

SUPREME COURT OF NIGERIA
FRIDAY 13TH JULY, 1995. SC. 4/1992
CORAM:- M. L. UWAI, A. B. WALI, I. L. KUTIGI,
E. O. OGWUEGBU, Y. O. ADIO, JJSC

1. UNDERWATER ENGINEERING CO. LTD.
2. DR. EUGENE DURU APPELLANTS
AND
DARUSHA DUBEFON RESPONDENT

MASTER & SERVANT - *Misconduct - Were both parties agreed that employee misconducted himself- Whether employee's Counsel can contend that onus of proof is on the appellants*

MASTER & SERVANT - *Dismissal - Of respondent on ground of misconduct - Whether justifiable*

MASTER & SERVANT - *Dismissal-Misconduct - Where dismissal was not communicated - Whether effective from time of the misconduct or time of communicating the dismissal*

MASTER & SERVANT - *Absence from Duty - During time of employee's prosecution at his master's instance - Whether employee is entitled to his remuneration.*

PRACTICE & PROCEDURE - *Counterclaim - Master & Servant - When the master's counterclaim is deemed vexatious and oppressive.*

FACTS

The plaintiff/respondent before the Lagos High Court filed an action against the appellants claiming the sum of N26,000. 00 for wrongful dismissal, breach of contract and conversion of his diving equipment Respondent was employed by the 1st appellant as Chief Diver in 1973, on a total salary of N1,000.00 per month. The 2nd appellant is the Chairman/Managing Director of 1st appellant. Sometime in May, 1982, three rolls of thermolance belonging to the appellants were stolen. Respondent and one other person were prosecuted in respect of the theft but they were discharged and acquitted on the 23/8/82. Respondent reported for duty after his discharge but the appellants refused to remote him. On 12/10/82 he insisted on seeing 2nd appellant, who then told the respondent that his services were no longer required and that his post had been filled. Appellants also refused to return respondent's wet suit (a diving equipment)

The appellants denied the claim and counterclaimed the sum of N800.00 being a month's salary in lieu of notice. They contended that the respondent voluntarily withdrew his services. The trial court gave judgment in

favour of the respondent granting some items of his claim and dismissed the 1st defendant's counter-claim. Appellants' appeal to the Court of Appeal was dismissed. Appellants have further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION:

(1) *Whether the learned Justices of the Court of Appeal were right in law and directed themselves properly on the facts in holding that the respondent is fully entitled to his remuneration for the months of May to October, 1982 when the consideration for work is wages and the consideration for wages is work - Browning & ors. v. Crumlin Valley Collieries Ltd. (1925) 1 K. B. 522 at 528.*

(2) *Whether upon the uncontradicted evidence of the appellants the learned Justices of the Court of Appeal were right in dismissing the counter-claim of the appellants which was adequately proved and sustained by the evidence on record.*

HELD (Unanimously dismissing the appeal per lead judgment of
OGWUEGBE JSC)

Where both parties agreed that employee misconducted himself

1. Both parties agreed that the incident leading to the arrest and trial of the respondent amounted to a misconduct. The learned respondent's counsel cannot be heard to contend in this court that the onus is upon the appellants to prove the misconduct or dishonesty which justified the dismissal of the respondent. There was no cross-appeal against the concurrent findings of the courts below that the misconduct was incompatible with the faithful discharge of the respondent's duty to the appellants. In any case, the appellants pleaded facts which gave rise to the dismissal of the respondent and led evidence in support of the averments which the courts below accepted. (p. 1300 H)

Dismissal on ground of misconduct

2. From the pleadings and the evidence, I have myself no doubt at all that the respondent was rightly and justifiably dismissed by the appellant. The court below was right in so holding.

Failure to communicate dismissal for misconduct

3. The respondent's employment was infact existing up to 12th October, 1982 when he was told that his services were no longer required. The right of the appellants to terminate the employment by reason of antecedent misconduct which was known to the appellants all along and for which the respondent had been tried and acquitted did not entitle them to treat the contract of employment as having been determined in May, 1982. The respondent was therefore entitled to recover his salary up to 12th October, 1982. I agree with the court below that the effective date of the respondent's dismissal was 12th October, 1982 and not earlier.

Master & Servant - Absence from duty

4. The respondent's absence from duty from 20th May to 12th October, 1982 was as a result of his arrest and prosecution at the instance of the appellants. It cannot be said that he voluntarily absented himself from work without excuse. He was not interdicted during the period. Even after his acquittal and discharge, the appellants said nothing to him about his employment until 12:10:82. He had every reason to believe and rightly too, that, his employment was still subsisting at least up to 12th October, 1982 when he received the oral instruction that his services were no longer required by the appellants. He was full entitled to his remuneration as it accrued from month to month, that is, from May to 12th October, 1982.

Counter claim - Deemed vexatious and oppressive

5 Since the courts below found that the respondent did not absent himself from work without good cause, there was therefore no basis for the counterclaim. It was rightly dismissed. The court below held that it was misconceived. I would add that it was also vexatious and oppressive having regard to all the circumstances of the case. It was meant to harass the respondent. Such an action should be discouraged.

REPRESENTATION

Appellants Absent and not represented

Mr. M. A. Olajumoke (with L. A Emelieze) (Mrs) and J. Anabor (Mrs.) for the Respondent.

CASES REFERRED TO

Brownmg v Crumlin Valley Collieries Ltd 1926)1 KB 522 at 528

Ajayi v. Texaco (Nig) Ltd (1987)3 N.W.L.R (Pt 62) 577

N.N.B. Ltd v. Obevudiri (1986) 3 N.W.L. R (Pt 29)389 (C.A.)

Timanan v. Robinson (1979) 3-4 SC. 1 at 9-10

Akinbule v. U.B.A. Ltd (1980) 1-3 C.C.H.C. J 363

Oyegoke v. Hamman (1990) 4 N.W.L.R. (Pt. 143) 197 (C.A.)

Healey v. Societe Anonyme Francaise Rubastic (1917) 1 K.B. 946

LEAD JUDGMENT BY OGWUEGBU JSC

The respondent in this appeal was the plaintiff in the High Court of Lagos State where he brought a civil action against the appellants as defendants in the said court for wrongful dismissal, breach of contract and conversion of his diving equipment.

His claim against the defendants jointly and severally is for the sum of N26,000.00 and interest thereon at such rate and for such period as the court should think fit.

The respondent was employed by the 1st appellant as Chief Diver on 14:6:73. on a salary of N800.00 per month, a monthly sea allowance of N100.00 and a monthly housing and transport allowance of N100.00. In all, he was

earning a total of N1,000.00 per month. The 2nd appellant is the Chairman/Managing Director of the 1st appellant.

Sometime in May, 1982, a report was made by the security men of the appellants of the theft of three rolls of thermolance belonging to the appellants. A complaint was later made to the police by the appellants and at the close of the investigation, the respondent and one Ben Ari, an expatriate were arrested and arraigned before an Apapa Chief Magistrate for conspiracy and theft of the rolls of thermolance. At the end of the trial on 23:8:82, the respondent and the expatriate were discharged and acquitted.

After his discharge, the respondent reported for duty but the appellants refused to reinstate him. The appellants also refused to pay him his monthly emoluments from May, 1982 despite repeated demands.

On 12th October, 1982, the respondent insisted on seeing the 2nd appellant about the future of his employment. It was on that day that the 2nd appellant told the respondent orally that his services were no longer required by the appellants and that his post had been filled.

The respondent also requested for the return of his wet suit (a diving equipment) which he left in the possession of the appellants. They refused to return it to him.

The respondent thereupon instituted the civil proceedings which gave rise to this appeal. As stated earlier in this judgment, he claimed the sum of N26,000.00 against both appellants jointly and severally as special and general damages.

The particulars of special damages are as follows:-

(i) N4,800.00 being basic salary for the months of May, June, July, August, September and October, 1982 at N800.00 per month.

(ii) N600.00 being housing and transport allowances for the months of May to October, 1982

(iii) N600.00 being sea allowance for the months of May - October, 1982 at N100.00 per month.

(iv) N700.00 being value of plaintiff's wet suit equipment unlawfully converted by defendants.

(v) N2,400.00 being three months salary in lieu of notice at N800.00 per month.

(vi) N6,000.00 being damages for unlawful conversion of plaintiff's wet suit equipment.

(viii) N12,000.00 being damages for breach of contract of employment N26,000.00

In addition to the pecuniary damages, the respondent also claimed the following reliefs:

“(a) A declaration that the purported termination of the plaintiff’s appointment as a Chief Diver of the 1st defendant company with effect from 12th October, 1982 is unlawful, invalid and of no effect.

(b) A declaration that the conversion of the plaintiff’s wet suit equipment by the defendants is unlawful. ALTERNATIVELY, the plaintiff claims against the defendants the sum of N26,000.00 as special and general damages for breach of contract and wrongful conversion of the plaintiff’s wet suit equipment.”

In paragraph 18 of their amended statement of defence, the 1st defendant/appellant counter-claimed as follows:

“The 1st defendant hereby counter-claim from the plaintiff the sum of N800.00 (eight hundred naira) being the month’s salary in lieu of notice which the plaintiff did not give the 1st defendant before the plaintiff’s voluntary withdrawal from the service of the 1st defendant. “

After pleadings were ordered, filed and exchanged, the case proceeded to trial. At the close of hearing, the learned trial judge gave judgment for the respondent in respect of items (i) to (v) above and dismissed the counter-claim of the 1st defendant. The defendants were aggrieved by the decision and appealed to the Court of Appeal, Lagos Division. The appeal was partially allowed. The court below ordered as follows:

“(a) The appellants should pay to the respondent, jointly and severally, total sum of N5,500.00 representing his salary and allowances for 51/2 months at the rate of N 1,000.00 a month.

(b) The appellants’ counter-claim is hereby dismissed, and

(c) The appellants shall pay to the respondent cost of this appeal which I assess at N200.00.”

The defendants were dissatisfied with the above decision and have further appealed to this court.

From the three grounds of appeal filed by the defendants/appellants, two issues were formulated in the appellants’ brief of argument:

(1) Whether the learned Justices of the Court of Appeal were right in law and directed themselves properly on the facts in holding that the respondent is fully entitled to his remuneration for the months of May to October, 1982 when the consideration for work is wages and the consideration for wages is work - Browning & Ors v. Crumlin Valley Collieries Ltd. (1925) 1 K.B. 522 at 528

(2) Whether upon the uncontradicted evidence of the appellants the learned Justices of the Court of Appeal were right in dismissing the counter-claim of the appellants which was adequately proved and sustained by the evidence on record.

The contention of Prince Ohwovoriole, S.A.N in the appellant’s brief of argument was that the court below erred in law and misdirected itself on the facts

when it held that the respondent is fully entitled to his remuneration from the month of May to October, 1982, a period he never worked for the 1st appellant. He referred the court to the case of Browning & Ors. v. Crumlin Valley Collieries Ltd. (1926) 1 K.B. 522 at 528. He relied on the opinion of Greer, J. at p.28 of the report where he said that:

B *“The consideration for work is wages and the consideration for wages is work.”*

He urged the court to be persuaded by the above decision which he rightly conceded is not binding on this court.

C He further submitted that the incident of 20th May, 1982 for which the respondent was arrested amounted to a misconduct and, therefore, the respondent’s contract with the appellants became summarily determined. He referred to the cases of Ajayi v. Texaco (Nig.) Ltd. (1987) 3 NWLR (Pt.62) 577 and NNB. Ltd. v. Obevudiri (1986) 3 NWLR (Pt.29) 387 (C.A.). He said that the respondent was only entitled to be paid for the period he worked for the appellant which was 1st May to 20th May, 1982, and that he deliberately absented

D himself from work between 20th May and 12th October, 1982.

On the second issue, the learned Senior Advocate submitted that the counter-claim ought not have been dismissed because the appellants’ evidence in support of it was uncontradicted. He referred to the evidence of the 2nd appellant which, according to him, was not discredited by cross-examination.

E Reference was made to the following cases:

F Omeregbe v. Lawani (1980) 3/4 S.C. 108; NICON. v Power & Ind. Eng. Co. Ltd.; (1986)1 NWLR (Pt.14)1; Nigerian General Insurance Co. Ltd. v. Augustine Emoh & ors. (1990) 3 NWLR (Pt.138) 314 at 315; (CA.), F.C.D.A. v. Naibi (1990) 3 NWLR (Pt.138) 270 at 272; United Dominion Corporation (Nig.) Ltd. v. Ladipo (1971) 1 All NLR 102 and Imana v. Robinson (1979) 3-4 S.C.1 at 9-10.

G Mr. Olajumoke, learned counsel for the respondent in reply, conceded that the incident of 20th May, 1982 for which the respondent was arrested and charged to court amounted to a misconduct. He however argued that where an employer alleged misconduct as reason for summary dismissal of an employee, the onus is upon the employer to prove the misconduct or dishonesty which justified the dismissal. He relied on the cases of Akinbule v. U.B.A. Ltd. (1980) 1-3 C.C.H.CJ. 363 and N.N.B. Ltd v. Obevudiri supra.

H He further submitted that the respondent did not deliberately absent himself from work from 20th May to 12th October, 1982.

On the second issue, he submitted that the counter-claim was not proved. He referred to the cases of Oyegoke v. Hamman (1990) 4 NWLR (Pt.143) 197 (C.A.) and Biode v.. Pharmaceutical Adsell Ltd. (1986) 5 NWLR (Pt.46) 1070 (C.A.).

Both parties agreed that the incident leading to the arrest and trial of the

respondent amounted to a misconduct. The learned respondent's counsel cannot be heard to contend in this court that the onus is upon the appellants to prove the misconduct or dishonesty which justified the dismissal of the respondent. There was no cross-appeal against the concurrent findings of the courts below that the misconduct was incompatible with the faithful discharge of the respondent's duty to the appellants.

In any case, the appellants pleaded facts which gave rise to the dismissal of the respondent and led evidence in support of the averments which the courts below accepted. It is therefore not open to the learned counsel for the respondent to argue in the way he has done. B

The circumstances of the misconduct can be found in paragraph 10 of the amended statement of defence which reads: C

"10. The defendants state that the plaintiff misconducted himself in the said service of the defendant company in that he in concert with Ben Ari stole four bundles of thermolance, property of the 1st defendant and made them over for the use of Delta Diving Company (Nig) Ltd., a rival company to the 1st defendant. The plaintiff all along knew that Ben Ari left the 1st defendant for the employment of a rival company and was determined to run down the 1st defendant. The plaintiff was aiding and abetting the said Ben Ari in the latter's mission of trying to destroy the first defendant." D

The respondent apart from a general denial in his reply and defence to the counter-claim did not specifically deny the averment in the above paragraph of the amended statement of defence and counter-claim. In his answer to cross-examination, he admitted lending the thermolance to Ben Ari without obtaining the permission of his expatriate boss. E

On the above facts, the Court of Appeal found as follows:

"Therefore as the thermolance appears to be a very essential working material for divers, the lending of it out to an opposing business man without permission would in my view appear to be incompatible with the faithfully (sic) discharge of the respondent's duty to the appellants and would be injurious to the appellants' business to retain the respondent in the business. (Maja's case supra). Therefore in my judgment, the dismissal or the termination of the respondent's employment by the appellants on the 12th of October, 1982, was justifiable. The effective date of the dismissal was the 12th of October, 1982 when the 2nd appellant verbally informed the respondent that his position was taken by someone." F G

From the pleadings and the evidence, I have myself no doubt at all that the respondent was rightly and justifiably dismissed by the appellant. The court below was right in so holding. See *Maja v. Stocco* (1968) 1 All NLR 141 at 151. H

The next question is whether the dismissal or termination of the respondent with retrospective effect was proper. In which case, he would not be entitled to remuneration from May to October, 1982. The contract was oral and the respondent's basic annual salary is N4,800.00 at N800.00 per month. His

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salary became due and his right to it vested at the end of each month. The respondent's employment was infact existing up to 12th October, 1982 when he was told that his services were no longer required. The right of the appellants to terminate the employment by reason of antecedent misconduct which was known to the appellants all along and for which the respondent had been tried and acquitted did not entitle them to treat the contract of employment as having been
B determined in May, 1982. The respondent was therefore entitled to recover his salary up to 12th October, 1982. I agree with the court below that the effective date of the respondent's dismissal was 12th October, 1982 and not earlier. See *Healey v. Societe Anonyme Francaise Rubastic* (1917) 1 K.B. 946.

C The respondent's absence from duty from 20th May to 12th October, 1982 was as a result of his arrest and prosecution at the instance of the appellants. It cannot be said that he voluntarily absented himself from work without excuse. He was not interdicted during the period. Even after his acquittal and discharge, the appellants said nothing to him about his employment until 12:10:82. He had every reason to believe and rightly too, that, his employment was still
D subsisting at least up to 12th October, 1982 when he received the oral instruction that his services were no longer required by the appellants. He was fully entitled to his remuneration as it accrued from month to month, that is, from May to 12th October, 1982.

E The case of *Browning & ors. v. Crimlin Valley collieries Ltd.* supra which the learned Senior Advocate relied heavily upon has no application to this case. 'That case was correctly decided on its peculiar facts.

In that case, the plaintiffs who were miners were employed by the defendants to work at their colliery. They refused to work in the mine on the
F ground that it was unsafe owing to the condition of the shafts. As a result, the plaintiffs refused to go down into the mine until sufficient work was done to render the shafts safe. The dangerous condition of the shafts was not due to the negligence or breach of duty on the part of the defendants.

G The mine was closed by the defendants in order to enable them to execute the necessary repairs. The plaintiffs in consequence sustained loss of wages for which they claimed declaration that the defendants were liable to pay them wages, or alternatively damages, in respect of their loss of wages while they were absent from work by reason of the mine being closed.

H It was held that in order to give effect to the presumed intention of both parties to the contract of employment, it was necessary to imply a term that, in the events which happened, the mine owners should not be liable to pay wages or damages to their workmen during the time which was reasonably required to put the mine into a safe condition.

In that case, the principle of "the consideration for work is wages, and

the consideration for wages is work” was held applicable. As I said earlier, the facts of Browning’s case supra are not the same as those in the present appeal. That decision is therefore inapplicable to the present case.

The court below was therefore right in its award of the sum of N5,500.00 representing the respondent’s salary and allowances for five and a half months from 1st May to 12th October, 1982 at the rate of N1,000.00 per month.

Since the courts below found that the respondent did not absent himself from work without good cause, there was therefore no basis for the counter-claim. It was rightly dismissed. The court below held that it was misconceived. I would add that it was also vexatious and oppressive having regard to all the circumstances of the case. It was meant to harass the respondent. Such an action should be discouraged.

In the circumstances, I see no merit in the appeal. All the grounds of appeal fail. The appeal is hereby dismissed with N1,000.00 costs to the respondent.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C. I entirely agree. I have nothing to add. I, therefore, adopt the judgment as mine and abide by the order therein.

WALI JSC

I am privileged to have read before now, the lead judgment of my learned brother, Ogwuegbu, J.S .C and I agree with it.

For the same reasons ably stated in the lead judgment, I also see no merit in this appeal and same is hereby dismissed with N1,000.00 costs to the respondent.

KUTIGI JSC

I read before now the judgment just delivered by, my learned brother Ogwuegbu, J.S.C. He has adequately dealt with the two issues for determination in the case. I agree with him that there is no merit in the appeal and dismiss same accordingly. The respondent is awarded costs of N1,000.00 only.

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I agree that the appeal has no merit. Accordingly, I dismiss it and I abide by the order for costs.