opined that the learned trial judge failed to consider and evaluate the evidence led by DWI; the only witness for the defence. He submitted that his lordship rather referred to and relied wholly upon the unsworn statement of DWI; which said statement; though tendered as Exhibit 01 by PW5 during his examination in chief, did not in itself offer evidence of its truth for the purpose of arriving at the conclusion reached by the learned trial Judge. Counsel referred to the case of Tegwonor v State (2008) 1 NWLR (Pt. 1069) 630 at 664 where the court held:

A trial court must review all the evidence before it. it is the totality of the evidence that has to be evaluated and assessed together. A trial court cannot pick and choose the evidence to be assessed. Thus a proper evaluation of evidence is absolutely important, for in order to determine a case and come to a just conclusion the trial Judge must assess and appraise all evidence before him."

Counsel submitted that the failure of the learned trial Judge to consider the evidence and evaluate same occasioned a grave miscarriage of justice.

On issue 4, whether the learned trial Judge was right in failing to consider relevant evidence that could establish the innocence of the Appellants, learned counsel submitted that the lower court failed to consider relevant evidence that could have disproved the guilt of the accused. For example, failure of PW2 to obtain and tender in evidence the report of the analysis of the sample of "My Pikin Baby Teething Mixture" which allegedly killed the child of one Njoku Chidi Bright; failure to consider the effect of the 44 days delay in conducting the sampling procedure on the suspected adulterated products already in the custody of NAFDAC; failure to consider the import of Exhibit CI & C2 (Certified True Copy of Punch Newspaper cut-out dated November 26th 2008. Learned counsel submitted that the learned trial Judge erred in finding the Appellant guilty on counts 3 & 4 when there was such a gaping hole in the investigation of the case.

On issue 5, learned counsel submitted that the lower court erred in convicting and sentencing the Appellant upon a finding of failure to follow proper test procedures when the charge before the Court was for manufacture and sale of adulterated/dangerous drugs. Counsel opined that the material charge before the Court (as in Counts 3 and 4 of the amended Charge) borders on conspiracy to sell and selling dangerous drug; and that the Appellant (and the other accused persons) were never charged with failing  to   follow  test   procedures  or  manufacturing   below certain quality/standard. Counsel argued that the Charge upon which the plea of the Appellant (and the other accused persons) was taken and upon which they were tried is at variance with the offence of failing to follow test procedure or manufacturing drug below certain quality.

On their issue 6 whether there was any evidence of conspiracy to sell dangerous drugs, counsel submitted that in order to establish the offence of conspiracy, the apex Court held in numerous cases, Abdullah/' v. The State (2008)17 NWLR (Pt.1115)203 at 221, paras. F-H; Kaza v. The State (2008)7 NWLR (Pt. 1085)125, Ishola v. The State (1972)10 S. C. 63 at 76-77; Haruna v. The State (1972) 8-9 S.C. 174; Oladejo v. State (1994)6 NWLR (Pt. 348)101 at 127, 6badamosi & Others v. The State (1991)6 NWLR (Pt. 196)182 that it is the duty of the Prosecution to adduce evidence to establish the following ingredients:

i. An agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means; and

ii. That an illegal act was done in furtherance of the agreement and that each of the accused persons participated in the illegality.

Counsel submitted that proof of conspiracy is generally a matter of inference. He opined that there was no evidence of complicity, or agreement between the Appellant and the other accused persons to sell dangerous drug to Roca Pharmacy or any other person. Counsel submitted that the learned trial Judge misdirected himself gravely in finding the accused persons guilty of conspiracy when the prosecution did not even attempt to lead evidence to show conspiracy.

On their issue 7, whether the sentence of seven years imprisonment against the Appellant was justified in the circumstance of the case, learned counsel submitted that even if the conviction of the appellant was valid, that the sentence of seven years imprisonment was excessive because the Appellant was a first time offender and the prosecution led no evidence to show that the Appellant had the mens rea to commit the offence. He posited that the learned trial Judge should have exercised his discretion judicially and judiciously to impose a lesser sentence rather than a sentence that was close to the maximum penalty of ten years imprisonment for each offence.

Counsel finally urged us to resolve all the issues in favour of the Appellant and reverse the decision of the lower Court with an order of discharge and acquittal.

RESPONDENTS ARGUMENTS:

On issue one, learned senior counsel for the Respondent submitted that some of the arguments and complaints by the Appellant are completely obtuse, inflated and totally unrelated to the issues as to whether scientific evidence was adduced to prove that the drug 'My Pikin batch 02008' was dangerous. He submitted that there was clear evidence based on the certificates emanating from NAFDAC laboratory report on test carried out on samples "of batch 02008 received from the -3rd Convict (Barewa Pharmaceutical Ltd) through the Establishment Inspectorate Department of NAFDAC (EID) on the 25th November 2008 that the sample was contaminated with the contaminant Diethylene Glycol.

Learned senior counsel referred to Sections 55 (1) and (2) Evidence Act, 2011 which allows the production of a certificate by certain Government officials to be taken as sufficient evidence of facts stated therein. Counsel submitted that it was established in evidence that the Appellants lacked the capacity to conduct the necessary tests to determine the wholesomeness of its raw material or its finished product. On the other hand, it was not in dispute that the Respondent has the capacity to conduct the test on the samples of "My Pikin" which on the basis of the findings reported on the certificate issued by the appropriate officers of the Respondent, showed conclusively that the product batch 02008 was contaminated with Diethylene Glycol. Counsel submitted that PW1 a qualified and registered pharmacist testified that Diethylene Glycol is very poisonous and that this piece of scientific evidence was never rebutted by the Appellants and DWI who is a Chemist and the Quality Assurance Officer of the Appellants at the time. Counsel further submitted that once it is shown that Diethylene Glycol is present in a drug as a contaminant; such drug is without more unwholesome and very dangerous as in the case with Batch 02008.

Learned senior counsel submitted that the Appellant and the two other accused persons, now convicts made statements and were present when samples were packaged and sent to the laboratory and that evidence was led by the Respondent to show the various tests that were carried out with results which culminated in the certificate issued and now relied upon. With the certificate having been tendered and admitted in evidence, the burden shifted to the Appellants to adduce evidence to discredit the certificate. Counsel submitted that they failed to discharge the evidential burden. Counsel urged us to resolve issue one in the Respondent's favour, and to hold that the Respondent has proved that My Pikin Baby Teething Mixture batch no. 02008 manufactured by the accused persons was adulterated/ contaminated and/or dangerous.

On issue 2, whether the evidence proffered by the respondent was credible enough to support the conviction of the Appellants and the other convicts, learned senior counsel for the Respondent submitted that the argument proffered by the Appellant as regards conflicts in the evidence of the prosecution witnesses is misconceived. Learned silk posited that it was clear from the evidence adduced that all the initial samples recovered by PW2 were sent to the Central Drug Control Laboratory of NAFDAC for test; and that there is evidence that the investigation was later handed over to the team of PW3 and PW5 together with the 5 cartoons of batch 02008 recovered from Roca Pharmacy. He submitted that PW5 testified that he received the 5 cartoons from the team of PW2 which was the correct position and PW3 said she dispatched one set of samples to PW5 to be kept as exhibit after handing over one set to the accused persons (convicts) and the third set forwarded to the laboratory. He submitted that PW2 did not say she sent the same sample to NAFDAC. Learned silk urged us to discountenance the alleged contradictions. He opined that if there are any contradictions at all, they are inconsequential and cannot affect the culpability of the Appellant. He cited in aid the case of DIBIE V. STATE (2007) 2 NCC 475 AT PAGE 495-496. RATIO 13.

On the allegation by the appellant that certain witnesses (receptionist who received the sample at Oshodi laboratory) were not called to give evidence, learned senior counsel submitted that there is no rule of law which imposes an obligation on the prosecution to call a host of witnesses; that all the prosecution is required to do is to call enough material witnesses to prove its case. He cited the cases of OOOFIN BELLO V. THE STATE (1966) 1ALL NLR 223 AT 230; SAMUEL AOAJE V THE STATE (1979) 6-9 SC 18 AT PAGE 28; EO. OKONOFUA & ANOR V. THE STATE (1981) 6-7 SC. 1 AT 18; OGOALA V. THE STATE (1991)2 NWLR (PT. 175). 509 AT 527; NWAMBE V. STATE (1995) 3 NWLR (PT.384) pp V 40 7-408 PARAS. E-A.

On the Appellants contention that there are discrepancies in the witness statement of PW7 to the Police (exhibit V) and the certificate of laboratory analysis (exhibit U) on what was received (My Pikin Paracetamol Syrup) and the description of the product, Learned senior counsel submitted that these are insignificant discrepancies conceivable within the province of errors in human daily transactions. Counsel submitted that a thorough perusal of exhibits U and V and other evidence before the Court shows that PW7 was referring to My Pikin Baby Teething Mixture and that this was expatiated in his evidence-in chief. Counsel posited that it is common-place knowledge that it is only the same products manufactured by the same company that can share the same brand name, content, size, batch number and NAFDAC registration number and that the particulars disclosed in exhibit U by PW7 are the same as disclosed in exhibit T, save that exhibit T mentioned My Pikin Baby Teething Mixture. Counsel further submitted that it is a matter of fact that My Pikin is a brand name for teething drugs manufactured by Barewa pharmaceutical and that no other pharmaceutical company in Nigeria bears such name as testified to by the appellant as 2nd accused person during his cross-examination.

Counsel referring to the case of AKINBISAOE V. STATE (2007)2 NCC PAGES 76 AT 88 RATIO 3, submitted that the exhibits must be considered holistically in their entirety to decipher their real import and effect and not piecemeal as the Appellants did.

On issue 3, whether the sentence of seven years imprisonment imposed on the Appellant was justified in the circumstance of the case, counsel submitted that the issue of the imposition of a sentence within the bounds provided is purely within the discretionary power of the Court. Counsel argued that there is nowhere In the miscellaneous Offences Act where it is provided that the trial judge should impose a sentence below what the Act prescribed. He posited that the fact that the Appellant has not been convicted of any offence prior to that by the trial Court is not in itself, a requirement of the law for a derogation from the provision of law regarding a crime for which the Appellants has been found guilty by the trial Court. Counsel submitted that it is all within the discretion of the trial court and that the discretion must be exercised judicially and judiciously within the law.

On the conviction of the appellant on count 3 learned counsel submitted that the Respondent led evidence to show that the Appellant and his co-accused manufactured My Pikin Teething Mixture during the time they all knew they had no materials in their laboratory to guarantee the safety and/or quality of the product and also purchased unsafe Propylene Glycol from road side retailers despite their wealth of experience in drugs production and from such circumstantial evidence the Court rightly inferred conspiracy. Learned counsel urged the court in inferring conspiracy from the circumstances of this case, to lay particular emphasis on the findings of PW1 A 2 on their visit of 25th day of November, 2008, to the premises of the accused persons and the interrogations by PW3 as stated in both their oral testimonies and written statements (Exhibits E' & H) as well as the confessional statement of the 2nd accused person (Exhibit 01).  
 

In respect of count 4, counsel submitted that the Respondent led evidence to prove beyond reasonable doubt that the Appellants sold My Pikin Baby Teething Mixture having changed materially the quality, substance or efficacy of the drug and/or rendered same dangerous or unfit by reason of the adulteration of the product. Learned senior counsel submitted that the Respondent succeeded in linking the accused persons with the six-count charge before the lower court. He submitted that the 1st accused person is the General Manager/Production Pharmacist of the 3rd accused person while the 2nd accused person is the Quality Assurance Manager for the 3rd accused person. He opined that the Appellant and his two co-accused are guilty of the offences for which they have been charged and convicted by reason of Section 3(2) of the Counterfeit and Fake Drugs and unwholesome Processed Foods (Miscellaneous provisions) Act Cap C34 Laws of the Federation of Nigeria 2004 as well as Sections 3 (l) of the Miscellaneous Offence Act, Cap. M17 LFN, 2004.

Counsel submitted that the prosecution proved its case beyond reasonable doubt. He submitted that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt relying on STATE V. ABIBANGBE (2007) 2 NCC 628 AT 687, RATIO 4 and OIBIE V. STATE (2007) 2 NWLR 475 AT PGS 495-496.

Learned senior counsel urged us to dismiss the appeal and uphold the judgment of the trial court which convicted the accused persons in counts 3 & 4.

RESOLUTION:

It is surely stating the obvious to say that the burden is on the Prosecution to prove the guilt of the accused person beyond reasonable doubt. In the instant case, the Prosecution must lead clear scientific evidence that the drug "My Pikin Baby Teething Mixture" was indeed dangerous; and that there was a conspiracy by the Appellant and his co-accused to sell the dangerous drug to Roca Pharmacy. Even where there is a confession by an accused person, it does not dispense with the requirement of scientific proof of the offence charged. See Ishola v. The State NMLR (1) 1969. As rightly submitted by learned senior counsel for the Respondent, proof beyond reasonable doubt does not however mean proof beyond the shadow of doubt. Learned counsel for the Appellant is also right that scientific proof means that the Prosecution must establish an unbroken link in the chain beginning from the collection of the alleged offensive substance or article from the accused person's possession to the point of scientific/laboratory analysis and to the point of presenting the result of the analysis in Court. The integrity of the entire process must be guaranteed. In Ishola v. The State NMLR (t) 1969 the court observed:

"it is of the utmost importance then that the plant found in the possession of an accused person is the actual one that has been analyzed by the Chemist. The prosecution therefore has a duty to prove that once the plant is taken from the possession of the accused, every possibility whatsoever of its being tampered with or its being substituted with another has been excluded. Once an opportunity exists for this, the chain snaps and a reasonable doubt would exist as to whether the plant that was taken from the possession of the accused is the one that has been analyzed...."

It must however be noted that the drug in question is the product of the 3rd accused, Barewa Pharmaceutical Ltd. The company alone manufactures products with the brand name "My Pikin" duly registered with NAFDAC. No other pharmaceutical company in Nigeria manufactures products bearing that brand name. The Appellant who gave evidence as DWI under cross-examination at page 238 of the Record observed:

"My Pikin is a brand name for teething drugs produced by Barewa Pharmaceutical Ltd NAFDAC conducted the preregistration inspection of Barewa Pharmaceutical premises for the production of my Pikin Baby Teething Mixture between 2005 and 2006."

It can consequently be rightly assumed that any of the products in circulation in Nigeria are the ones manufactured by the 3rd accused. It may not be out of place to recapture the facts giving rise to this case for better appreciation of its peculiarities. The facts can be taken from the evidence of PW1 Mrs Hauwa Keri, a Pharmacist and at the time of her evidence Director of Establishment Inspection NAFDAC. Before then she was the Director of Narcotics and Controlled substances NAFDAC. Her evidence is at pages 134 - 151 of the printed records:

“Sometime in the middle of November, 2008, I received a telephone call from the Chief Pharmacist of Ahmadu Bello University Teaching Hospital Zaria reporting to me that some children died after taking a syrup called "My Pikin". I immediately reported the matter to the then Director-General Prof. Dora Akunyili who instructed me to investigate the case. I set up a team of NAFDAC inspectors who went to ABUTH Zaria and investigated the case. They came back and reported to me that they had interviewed the Chief Pharmacist Alhaji Salisu Ibrahim. They also interviewed the Head of Pediatrics' Department Dr.Malro Bugaje. They also spoke with the Chief Matron of the Hospital. They were able to retrieve the remnants of the syrup from Dr. Bugaje. Preliminary investigation revealed that the drug that was common to all the children that died was "My Pikin' All the children had the same symptom of renal failure characterized by the inability to pass urine. After the receipt of the report, I dispatched two teams - one to the UCH Ibadan and the other to Lagos University Teaching Hospital (LUTH) Lagos. I also asked my officers in Kaduna to purchase random samples of "My Pikin" syrup off the shelf. The random samples were sent to the laboratory together with the remnants from ABUTH and LUTH. With the first result from the laboratory we went to Barewa Pharmaceutical Industries Ltd and sealed it up. I asked all our officers nationwide to mop up all "My Pikin" syrup irrespective of batch, even though the laboratory result was for batch No. 02008. That was because the result indicated contamination with a deadly chemical called Diethylene Glycol (Anti freeze). We also immediately put out a public alert urging the public to stop using "My Pikin" syrup and all brands of paracetamol syrup till further notice. We also made a press statement to heighten public awareness and to forestall further casualties. Barewa Pharmaceutical Industries Ltd was directed to mandate their distributors to withdraw all batches of the syrup in their possession. I then led a team of inspectors to Barewa Pharmaceutical Industries Ltd. Mrs. Titi Owolabi who is the Deputy director In charge of Lagos State Zone and Mrs. Edosa Ogbeide next in command to Mrs. Owolabi were in my team. It was at this visit that we established some facts. First the contaminated batch 02008 was produced around the time that a school certificate holder purchased a keg of that Diethylene Glycol wrongly labeled propylene Glycol. We also established that the Quality Control Officer did not carry out the mandatory Identification test for all the raw material before production as required by law. Even more was the discovery that production manager went ahead to produce batch 02008 with only a verbal clearance from the Quality Control Officer. Several other violations were documented in the final report. At the entry meeting with the management of Barewa Pharmaceutical Industries Ltd we asked the key officers to be at the meeting so that we see their qualifications and their terms of engagement. We also requested to see their documents like batch manufacturing records, quality control release records, purchase orders and store ledger. We also visited the whole factory from receipt to release. I then submitted the report to the Director-General with the recommendation that the case be transferred to the Enforcement Department because of the involvement of illegal chemical marketers."

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. It was argued for the Appellant that the lower court in convicting the appellant on counts 3 & 4 relied on the evidence of PW4, PW5, Pw6 and PW7 when their evidence failed to meet the required scientific standard for such conviction. PW4 is one Ezekiel Akerele who was at the relevant time the sales representative of ROCA Pharmacy who went round to retrieve from their customers (wholesalers around) My Pikin Baby Teething mixture in accordance with the directives of Barewa Pharmaceutical Ltd the 3rd accused/convict in their letter Exhibit M. The Appellant had submitted that PW4's testimony:

" is fraught with legion of unexplained gaps and as such, is most unreliable to secure a finding of guilt of the offences in Counts 3 and 4 of the amended Charge. There was no evidence whatsoever led by the Prosecution in respect of a number of essential particulars which would have otherwise made the testimony a reliable one. For example:

i. There was no evidence showing that what PW4 collected from "wholesalers around” was indeed what he had actually sold to them. The "wholesalers around" could probably have purchased the product from sources other than Roca Pharmacy Limited (PW4's company);

ii. Also, there was no scintilla of evidence as to the identity of these "wholesalers around" from whom PW4 had retrieved various Batches of "My Pikin Baby Teething Mixture"; their names, their addresses etc.

iii. More importantly, there was no collection identification and sampling of the drugs against the "wholesalers around" to whom Roca had sold the drugs. In other words, PW4 could have collected any drug from anywhere and simply claimed that it was the same drug he sold to the "wholesalers around"

With the background history of this case as set out above, it is obvious that the Appellant's complaints are without merit. Batch 020O8 of My Pikin is what has been found to be dangerous. Five cartons of batch 02008 were amongst the drugs retrieved by PW4 from wholesalers around to whom they had supplied the drugs. 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 PVV4. The argument of counsel defies logic and is contrary to common course of human reaction to such a situation. Besides as earlier stated, the drug in question is the product of the 3rd accused, Barewa Pharmaceutical ltd. The company alone manufactures products with the brand name. No other pharmaceutical company in Nigeria manufactures products bearing that brand name. The 3rd Accused/convict knew their distributors and the distributors knew their customers to whom they supply the drugs. Indeed the Appellant and his co-accused especially the 3rd accused Barewa Pharmaceuticals did not deny in their statements or oral evidence that the products were their own. They had identified the drugs as theirs. The identities of the wholesalers and individual sampling of what was retrieved from them are consequently irrelevant under the circumstances. Appellant's contention is obviously a case of pleading to allow fanciful possibilities deflect the cause of justice. All the drugs retrieved by PW4 had been duly marked and surrendered to NAFDAC. PW3 at page 184 of the record testified as follows:

"The Sales representative of ROCA pharmacy made a written statement to the Police and Batch 02008 was sampled again in the presence of superintendent pharmacist, production pharmacist and analyst of Barewa pharmaceutical Ltd. The sample was in triplicate, one set given to the three officers of Barewa Pharmaceutical Ltd. One set was sent to NAFDAC Control Laboratory. The third set was given to the investigating Police officer (IPO) as exhibit'

PW5 a Deputy Superintendent of Police attached to Federal Task Force Counterfeit and fake Drugs Police Squad NAFDAC testified that this case was referred to the squad for investigation by Establishment Inspection Directorate NAFDAC which also transferred to them five cartons of suspected contaminated My Pikin Baby Teething mixture. PW5 testified:

"Mr. Ezekiel Akerele a sales representative of ROCA Pharmaceutical Ltd of no. 34 Balogun Street Agege, Lagos who is a distributor of Barewa Pharmaceutical Ltd from whom the inspection  Directorate of  NAFDAC  recovered  the alleged contaminated My Pikin Baby teething mixture batch no. 02008 manufactured by Barewa Pharmaceutical Ltd confirmed that the said  pharmaceutical  product   batch   02008   is  among the pharmaceutical product recovered from him. The accused persons were called upon. They came and inspected the products and confirmed that the product batch 02008 was manufactured by Barewa Pharmaceutical Ltd. The Police form D22 was filled containing the particulars of the alleged contaminated My Pikin Baby Teething mixture and the names of the accused persons. The product batch was packaged and sealed in the presence of the accused persons in three units. On each of the sealed units of the product the accused persons wrote their names and signed. I countersigned. One of the sealed units of the product was given to the accused persons. One of the units was retained by the Federal Tax Force on Counterfeit and Fake Drugs Police Squad Investigation team. One of the units accompanied with the Police form D22 was forwarded to NAFDAC Laboratory for analysis"

Learned counsel for the appellant had contended thus:

"Whereas PW5 confirmed receiving the samples on 28/11/08, the packaging and sampling was done on 14/01/09 44 DAYS AFTER THE PRODUCTS WERE RECEIVED by PW5 and his team (page 209 of the record)!!! No explanation was given by PW5 for the 44 day interlude between the initial arrest of the accused persons, and the date the sampling was earned out. In such a sensitive case, Involving evidence the integrity of which must be secured and accounted for at every moment, PW5 waited for 44 days before conducting the sampling procedure on the suspected adulterated products already in their custody."

Learned counsel overlooked the fact that before PW5 took over the drugs it had already been sampled so that the sampling of 14/10/09 was a second sampling as shown in the evidence of PW3 set out above that "The Sales representative of ROCA pharmacy made a written statement to the Police and Batch 02008 was sampled again". The 44 days wait was consequently of no moment. Besides as earlier stated, Barewa Pharmaceuticals are the only manufacturers of the drug. They identified the products as their own. The possibility of substituting the samples with another is nonexistent. There was no doubt whatever that the samples are same as the ones retrieved by PW4 who confirmed the samples. The attempt by learned counsel to challenge the authenticity of the drugs at this point is surely an afterthought.

PW6, Segun Mamodu, Deputy director and Head Central Drug Laboratory, NAFDAC Yaba testified that the sample of a product labeled and sealed as My Pikin Baby Teething Mixture Batch no. 02008 manufactured by Barewa Pharmaceutical ltd was brought to their laboratory by the Investigating Police Officer from NAFDAC Enforcement Directorate for analysis. It was found that it contained Diethylene. The sample was taken to their sister Laboratory Oshodi for confirmatory tests. He prepared a Laboratory Report which was admitted in evidence as Exhibit T. PW7; Anikoh Musa Ibrahim the analyst in NAFDAC Laboratory Oshodi also found that the sample was contaminated by Diethylene Glycol. He also prepared a Report admitted in evidence as Exhibit U.

One of the complaints of the Appellant is that the Report of PW6 was hearsay because the analysis was not carried out personally by PW6 but by one Adekunle Segun Olawole, the head analyst under PW6. This argument in my view is misconceived. Adekunle worked under the direct supervision of PW6. Whatever is done in that Department under the supervision of PW6 is his act as the head of the Department. As to how the product came to the laboratory, the evidence of PW6 is that it was brought to them by the IPO. From the cross-examination of PW7 at page 220-223 of the Record, there is no confusion as to what was received. PW7 testified that the sample came from the Central Laboratory Yaba to his Laboratory in Oshodi. Although PW7 referred to the sample as My Pikin Paracetamol Syrup, in Re-examination he said it was the same as My Pikin Baby Teething Mixture. Such minor discrepancies which result from failure on the part of PW7 to pay attention to the full details of the actual name of the product cannot be a ground for questioning the judgment of the court. See Musa v The State (2009) 15 NWLR (Pt. 1165) 465 @ 489; Habib Musa v. The State (2013) LPELR-19932(SC).

The truth of the matter is that throughout the entire gamut of the evidence led in this case, the appellant and his co-accused did not at any point deny their presence during the packaging of the samples or the fact that the drug My Pikin Baby Teething Mixture batch 02008 was manufactured by the 3rd accused/convict. They knew and accepted that there was a problem and they were as anxious as NAFDAC to withdraw the drugs from the market to avoid further loss of life, hence their letter exhibit M to PW4. There was in fact no break in the chain of handling the samples. Samples of the drug were tested at various stages as shown in the list of additional exhibits at page 384 of the supplementary records tendered by the defence through PW1. The process was clear and smooth and culminated in the certificates issued by PW6 and PW7 Exhibits T and U. I agree with learned senior counsel for the Respondent that based on these certificates emanating from NAFDAC laboratories in Yaba and Oshodi, the sample was contaminated with the contaminant Diethylene Glycol. I join the Respondent in asking "what other scientific evidence or proof could be more sufficient and convincing given the provision of Section 55(1) and (2) of the Evidence Act?” The sections provide:

"55 (1) Either party to the proceedings in any criminal case may produce a certificate signed by the Government Pharmacist, the Deputy Government Pharmacist; an Assistant Government Pathologist or Entomologist or the Accountant-General, or any other Pharmacist so specified by the Government Pharmacist of the Federation or of a State, any pathologist or entomologist specified by the Director of Medical Laboratories of the Federation or of a State or any accountant specified by the Accountant-General of the Federation or of a state (whether any such officer is by that or any other title in the service of the state or of the Federal Government), and the production of any such certificate may be taken as sufficient evidence of the facts stated therein"

(2) Notwithstanding subsection one of this Section any certificate issued and produced by any officer in charge of any laboratory established by the appropriate authority may be taken as sufficient evidence of fact stated in it."

In his Reply brief, Mr. Ideh for the Appellant submitted that the presumption of regularity of the certificates based on Section 55(1) and (2) of the Evidence Act is misconceived. He posited that that the law is settled that to satisfy the question whether there is sufficient proof or evidence that the product My Pikin Baby Teething Mixture' was dangerous, the prosecution must prove:

(a) That the identity of the product given to the analyst was the same as the one actually analyzed;

(b) The integrity of the process from sampling all the way to tendering of the product in court; that there is no break in chain.

(c) The integrity of the sampling is unquestionable.

I have shown in this judgment so far that the identity of the product given to the analysts was the same as the one actually analyzed. I have also shown that the process of sampling all the way to the tendering of the products in court was unbroken and that the integrity of the sampling cannot rightly be questioned. The 3rd accused/convict Barewa Pharmaceutical is the only manufacturer of the mixture duly registered with NAFDAC. It is safe to assume that the baby mixture once properly packaged as normal and the chain of distribution is confirmed by Barewa; that the product is that of Barewa unless there is evidence to the contrary. In the instant case there was no such contrary evidence. Rather both the appellant and his co-accused and PW4 confirmed the bottles to be that of Barewa before they were sent to the Laboratory for analysis. There did not appear to be any possibility of the drugs being substituted with another. There is no question of the chain snapping and a reasonable doubt arising. Both PW6 and PW7 are officers in charge of the Laboratories established by NAFDAC, the appropriate authority. In the circumstances, the certificates presented by PW6 and PW7 Exhibits T and U have to be taken as sufficient evidence of the facts stated therein. The evidence led by the Appellants did not in any way detract from the facts in the certificates that the samples analyzed were contaminated. Issue one is resolved in the affirmative against the Appellants.

On issue 2, contrary to the contention of learned counsel for the Appellant there are no substantial contradictions in the evidence of PW2, PW3 and PW5. The argument of learned counsel for the appellant ran thus:

PW2 stated at pages 153-158 of the records that she visited the factory of Barewa Pharmaceuticals Limited three (3) times on the 19th & 24th 25th of November. According to PW2 she forwarded the samples taken during her visit on 24/11/08 to the NAFDAC Laboratory for analysis. PW2 never gave evidence that she recovered any products from Roca Pharmacy, nor that she sent any samples of products to the Federal Task Force on Counterfeit and Fake Drugs Enforcement Directorate.

Excerpts of her evidence of 15/05/12 are hereunder reproduced for ease of reference:

"We thereafter inspected their quality assurance quarantine room where we took some samples of My Pikin Teething Baby Mixture. I drew up a sample receipt form detailing the batches of my Pikin teething mixture, which included Batch No. 02008 manufactured October 2008 to expire October 2011. 1 also included samples of the raw materials that we took. I signed on behalf of NAFDAC and Mr Adeyemo signed on behalf of Barewa Pharmaceuticals Ltd. We departed the company and forwarded the samples taken to NAFDAC Laboratory for evaluation."

In clear contradiction to the above, PW5 testified on 19/04/12 as follows:

"... The investigation was ongoing. Botch 02008 was among the other products recovered from Roca Pharmacy. The product Roca (sic) was sent to the Federal Task Force on Fake and Counterfeit Drugs bv Mrs. Owolabi Deputy Director of Establishment Inspectorate Directorate NAFDAC"

In further contradiction of the statement of PW5, PW3 testified as follows at pages 183184 of the records:

"... The sales representative of ROCA Pharmacy made a written statement to the police and Batch 02008 was sampled against in (sic) the presence of superintendent pharmacist, production pharmacist and analyst of Barewa Pharmaceuticals Ltd. The sample was in triplicate one set given to three officers of Barewa, one set was sent to NAFDAC Control (sic) Laboratory. The third set was given to the Investigating Police Officer (IPO) as exhibit. The case was transferred from NAFDAC Enforcement Directorate to the Legal department of NAFDAC "

Respectfully, we contend that the learned trial Judge in convicting the Appellant, failed to properly avert his mind to the three materially different versions of the same alleged factual situation; as testified by PW2, PW3 & PW5. Whereas PW3 stated that she dispatched one set of the samples to the IPO, he (PW5) testified to having received it from PW2, under the cover of a written document He could therefore not have been mistaken. Surprisingly the written document was not tendered.

On account of all these material contradictions, it is our submission that the learned trial Judge ought not to have convicted the Appellant as charged on Counts 3 & 4 as the testimony of PW2, PW3 A PW5 ought not to have been believed and consequently relied upon.

There are no material contradictions in the evidence of the three witnesses. The first quoted evidence of PW2 referred to samples collected from the factory of 3rd accused/convict before the mopping up exercise and the return of the samples retrieved by PW4 of ROCA Pharmacy. These samples were forwarded to NAFDAC Laboratory for evaluation as testified by PW2. At page 158 and 160 of the printed record, PW2 further testified:

"The company was directed to indicate the recall of their products. The then Director-General directed that we mop nationwide the product My Pikin Baby Teething Product nationwide. I thereafter transferred as directed all documents and products moped up to the Enforcement Directorate of NAFDAC...'

The evidence of PW5 clearly tallies with the above further evidence of PW2. PW5 was right when he said that the product from ROCA Pharmacy was sent to the Federal Task Force on Fake and Counterfeit Drugs by Mrs. Owolabi Deputy director of Establishment Inspectorate Directorate NAFDAC. The evidence of PVV3 at pages 183-184 reproduced above also tallies with the evidence of PW5 at pages 195-198 of the Record. PW3 was actually describing the scenario that occurred in the presence of PW5 as they worked as a team. PW5 obtained the statements of the accused persons and that of PW4 of ROCA. He and PW3 then again prepared the samples in triplicate and distributed as indicated by PW3. The learned trial judge was consequently right in acting on the evidence as there were no material contradictions in the statements.

On the discrepancy relating to PW7 referring to the sample as "My Pikin Paracetamol Syrup" as against "My Pikin Baby Teething Mixture"; I agree with learned senior counsel for the Respondent that it is a mere discrepancy resulting from failure of human memory which cannot lead to the setting aside of the judgment of the lower court. As I stated earlier, Although PW7 referred to the sample as My Pikin Paracetamol Syrup, in re-examination he said it was the same as My Pikin Baby Teething Mixture. As rightly submitted by Respondent's counsel it is a notorious fact that it is only the same products manufactured by the same company that can share the same brand name, content, size, batch number and NAFDAC registration number.

The particulars disclosed in exhibit U by PW7 are the same as disclosed in exhibit T, save that exhibit T mentioned My Pikin Baby Teething Mixture. My Pikin is a brand name for teething drugs manufactured by Barewa pharmaceutical and no other pharmaceutical company-in Nigeria bears such name. Furthermore, it was alleged for the Appellant that exhibit F described the product to have a plastic screw cap whereas in exhibit U, the description of the sample My Pikin Baby Teething Mixture was with a liquid amber coloured glass bottle with tamper proof metallic screw. The truth is that these insignificant discrepancies are not enough to entitle the appellant to an acquittal.   It is only when the contradictions in the evidence of witnesses called by the prosecution are substantial and fundamental to the main issues in question as to create doubts in the mind of the court that an accused person may be entitled to an acquittal. See the cases of Isibor v. State (2002) 9 NSCC 248 @ 254; Ndike v. State (1994) 8 NWLR (Pt. 360) 33. The discrepancies here are conceivably within the margin of human error. See the following cases referred to by Respondent's counsel: Okonji v. State (1987) 1 NWLR (pt.52) 659; State v. Mbanpbese & anor (1988) 3 NWLR (pt.84) 548; Onubogu v. State (1974)9 S.C. l;Wankey v. State (1993) 5 NWLR (pt.295) 542 at 552. In the case of Dibie v State (Supra) also cited by learned counsel for the Respondent the SC observed:

"Contradictions in evidence of prosecution witnesses can only be of assistance to an accused person if they are material and substantial. Where contradictions are immaterial and are regarded as mere discrepancies, they cannot exculpate an accused from criminal responsibility... Evidence of witnesses in court is not an exact thing like a triangle in geometry. Human beings will see the same object and describe it in different ways with some personal embellishments here and there that colour the object in some inarticulate difference. This does not detract from the main object..."

PW7 testified at page 220 of the Record that Exhibit R containing my pikin baby teething mixture batch no 02008 manufactured by Barewa pharmaceuticals Ltd is what he was asked to analyze. The exhibit was properly identified by PW7 during his examination-in-chief as being the same as the sample analyzed which was also identified by PW6 as being the same as the sample he analyzed. By the testimonies of PW4 and PW5, the accused persons did not present their own set of drug sample to contradict or disprove the authenticity and accuracy of exhibit R.

Learned counsel for the Appellant also made an issue of the fact that the prosecution did not produce any death certificate in proof that death occurred as a result of the sales or distribution of the contaminated batch of My Pikin. As rightly submitted by learned counsel for the Respondent, the charge here is not one of murder. Consequently production of death certificate is unnecessary. The charge is for conspiracy and selling of dangerous drug to ROCA pharmacy. It was proved scientifically that My Pikin "batch 02008 contained diethylene glycol. PW1 in her unchallenged evidence testified that diethylene Glycol is a lethal chemical.

On whether there was any evidence of conspiracy to sell dangerous drugs, learned counsel for the Appellant had submitted that the offence was not a strict liability one and that the prosecution must prove the mental element as well as the physical act for which the offence of conspiracy can either be proved directly or reasonably inferred. He cited the cases of Oyediran v. Republic (1967) NMLR 127 and Oduneye v. State (2001) 2 NWLR (Pt 697) 311.

In the case of Obiakor v. State (2002) 10 NWLR (Part 774-776) 612 @ 628-629, Kalgo JSC discussed the nature of the offence of conspiracy thus:

"Conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed. Because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts..And for circumstantial evidence to ground conviction, it must lead to one and only one conclusion i.e the guilt of the accused. See Popoola v. Commissioner of Police (1964) NMLR 1; R. v. Roberts (1913) 9 CAR 189 Raphael Ariche v. State (1993) 6 NWLR (Pt.302) 752. The facts to be relied upon for conviction must be consistent, cogent and must irresistibly lead to guilt of the accused."

Further in the case of Clark v State (1986) 4 NWLR (Pt. 35) 381 @ 394H Kolawale JCA delivering the lead judgment observed:

"What then is the nature of evidence required in a case of conspiracy of this kind? Generally, it may be stated that where persons are charged with criminal conspiracy, it is usually required that the conspiracy as laid in the charge be proved, and the person charged be also proved to have been engaged in it, I think it is well recognized in law that it is not necessary that it should be proved that the appellants met to concoct the scheme which led to the theft of the subject aircraft

I believe that the essential ingredient of the offence of conspiracy or the gist of the offence lies in the bare engagement and association to do an unlawful thing which is contrary to or forbidden by law, whether that thing be criminal or not, whether or not the accused persons had knowledge of its unlawfulness. It is of course necessary to constitute the offence that there should be a criminal purpose common to all the conspirators. (See R. v. Clayton (1943) 33 Cr App.R 113)"

Did the accused persons conspire among themselves to sell dangerous drugs to wit My Pikin Baby Teething Mixture to Roca Pharmacy? The evidence did not disclose any such agreement. Can an inference of such an agreement be drawn from the evidence led in this case? The actual reasoning of the lower court in reaching its judgment is at pages 365 - 369 of the printed record. The Court did not evaluate the evidence led by each side of the divide on the matter of conspiracy before convicting the accused persons on count 3. Was there evidence from which a criminal purpose common to the appellant and his co-accused can be inferred? There does not in my humble view appear to be any evidence of complicity or agreement between the appellant and his co-accused persons to sell dangerous drug to Roca Pharmacy or any other person. As rightly submitted by learned counsel for the Appellant, PW1's evidence was that a school certificate holder purchased a keg of Diethylene Glycol wrongly labeled as Propylene-Glycol. This is what led to the quagmire the appellant and his co-accused found themselves in. It cannot be said that they conspired to buy the contaminated chemical. Yes, there may have been negligence in allowing a school certificate holder to purchase from the street instead of from a reputable company. There may have been negligence in not having the necessary materials to carry out proper test of raw materials and finished product. The evidence of PW1 and PW2 with respect to their visit of 25/11/08 may have shown a great deal of laxity and failure to follow procedure to ensure safety of drugs manufactured by the company. All these do not in any way show complicity to sell dangerous drug. They certainly did not deliberately plan, agree or intend what happened to happen. In Oduneye v. State (supra) the Supreme Court per Achike JSC at page 325 A-B observed:

"The overt act or omission which evidence conspiracy is the actus reus and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. The gist of the offence is the meeting of the minds of the conspirators. This is hardly capable of direct proof for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal act of the parties concerned done in pursuance of the apparent criminal purpose in common between them, and in proof of conspiracy the acts or omissions (and or commissions) of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. In essence, conspiracy is invariably an offence that is inferentially deduced from the acts of the parties thereto which are focused towards the realization of their common or mutual criminal purpose."  
   
See generally the following cases: KAYOOE V ST A TE (2016) LPELR-SC.83/2012; OKAFOR V THE STATE (2016) LPELR-SC.843/2014: JOHNV. STATE (2016) LPELR-SC.59/2014

There is nothing in the evidence adduced by the prosecution from which an inference may be drawn of a meeting of the minds; or the existence of a common design or mutual agreement by the appellant and his co-accused persons to sell dangerous drug to ROCA Pharmacy or any other person. The Appellant and his co-accused who are the Quality Assurance Manager and General Manager/Production Pharmacist of the 3rd Accused Barewa Pharmaceutical Ltd were negligent bothering on recklessness given their wealth of experience in drug production and knowledge of the danger to the health of consumers if mistakes are made. The evidence of PW1 and PW2 chronicled the lapses noted during their visit to the factory premises on 25/11/08 which lapses were confirmed by the appellant in Exhibit 01, his statement to the Police. Therein he stated:

“The company has written standard Operation Procedure for all raw materials including Propylene Glycol testing such as identification tests and solubility. But other tests that could differentiate it from other materials such as boiling point and other tests could not be carried out due to lack of reagent. TLC is performed on propylene glycol but because of lack of ammonium hydroxide it could not be standardized, thus not documented. The laboratory is not adequately equipped for the test of contamination and other tests."

None of the evidence disclosed any meeting of the mind of the appellant and his co-accused to sell dangerous drug to Roca pharmacy. Indeed the evidence contradicts the theory of a conspiracy. The learned trial judge was consequently wrong to have convicted the appellant and his co-accused on count 3 of the charge.

Learned counsel for the appellant complained that the learned trial judge failed to consider the evidence of DWI but rather relied heavily on his unsworn statement to the police. The unsworn testimony of DWI is almost in the nature of a confession. No objection was raised to its admissibility at the time it was tendered as an exhibit. DWI did not disclaim the statement in his oral evidence in court. But he made statements on oath which contradicted his statement to the police. For example, in his statement to the police, he stated plainly that the laboratory was not adequately equipped for tests of contamination and that because of inadequate supplies; they could not guarantee the quality of both raw materials and the finished product My Pikin". In his oral evidence in court, DWI backpedalled and recanted from these confessional statements. The fact that an accused has retracted a confessional statement does not mean that the court cannot act on it. Before a conviction can be properly founded on a retracted statement, it is desirable to have some evidence outside the confession which would make it probable that the confession was true. See Ubierho v. The State (2005) 5 NWLR (Pt. 919) 644.The evidence of PW1 and PW2 on their visit to the factory supported the unsworn statement to the police. The learned trial judge was right in acting on the confessional statement. I am of the firm view that the evidence adduced by the prosecution even without the unsworn statement and oral evidence of DWI was credible enough to support the conviction of the Appellant on count 4. Subject to the setting aside of the judgment of the lower court on the count of conspiracy, Issue 2 is resolved against the Appellant.  
 

On whether the sentence of seven years imprisonment on count 4 was justified, 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. See the case of Omokuwajo v. FRN (2013) LPELR-20184(SC). 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 7 years instead of the maximum of 10 years. We find no reason whatsoever to interfere with the lower court's exercise of discretion in imposing a sentence of seven years with respect to count 4.

In the final result, this appeal succeeds in part. The conviction and sentence of the Appellant on count 3 is hereby set aside. The conviction and sentence of the appellant on count 4 is affirmed.

**YARGATA BYENCHIT NIMPAR, JCA**

I had the privilege of reading in draft the judgment just delivered by my learned brother CHINWE EUGENIA IYIZOBA, JCA and I agree with the reasoning and conclusions arrived at in the judgment.

The issues raised in this appeal boils down to majorly evaluation of evidence. The Appellant sought to raise a lot of contradictions and loopholes in the case of the Respondent. For example, he raised doubts on the source of the product samples with Batch No. 02008. However, the fact still remains that ROCA Pharmacy acted on the instructions of the Appellant when it went to retrieve the drug from the wholesalers it supplied to. Since the Appellant did not prove any other fact to the contrary, neither was the testimony of PW4 discredited during trial, then, there is a presumption of truth in that fact. See the case of EGHAREVBA v. STATE (2016) LPELR - 40029 (SC) which states thus:

"Now, what is proof beyond reasonable doubt? The answer is provided in the case of K.GOPAL REDDING V. STATE OF AP AIR 1979 SC 387 wherein the Indian Supreme Court held, inter alia: "A reasonable doubt does not mean some light, airy, insubstantial doubt that may flip through the minds of any of us about almost anything at some time or other, it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons." More so, it is of no consequence that the investigator, PW5 did not go further into investigating the various deaths allegedly caused by the product.

The Appellant was only charged with manufacturing and distributing an adulterated drug and not causing death and consequently, investigations which bordered on whether the drugs manufactured and distributed by the Appellant were adulterated is sufficient for the purpose. The fact that drugs distributed and sold contained chemicals dangerous for human consumption is bad enough. Death must not be proved.

As to the credibility of the witness PW6, who testified on the conduct of the sample analysis, there is a presumption of regularity in the manner of the sampling besides the Appellant did not raise any evidence to the contrary. It was also not necessary for the forensic expert, who analysed the drugs, to come to Court, in person, to tender the document for it to be admitted. What governs admissibility is relevance, the fact that the document had been pleaded and is properly tendered in the correct form and by the person it should be produced. While it is quite settled that it is the maker of a document that should tender the document in any legal proceedings in court, this is not the case here. The witness who tendered the report in this case was also a signatory to the report and this is sufficient to enable him tender such document in court. The contention as to hearsay evidence is not tenable, see IFEANYI CHIYENUM BLESSING V. FEDERAL REPUBLIC OF NIGERIA (2012) LPELR - 9835(CA). Besides, the testimony by an officer in charge of a laboratory established by appropriate authority may be taken as sufficient evidence of facts stated in it. This position was clearly stated in the case of IFEANYI CHIYENUM BLESSING V. FEDERAL REPUBLIC OF NIGERIA (SUPRA) as follows: "By section 55 (1) (2) and (3) of the Evidence Act, 2011; (1) "Either party to the proceeding in any Criminal case may produce a Certificate signed by the Government pharmacist, the deputy Government  pharmacist, an Assistant Government pharmacist, a Government Pathologist or entomologist or the Accountant - General, or any other pharmacist so specified by the Government pharmacist of the Federation or of a state, any pathologist or entomologist specified by the Director of Medical Laboratories of the Federation or of a State or any accountant specified by the Accountant General of the Federation or of a state (whether any such officer is by that or any title in the service of the state of the Federal Government), and the production; of any such certificate may be taken as sufficient evidence of the facts stated in it (2) Notwithstanding subsection (1) of this section, any certificate issued and produced by any, officer in charge of any laboratory established by appropriate authority may be taken as sufficient evidence of facts stated in it" In any case, when an official act is shown to have been done in a manner substantially regular, it is presumed that all formal requisites for its validity were complied with. The presumption is rebuttable only by contrary evidence. The onus is therefore on the party alleging the contrary to rebut this presumption of regularity which enures in favour of the plaintiff. See NWACHUKWU v. THE STATE (2002) 12 NWLR [pt.782] 543, HORSFALL v. AMAIZU & ORS(2013)  LPELR-22874(CA). The Appellant failed to tender any evidence to the contrary. And may I also say that the submissions of the Appellant that establishing the integrity of the unbroken chain is a pre - condition to establishing the offence is not backed up by any authority.

In my opinion the certificate of test analysis in respect of the drug is sufficient to satisfy the burden of proof required by law under Section 138 (1) of the Evidence Act, see FEDERAL REPUBLIC OF NIGERIA V. JOSEPH DANIEL (2011) LPELR - 4152(CA). The certificate having been tendered and admitted in evidence can be relied upon by the court to determine the content and quality of the sample.

The testimony as to the metallic screw cap being different from the original plastic cap or as to the contradictions of the name (whether referred to as "My Pikin Paracetamol" or "My Pikin Teething mixture") is not sufficient to discharge the accused. The issues raised by the Appellant as to his unconsidered testimony do not help his case. The fact still remains that it was the sample manufactured by the Appellant that was tested but found to contain the contaminant. The case of UWAGBOE V. STATE (2008) ALL FWLR (PT. 419) 425 AT 432 - 433 (SC) states as follows:

"Two pieces of evidence contradict one another when they are by themselves inconsistent A discrepancy may occur when a piece of evidence stops short of or contains a little more than what the other piece of evidence says, or contains some minor differences in details. Minor discrepancies between a previous written statement and subsequent oral testimony do not destroy the credibility of witness."

The Appellant argued that the intent of conspiracy and selling of the drug was not proved. As to the issue raised on the proof of conspiracy, where the count of conspiracy is based on the same facts as those of the substantive offence, courts are enjoined to deal with the substantive charge first. This is logical because should the substantive charge be unproven, there would indeed be no conspiracy to commit the substantive offence, see ADELARIN LATEEF & ORS. v. THE FEDERAL REPUBLIC OF NIGERIA (2010) LPELR - 9144(CA).

Now to the substantive offence; S. 1 (18) (a) (ii) of the Miscellaneous Offences Act for which the Appellant were convicted states as follows:

"Any person who deals in, sells, offers for sale or otherwise exposes for sale any petroleum, 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, 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 years'"

The ingredients of the offence which must be established are that: 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 product 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'

Intention to sell the drug' is not an ingredient of the substantive offence for which the Appellants were convicted. I find that the three ingredients have been sufficiently established and that the trial court rightly convicted the Appellants on count 4.

   
Now to the offence of conspiracy. My learned brother, IYIZOBA, JCA has aptly conveyed my exact thoughts on this issue. I need not say more.

On the whole, I agree that the offence of conspiracy in count 3 was not established and the conviction and sentence on count 3 is hereby set aside. The appeal succeeds in part. However, the effect of this decision will have no effect on the sentencing since the 7 years sentence on the

**JAMILU YAMMAMA TUKUR JCA.**

I had the priviledge of read in draft the lead judgment just delivered by learned brother Chinwe Eugenie Iyizoba JCA.  
I agree with the reasoning and conclusion in the judgment. I also allow the appeal in part I abide by the consequential orders made therein.