

SUPREME COURT OF NIGERIA
17TH FEBRUARY, 1995, SC. 195/1992
COR AM: M.L. UWAIS, A.B. WALI, E.O. OGWUEGBU,
U. MOHAMMED, S.U. ONU, JJSC.

MRS PATIENCE OMAGBEMI APPELLANT

AND

GUINNESS NIGERIA LTD RESPONDENT

APPEALS - Issue - Grounds of appeal - Whether the lone issue - Is related to any of the eight grounds of appeal.

APPEALS - Single issue - That is not related to any ground of appeal - Is to be struck out - Leading also to striking out of the appeal.

FACTS

The Appellant as Plaintiff was formerly employed Defendant/ Respondent as a staff nurse. Appellant's appointment was terminated following a re-organization by the Respondent. She collected all her terminal benefits. By virtue of a document (exhibit 1) addressed to its workers, Respondentsought to employ about 1000 workers most of whom would be those laid off. Appellant had a chat with the Respondent and without re-absorbing her, the post of staff nurses was advertised in Observer Newspaper.

Appellant filed an action before the Benin-City High Court seeking to be re-absorbed by Respondent, amongst other reliefs. The trial court found that by the custom of L.I.F.O. (last in first out) enshrined in s.20 of the Labour Act, Appellant was to be in the Respondent's service until age 55. Respondent's appeal to the Court of Appeal was upheld. Appellant has now appealed to the Supreme Court upon a lone issue not related to any of her eight grounds of appeal.

HELD (Unanimously striking out the appeal per lead judgment of **ONU JSC**)

Whether issue is related to grounds of appeal

1. With or without the preliminary objection, which in any case has been withdrawn and struck out, a close look and careful scrutiny of the lone issue formulated vis-a-vis each of grounds 1, 3, 5, 6, 7, 8, 9 and 10 all of which

are set out above, clearly indicates that the lone issue is neither related to any or distilled from each or all of these grounds. (P. 458 E)

Issue - Whether to be struck out

2. Where such is the case the issue is unarguable and is a fortiori incompetent and ought therefore to be struck out. The result is that the appeal itself be and is accordingly struck out. (P. 458 E)

NOTABLE POINT OF INTEREST

UWAIS JSC

1. Need to base issue on grounds of appeal

It is now settled that any issue or issues for determination formulated, in either the brief of argument of the Appellant or the Respondent, in any case, must be based on and be pertinent to the ground or grounds of appeal that give life to the appeal. If the issue or issues do not conform with the grounds of appeal, then they cannot stand for being irrelevant. It follows, therefore, that any argument in the brief based on the faulty issue for determination is equally irrelevant to the appeal. The result is that the mandatory requirements of Order 6 rule 2 of the Supreme Court Rules, 1985, have not been satisfied. (P. 459 A)

OGWUEGBU JSC

2. When an issue cannot be argued

In this appeal, the only issue formulated by the appellant has no support from any of the remaining six grounds of appeal. Issues formulated for determination by an appellant should arise from the grounds of appeal filed and parties to an appeal will not be allowed to argue any issue not covered by the grounds of appeal. (P. 460 E)

REPRESENTATION

Mrs. Ayanke Wilson for the appellant.
A.O. Alegeh Esq. for the respondent.

CASES REFERRED TO

Ifediorah v. Ume (1988) 2 NWLR (Pt. 74) 5

Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718

National Bank of Nigeria Ltd. v. Nigerian External Telecommunication Ltd (1986) 3 NWLR (Pt. 31) 667

Omomiwa v. Oshodin (1985) 2 SC 1

Modupe v. The State (1988)4 NWLR 130

Oniah v. Onyia (1989)1 NWLR (Pt.99) 514

Labiya v. Anretiola (1992)8 NWLR (Pt.258) 139

STATUTE & RULES REFERRED TO

Labour Act s.20

Supreme Court Rules 1985 0.6 r.2

LEAD JUDGMENT BY ONU JSC

The appellant, who was plaintiff, by her amended Statement of Claim claimed against the respondent (a limited liability Company), which was defendant, in the High Court of Bendel (now Edo State) holden at Benin City, the following: (a) a declaration that at all material times the Company is bound by the rule and practice LIFO.

- (a) a declaration that the said custom exists and binds the defendant Company; i.e. priority of retrenched staff over fresh intakes in the matter of filling resuscitated posts;
- (b) a declaration that the Company is bound by its own policy direction;
- (c) a declaration that having derived goodwill and benefit from its Policy Directive of 29th October, 1984, it is too late now for the defendant to renege in the case of the plaintiff; and plaintiff has acquired a vested right to be treated in accordance with the said Policy Directive;
- (d) an order for perpetual injunction that the defendant stay action in respect of the advertisement referred to above;
- (e) an order of reinstatement to the post advertised or any resuscitated position of similar nature;
- (f) an order that plaintiff is entitled to continue her service under the defendant Company till her retiring age of 55 unless earlier retired on grounds of ill-health or other reasonable grounds including proven inefficiency;
- (g) or in the alternative special damages being total emoluments due from the date of the original removal until age 55 including all annual increments less redundancy fees paid.
- (h) general damages.”

The parties, having exchanged pleadings as ordered by the trial court,

later amended same before the case went to trial. After witnesses on either side had testified, the learned trial Judge (Obi, J.) in his judgment dated September 15, 1987, found in favour of the appellant to the effect that respondent was bound by the custom of L.I.F.O; that appellant's retrenchment made in derogation of the statutory provision enshrined in S.19 (now S. 20) Labour Law should not be allowed to stay. He therefore granted her reinstatement and made the order that she was to be in employment until age 55 and finally granted the perpetual injunction sought.

The respondent being dissatisfied with the said judgment appealed to the Court of Appeal. Before I set out the facts of the case herein it may be necessary to make the following observations in order to throw light on the surrounding circumstances to the case thus:

There is what the appellant calls a sister appeal (Appeal No. S.C. 189/199: Margaret Agoma v. Guinness Nigeria Ltd.) which although decided by another High Court Judge but of the same Benin Judicial Division, learned counsel for the appellant at first sought to have it consolidated with the instant appeal. As it later transpired, realising that even though the facts of the two cases are similar, they raised separate and distinct issues. Learned counsel for appellant called off her insistence to have both cases consolidated. Instead, she has requested in her brief to have both cases heard at the same time. That is exactly what we have done, as today, judgments in the two cases are being delivered one after the other, having earlier on 21st November, 1994 heard both in like manner and reserved judgment.

Now the facts of the case:-

The appellant was employed by the respondent Company as a staff nurse in 1979 and remained in that employment until the 14th day of July, 1984 when, following a re-organisation embarked upon by it, the post which she held was declared redundant by it. The result is that a letter written on that day (14/7/84) vide Exhibit 3, was given to the appellant terminating her appointment and upon her acceptance of it was paid her terminal benefits including one month's pay in lieu of notice thereof. It is pertinent to point out that the respondent was only one of several workers affected by the retrenchment. In October, 1984, about 3 months after the termination of the appellant's employment and about two years before the institution of her action at the High Court, the Managing Director of the respondent Company issued an internal information sheet to "all employees" stating among other things that the Personnel Department had been instructed to recruit about 1,000 employees and that most of those to be recruited would be those laid off. The said information sheet (No.10) was admitted and marked as Exhibit 1 at the trial. There was uncontradicted

evidence at the trial that out of the 700 former employees that were re-trenched, 400 were re-employed while 200 new ones were recruited.

On May 20 1986, the appellant was invited for a chat by the respondent's Personnel Manager, who testified as DW2, and who was said to have informed the appellant at their meeting, that she would be contacted if her services were required by the respondent.

In October, 1986 the respondent advertised a vacancy for staff nurses (with 4 W.A.S.C./G.C.E O/L Credits, including English Language at one sitting). The said advertisement was admitted at the trial as Exhibit '5'. The appellant who did not apply for the position advertised wrote to the respondent (vide Exhibit 6) pointing out therein how at her meeting with DW2 she was promised that she would be recalled. Appellant's Solicitors followed up Exhibit 6 by writing a letter (Exhibit 6A), asking that she be re-employed. Upon the failure of the respondent to re-engage her, the appellant instituted the action herein against the respondent claiming the declarations, injunction, reinstatement and damages herein before set out. At the trial the appellant sought to establish two customs/practices, to wit: first, the principle of L.I.F.O. (Last in, first out) as exemplified in section 19 (now section 20) of the Labour Law, 1974, Cap. 198 and second, giving priority to retrenched staff in filling resuscitated positions. Based on these principles, appellant had called a Ministry of Employment, Labour and Productivity staff, PW2, who in his testimony stated that in the practice of L.I.F.O, an employer such as respondent would not have a staff imposed on it: while the second practice was not in vogue to his knowledge.

For its part, the respondent contended that its relationship with the appellant was governed by Exhibit '7A', namely respondent's Conditions of Employment which did not include any of the alleged custom/practice. That the post advertised was not the same post previously held by the appellant, adding that appellant did not possess the qualifications for the post advertised.

The learned trial Judge, after considering the evidence adduced, entered judgment in favour of the appellant to the effect that the respondent was bound by the custom of last in, first out' or LIFO as enshrined in section 19 (now Section 20) of the Labour Act, 1974; that the retrenchment of the appellant made in derogation of the statutory provision could not be allowed to stay and consequently was entitled to reinstatement. Further, it was ordered that appellant was entitled to continue her service under respondent till her retiring age of 55 years unless earlier retired on grounds of ill-health or other reasonable grounds and finally perpetual injunction was granted restraining the respondent from further action in respect of the advertised position of staff nurse in Exhibit 5 of Thursday

Aggrieved by that decision, the respondent as herein before al-
luded to appeal to the Court of Appeal, Benin which on February 20th,
1992, reversed that decision by allowing its appeal and holding inter alia:

(i) Appellant was retrenched on 14/7/84 by Virtue of Exhibit 3,
Written to terminate her appointment.

B (ii) That when appellant was retrenched she collected her entitle-
ments and no contract was made nor could be inferred that she would be
re-engaged when the respondent Company resuscitated.

C (iii) That the appellant at the time she sued respondent in 1986
purporting to act on Exhibit 1 made 3 months after her retirement, was
meant for the consumption of the respondent's staff, she (appellant) no
longer having locus standi to sue since having retired finally on 14/7/84 was
not respondent's staff.

D (iv) That though she looked discriminated against, no law com-
pelled the respondent to re-engage her failure to acquire higher qualifica-
tion (WASC/G.C.E. O/L (S.75) having been used as a ploy.

(v) That Exhibit 3 terminating her appointment was peremptory
and unequivocal and nothing temporary as appellant would have court
believe.

E (vi) That the recall of retrenched workers in Exhibit 1 is clear viz.
"that most of those retrenched be recalled" not *"all"* of them and that
accounts for why only 400 out of the 700 workers retrenched were re-
engaged and 200 out of 1,000 needed recruited as new hands.

F Being dissatisfied with this decision the appellant appealed to this
court on six original grounds. She later sought and was granted leave to
amend her Notice and Grounds of Appeal by way of filing additional grounds
7, 8, 9 and 10, leave to argue the appeal on grounds of facts and mixed
law and facts and in respect of the additional grounds, and amendment to
the Notice and Grounds of Appeal already filed an extension of time to
seek leave, an extension of time to appeal and leave to appeal against the
G judgment dated 20/2/92 and leave to introduce a new line of argument
respectively. Besides, having in her brief indicated the abandonment of
grounds 2 and 4, they are accordingly struck out.

H For purposes of the comments are findings I wish to make hereaf-
ter I think it pertinent to set out the remaining grounds of appeal namely
Grounds 1,3,5,6, 7,8,9 and 10 respectively. Bereft of their particulars the
grounds state:

Ground 1:

The Justices of the Court of Appeal erred in law when they failed to
take cognisance of the emergence and of the effect of a new contract

deriving from plaintiff's promise (to forbear to sue) in consideration of the defendant's promise (to recall plaintiff), which contract sprang up between the parties at/upon plaintiff collecting her entitlement and which contract, indeed, governed the collection of those entitlements: By reason of which failure to take cognisance there occurred a miscarriage of justice whereby the Court of Appeal erroneously likened plaintiff's action to "*medicine after death*," and dismissed it as such. B

Ground 3:

The Justices of the Court of Appeal erred in law when they believed they can make for the parties and (sic) agreement other than that by which the parties themselves contracted to be bound. C

Ground 5:

The Court of Appeal abandoned jurisdiction when it sat on Appeal to determine a matter different from that upon which, the trial court adjudicated, thereby rendering its appellate judgment void.

Ground 6:

The judgment is against the weight of evidence. D

Ground 7: (Additional)

The learned Justices of the Court of Appeal erred in law and fact when they held in effect that there was no evidence that plaintiff was induced to collect her entitlements without protest by the defendant's promise to keep her retrenchment temporary (i.e. without the inducement she would have taken steps to challenge her retrenchment: she would have protested against Exhibit 3): E

Additional Ground 8:

The learned Justices of the Court of Appeal erred in law, when, at pages 181 to 182 they proceeded to rely on irrelevant considerations to reverse the findings of fact of the trial Judge, who saw and listened to the witnesses in the witness box, and who found, from the demeanour of the witnesses, that they are not witnesses of truth. F

Additional Ground 9:

The appellate court below was in grave error of law and fact regarding the nature and effects of Exhibit 1 when the court held that Exhibit 1 produced no contractual relationship between plaintiff and defendant, an error which led that court to entertain irrelevant considerations: Thus occasioning a grave miscarriage of Justice. G

Additional Ground 10:

The judgment of the court below is perverse, resulting in gross injustice to plaintiff. H

The parties exchanged briefs of argument pursuant to the rules of this court, The appellant in addition filed a reply brief.

The lone issue formulated at the instance of the appellant, and which the respondent adopted, states:

B *“Whether Exhibit 3 operated to put an end to plaintiff’s rights under Exhibit 1 and/or under the earlier compromise agreement arising from plaintiff’s forbearance to sue in return for defendant’s promise to recall”*

C At the hearing of this appeal on 21st November, 1994, learned counsel for the appellant after saying that she had that morning had a chat with the Registrar of court over the non-despatch to her of the hearing notice in respect of this case to afford her the opportunity to bring her papers relating thereto, albeit indicated that she would adopt her brief and reply brief and abide by whatever fate befell it vis-a-vis the earlier case. She urged us to allow the appeal.

D Learned counsel for the respondent also relied on and adopted the brief he filed on respondent’s behalf. He in addition withdrew his preliminary objection in which he attacked all the grounds herein as being unarguable for one reason or the other. The preliminary objection is therefore accordingly struck out.

E With or without the preliminary objection, which in any case has been withdrawn and struck out, a close look and careful scrutiny of the lone issue formulated vis-a-vis each of grounds 1,3,5,6, 7, 8, 9, and 10 all of which are set out above, clearly indicates that the lone issue is neither related to any or distilled from each or all of these grounds. Where such is the case the issue is unarguable and is afortiori incompetent and ought therefore to be struck out. See Bennett Ifedorah & 4 Ors. v. Ben Ume & Ors. (1988) 2 NWLR (Pt.74) 5 at page 16; Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718 at 733; National Bank of Nigeria Ltd. V. Nigerian External Telecommunications Limited (1986) 3 NWLR (Pt.31) 667 and Omonuwa G v. Oshodin (1985) 2 S.C. 1 at page 8; (1985) 2 NWLR (Pt.10) 924.

The result is that the appeal itself be and is accordingly struck out with costs assessed at N1,000 to the respondent.

H **UWAIS JSC**

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. For the reasons contained therein, this appeal is incompetent.

It is now settled that any issue or issues for determination formulated, in either the brief of argument of the appellant or the respondent, in any case, must be based on an and be pertinent to the ground or grounds of appeal that give life to the appeal. If the issue or issues do not conform with the grounds of appeal, then they cannot stand for being irrelevant. It follows, therefore, that any argument in the brief based on the faulty issue for determination is equally irrelevant to the appeal. The result is that the mandatory requirements of Order 6 rule 2 of the Supreme Court Rules, 1985, have not been satisfied. In such a given situation. It is fatal if only one issue for determination is raised in the appellants brief of argument, as in the present case because the appeal becomes incompetent for non-compliance with the rules and liable to be struck out.

It is for the foregoing reasons that I too will strike out the appeal and it is hereby struck out with N1,000.00 costs to the respondent.

WALI JSC

I have had the privilege of reading in advance, a draft copy of the lead judgment of my learned brother, Onu J.S.C., with which I agree.

The main and crucial issue sought to be raised and canvassed in this appeal albeit abortively is whether the appellant relying on the practice of First in First out as implied in Section 20 of Labour Act Cap. 1989 of the Laws of the Federation of Nigeria, 1990 and Exhibit 1 issued by the Managing Director of the respondent (as an internal circular) three months after the appellant's appointment had been properly and effectively terminated by the respondent vide Exhibit 3, could still insist on being recalled and reinstated as of right.

Unfortunately for the appellant, none of the grounds of appeal filed encompasses this salutary issue. It is therefore incompetent and is struck out. See Bennett Ifediorah & Ors. V. Ben UME & Ors. (1988) 2 NWLR (Pt.74) 5.

As there is no competent issue for determination in this appeal, the appeal is in itself incompetent and is accordingly struck out with N1,000.00 costs to the respondent.

OGWUEGBU JSC

I have had a preview of the judgment just delivered by my learned brother, Onu, J.S.C. and I agree that the appeal is incompetent.

The appellant filed six original grounds of appeal on 19:10:93, she

filed an application in this court for leave to amend the notice and grounds of appeal filed on 19:3:92 by filing additional grounds 7, 8,9 and 10. The additional grounds of appeal were set out in Exhibit “A” annexed to the affidavit in support of the application. This court on 4:7:94 granted leave to file grounds 8 and 9 and refused leave to file and argue grounds 7 and B 10.

The valid grounds of appeal before the court are grounds 1-6,8 and 9. The appellant at page 3 paragraph 7 of her brief of argument filed on 2:11:92, abandoned grounds 2 and 4 of the original grounds of appeal. Grounds 1,3,5,6, 8 and 9 are the only grounds of appeal left. In the same C paragraph 7 at page 3 of the appellant’s brief of argument the appellant formulated one issue for determination in the appeal as follows:

“Issue for determination:
This is only one, and it is whether Exhibit 3 operated to put an end to the plaintiff’s rights under Exhibit 1 and/or under the earlier D compromise agreement arising from plaintiff’s forbearance to sue in return for defendant’s promise to recall.”

In this appeal, the only issue formulated by the appellant has no support from any of the remaining six grounds of appeal. Issues formulated for determination by an appellant should arise from the grounds of appeal E filed and parties to an appeal will not be allowed to argue any issue not covered by the grounds of appeal. See Modupe v. The State (1988) 4 NWLR (Pt.87) 130, Oniah & Ors. V. Onyia (1989) 1 NWLR (Pt.99) 514 and Labiyi v. Anretiola & Ors. (1992) 8 NWLR(Pt.258) 139.

Accordingly, the appeal is incompetent and it is hereby struck out F with N1,000.00 costs in favour of the respondent.

MOHAMMED JSC

I agree that the appeal is incompetent for the reasons given by my G learned brother, Onu, J.S.C. in the lead judgment which I have the advantage of reading in draft. Accordingly, the appeal is struck out. I award N1,000.00 costs in favour of the respondent.

H