

SUPREME COURT OF NIGERIA
13TH DECEMBER, 1996. SC. 286/1989
CORAM:- S. M. A. BELGORE, I. L. KUTIGI,
S. U. ONU, Y. O. ADIO, A. I. IGUH, JJSC.

ALHAJI A. R. ANIMASHAUN APPELLANT
AND
UNIVERSITY COLLEGE HOSPITAL RESPONDENT

APPEALS - *Point of law* - As to whether defendant was a juristic person
- Where that point is a new issue and is not related to any ground of
appeal - Whether the issue ought to be struck out.

MASTER & SERVANT - *Surcharge - Pensions Act* - That provided for a
surcharge of employee's benefit - Where steps to be taken before the sur-
charge were neglected - The surcharge is improper.

FACTS

The plaintiff/appellant was an employee working with the Univer-
sity Teaching Hospital, Ibadan. He had previously served in several gov-
ernment pensionable establishments, before he was retired on 29-6-79 while
serving the respondent. While paying the gratuity due to the appellant, the
respondent deducted the sum of N 12,227.41 as surcharge for an alleged
act of gross inefficiency without complying with the relevant steps. The
plaintiff filed an action before the High Court claiming the said amount as
being unlawfully deducted.

The trial court found that the said amount was wrongfully de-
ducted and gave judgment in favour of the plaintiff. The respondent ap-
pealed to the Court of Appeal which held that the amount was lawfully
deducted and allowed the appeal. Being dissatisfied, the plaintiff has fur-
ther appealed to the Supreme Court.

ISSUE FOR DETERMINATION

*Whether or not there was proof of the plaintiff's indebtedness to the defen-
dant to warrant the deduction of N12,227.41 in issue from his retiring
benefits*

HELD (Unanimously allowing the appeal per lead judgment of **BELGORE
JSC**)

Appeals - New point of law

1. The Court of Appeal extensively adverted to new point of law canvassed

by the defendant as appellant before them on the question whether the appellant was a juristic person or not. No leave was sought to argue the new issue and the conclusion of the Court of Appeal is that the issue of the appellant being a juristic person or not is a serious point of law and it was allowed to be argued as an issue, even though not relevant to any ground of appeal. The general rule is that issues for determination must be relevant to the grounds of appeal filed in Court; if not those issues are incompetent. The overriding principle of cause of justice, the umbrella under which the lower Court sought refuge, with greatest respect, does not avail an appellant whose grounds of appeal cannot be linked in any way whatsoever with the issues formulated for determination. Those issues are therefore incompetent and they ought to be struck out as such. What the Court of Appeal was confronted with is alarmingly new to the battles the parties fought in the trial Court. (p. 2040 C)

Surcharge - Pensions Act

2. It must be pointed out that the appellant was never told he was retired because of the Report of the Panel. He was not even informed how the sum he was surcharged with was arrived at. It has not been shown in the evidence before the trial Court how the indebtedness of the appellant was arrived at and that he was confronted with allegations against him so as to defend himself. It is true the Pensions Act applied to the staff of the defendant by virtue of its statute but all the steps that must be taken to allow the appellant to know he had committed any misdeed were withheld from him. The Court of Appeal overlooked this very fundamental aspect of fair hearing and arrogated to the Administrative Panel the status of unimpeachable inquisition. I therefore find merit in this appeal and I allow it. (p. 2041 B)

NOTABLE POINTS OF INTEREST

KUTIGI JSC

1. Failure to comply with regulations for a surcharge

The Defendant could certainly not have availed itself of the portion of Exh. 5 above, as there was no evidence whatsoever that the procedure laid down in financial Regulations Chapter 15 Section 1501 as recommended therein was complied with, nor was there any evidence that any Implementation Committee to determine the level of surcharge to be attributed to each officer was also set up. (p. 2042 D)

IGUH JSC

2. Court not to act in speculation

I think the Court of Appeal, with respect, was in definite error when it held that the issue before it was not whether the plaintiff was lawfully surcharged by the defendant or whether the surcharge was arbitrary, irregular and unlawful. Those were the major issues it was called upon to resolve. It is clear to me, on the evidence, that the defendant failed to discharge the onus placed on it by the law to establish that the plaintiff owed it the sum of N 12,227.41 as claimed. To uphold that figure in the absence of precise evidence as to how it was arrived at would amount to an exercise in speculation which courts of law must at all time resist. (p. 2046 H)

REPRESENTATION

Parties absent and not represented by counsel.

CASE REFERRED TO

Ikenya v. Ofune (1985) 2 N.W.L.R. 1

STATUTE REFERRED TO

Pensions Act No. 102 1979 ss. 18, 19.

LEAD JUDGMENT BY BELGORE JSC

The appellant was the plaintiff at the trial court. He served in several strata of government pensionable establishments for twenty-four years and seven months. i.e. Teaching Service, Water Corporation and Property Development Corporation, all statutory bodies of former Western Nigeria, and finally with the University Teaching Hospital, Ibadan, a Federal Government Ministry of Health parastatal for 2 years, five months and twenty seven days from where he retired on 29th day of June, 1979. He claimed he was entitled by way of gratuity to N20,920.73 for the cumulative years of service and that the statutory bodies he served in the old Western Nigeria (and their successors, probably) sent in their contributions as follows:

(i) Federal Government on behalf of former Western Nigeria the sum of N7,845.89; and

(ii) Property Development Corporation the sum of N572.13.

To those sums, the defendant, being his last employer, was to add the sum of N2,562.41. The sums sent by the Federal Government and the Water Corporation were remitted to the defendant to add the sum of N2,562.41 (aforementioned) and pay over to the plaintiff. However, when in 1984 the defendant was to pay the plaintiff this gratuity, the sum of N12,227.41 was deducted. In an earlier letter of 7th June, 1979, the plaintiff (appellant) was told by the defendant that this sum would be deducted

from his retirement entitlements as surcharge for an alleged act of gross inefficiency. The appellant replied to this letter denying any act of inefficiency or any wrongdoing to warrant the planned surcharge. Thus when finally the sum of N12,227.41 was deducted from his retirement benefits he sued the defendant claiming as follows:

B “(i) Declaration that the defendant wrongfully and unlawfully deducted the sum of N12,227.41 (Twelve thousand two hundred and twenty seven naira, forty-one kobo) from the lawful retirement benefits, (Gratuity and Pension) of the plaintiff.

C “(ii) The sum of N12,227.41 (Twelve thousand, two hundred and twenty-seven naira forty-one kobo) from the defendant being the amount due to the plaintiff wrongfully and unlawfully deducted from the plaintiff retirement benefits by the defendant.”

The appellant was retired by a letter Exhibit 6 reading as follows:

“Dear Mr. Animashaun,

D I am writing to inform you that the Board of Management has resolved that you should be retired from the service of this hospital in accordance with the Civil Service Rules, with immediate effect, for the purpose of facilitating improvements in the Service.

E Details of your gratuity and other entitlements including earned and deferred vacation leave, less any indebtedness to the hospital, will be communicated to you in due course.

I am by a copy of this letter informing both the Chief Accountant and the Under Secretary (Establishment) who will take appropriate action.

F You will hand over all hospital property to the Assistant Director of Administration, Mr. F.S. Onabowu immediately.”

G The appellant before receiving this letter appeared before an administrative panel as a witness where he was not personally confronted with any accusation of misdeed. The Administrative Panel was not a punitive panel but a fact-finding one to make recommendations to the defendant to take further action as may be deemed necessary. Little wonder therefore when in Exhibit 5 the Panel inter alia recommended as follows:

H “Some fraudulent practices were proved beyond doubts especially with regard to the supply of malted biscuits, margarine and corned beef. The Committee recommends that the fraud uncovered involved N6,916.00 should be referred to the Hospital Solicitor for legal advice. The other cases of incompetence, negligence, dereliction of duties and/or inefficiency are subject of appropriate disciplinary actions which should be instituted against the erring officers as deemed fit by the Director of Administration. (Details of the involvement of the Supplies Department Staff concerned are given

as part of Appendix 6)."

Learned trial Judge found from the above report of the Panel that instead of the defendant pursuing the recommendations to prosecute or institute disciplinary actions against erring officers, it rather took the report as the final word. Thus the Panel's recommendation was ignored. Even then, Exhibit 5 (supra) retiring the appellant never intimated he was being retired as a result of the recommendations of the Administrative fact-finding panel. The Conditions of Service of the defendant, Exhibit 10, sets out in its paragraph 5 the procedure for disciplinary action. By this booklet, a panel on disciplinary action set up must notify the officer concerned that disciplinary action was being contemplated against him, explaining to him his supposed misdeeds or shortcomings and asking him to come and defend himself. This procedure was never followed as nowhere was the appellant confronted with commission of any fraud, misdeeds or inefficiency in his official duty either verbally or in writing, in fact, the Panel was careful about its mission's scope when it recommended in Exhibit 5, as follows: D

"The Panel is convinced that losses amounting to N32,573.93 had been incurred by the Hospital between June, 1977 and September, 1978 as a result of the incompetence of members of the Supplies Department. In the circumstances, the Panel has no choice but to recommend that Chapter 15 Section 1501 of the Federal Government of Nigeria Financial Regulations 1976 should be invoked on all the officers of the Supplies Department who were involved in the purchases of the items investigated. The level of surcharge attributed to each officer may be determined by an implementation Committee which the Board may wish to set up." E

The defendant never invoked the provisions of Federal Government of Nigeria Financial Instructions, Chapter 15 paragraph 1501 as recommended. At any rate, in respect of the appellant that paragraph would not have been relevant. But the most remarkable aspect of the case for defence is that nowhere was evidence adduced as to how the sum of N12,227.41 surcharged the appellant was arrived at. G

Learned trial Judge had no option on all the aforementioned circumstances of this case than to find for the plaintiff on his claim. The defendant appealed to the Court of Appeal. The appellant/defendant raised the following issues for determination in the Court of Appeal:-

(1) *Can the learned trial Judge give judgment against a non-juristic person known to the law?*

(2) *Was the learned trial Judge right in holding that the defendant could not withhold gratuity of the Plaintiff for a debt due to the defendant as defendant was not synonymous with the Federal Military Government?"* H

This certainly was a complete departure from the case the defendant and the plaintiff fought at the trial Court and no leave was obtained to argue them. The two issues however flowing from the grounds of appeal alleging:

"1. error in law for failure to treat the defendant as a non-juristic person, and

B 2. the decision is against the weight of evidence,"

An additional ground of appeal was filed with leave and it reads:

"3 the Learned Trial Judge erred in law when he held that the defendant was not synonymous with the Federal Military Government and as such had no right to recover debt due to the defendant from the retirement benefit of the Plaintiff,"

C as the third ground of appeal but abandoned the general ground of appeal i.e. Ground 2 and it was duly struck out.

The Court of Appeal extensively adverted to new point of law canvassed by the defendant as appellant before them on the question whether the appellant was a juristic person or not. No leave was sought to argue the new issue and the conclusion of the Court of Appeal is that the issue of the appellant being a juristic person or not is a serious point of law and it was allowed to be argued as an issue, even though not relevant to any ground of appeal. The general rule is that issues for determination must be relevant to the grounds of appeal filed in Court; if not, those issues are incompetent. The overriding principle of cause of justice, the umbrella under which the lower Court sought refuge, with greatest respect, does not avail an appellant whose grounds of appeal cannot be linked in any way whatsoever with the issues formulated for determination. Those issues are therefore incompetent and they ought to be struck out as such. What the Court of Appeal was confronted with is alarmingly new to the battles the parties fought in the trial court; and as the Court of Appeal found inter alia:

G "In this case on appeal the issue as to whether the appellant is a non-juristic person falls in line with the arguments of counsel and this court will allow the new point to be taken, particularly since the issue is not really in contest between the parties, even though there is no ground of appeal before us from which such could be said to have arisen."

H This new vista was opened in the dispute without leave of court, and without any ground of appeal before the court to support the issues. However, the battle as fought in the Court of Appeal resulted in holding that mistake in that the defendant's name did not occasion any miscarriage of justice. But it went further that the appellant was properly surcharged and relied on s. 18 Pensions Act which provides that a pension and gratuity shall not be

assignable or transferable or liable to be withheld, attached, sequestered or levied upon except for

(a) “.....*debt due to Federal Military Government.*”

The lower court held that the conduct of the Panel of enquiry which found irregularities in the section the defendant headed by the appellant was known to the appellant; so were its findings. The court never adverted to whether the appellant was given a hearing. It therefore allowed the appeal.

It must be pointed out that the appellant was never told he was retired because of the Report of the Panel. He was not even informed how the sum he was surcharged with was arrived at. It has not been shown in the evidence before the trial court how the indebtedness of the appellant was arrived at and that he was confronted with allegations against him so as to defend himself. It is true the Pensions Act applied to the staff of the defendant by virtue of its statute but all the steps that must be taken to allow the appellant to know he had committed any misdeeds were withheld from him. The Court of Appeal overlooked this very fundamental aspect of fair hearing and arrogated the Administrative Panel to the status of unimpeachable inquisition.

I therefore find merit in this appeal and I allow it. I restore the judgment of the trial High Court and set aside the decision of the Court of Appeal. I direct that the sum of N12,227.41 deducted from the retirement benefits of the appellant be paid to him because the deduction was illegal and was a miscarriage of justice. I order N1,000.00 as costs of this appeal in favour of the appellant against the respondent, University College Hospital Management Board.

F

KUTIGI JSC

Briefly put, the plaintiff was in government service for a period of some twenty-four years before he was retired by the defendant for “the purpose of facilitating improvements in the service” via a letter, Exhibit 6 in the proceedings. On retirement, he was entitled to pension and gratuity of N20,980.73. Out of this amount he was paid only N8,753.32 by the defendant. The defendant informed the plaintiff that he had been surcharged and that the sum of N12,227.41 had accordingly been deducted from his retirement benefits. This latter figure represented the balance of what was to have been paid to the plaintiff as his retirement benefit as could be seen above.

The defendant contended that the surcharge arose from the findings of an administrative panel of enquiry which was set up to look into

alleged irregularities of purchases of materials by the Supplies Department of the defendant and of which the plaintiff was the functional head. The plaintiff who gave evidence before the panel on the procedure of purchases only was not asked anything about any fraudulent practice personal to him and he was never notified of any allegation made against him. The report B of the panel of inquiry was tendered as Exhibit 5. It reads in part-

“The Panel is convinced that losses amounting to N32,577.93 had been incurred by the Hospital between June 1977 and September 1978 as a result of the incompetence of members of the Supplies Department. In the circumstances the Panel has no choice but to recommend that C Chapter 15 Section 1501 of the Federal Government of Nigeria Financial Regulations 1976, should be invoked on all the officers of the Supplies Department who were involved in the purchases of the items investigated. The level of surcharge attributed to each officer may be determined by an Implementation Committee which the Board may wish to set up.”

D The defendant could certainly not have availed itself of the portion of Exh.5 above, as there was no evidence whatsoever that the procedure laid down in Financial Regulations Chapter 15 Section 1501 as recommended therein was complied with, nor was there any evidence that any Implementation Committee to determine the level of surcharge to be E attributed to each officer was also set up.

In the circumstances, I find the appeal quite meritorious. I also find it easy to come to the conclusion, as did the learned trial Judge, that the surcharge was arbitrary and not arrived at after appropriate procedure would have been followed.

F The defendant having failed to establish appropriate basis for the surcharge, it must be declared unlawful and I so declare. Consequently, the sum of N12,227.41 so unlawfully deducted from the plaintiff’s retirement benefit should be paid to him and I so order.

G It is for the above reasons and others contained in the lead judgment of my learned brother Belgore, J.S.C. which I read before now that I allow the appeal. The judgment of the Court of Appeal is set aside while that of the trial High Court is restored. I endorse the order for costs.

H **ONU JSC**

Having had the advantage to read before now the judgment just delivered by my learned brother Belgore, J.S.C., I have no hesitation whatsoever in agreeing with him that the appeal succeeds and is allowed by me.

I will say a word or two in expatiation as follows:-

The two main issues to consider in the case are, firstly whether the surcharge of the appellant's monetary entitlements was lawful and secondly, whether the respondents were entitled to deduct the money. On surcharge, the learned trial Judge quoting from the first sentence of Government Financial Regulations (a copy of which was made available by appellant's counsel) set out in paragraph 1501 thus:

"Where a cash loss to the value of N200 or under has occurred without fraud or theft being involved Permanent Secretaries or Heads of Extra-Ministerial Departments are personally empowered to surcharge the officer or officers responsible up to the full amount of the loss, provided the officer's salary is not above level 09."

As at the time, the appellant was shown to have been on salary of over grade level 09 Chapter 15 paragraph 1501 (supra) definitely did not apply to him, he being on a salary of G.L. 09. Besides, the respondent did not tender any document on the Inquiry held on the appellant's indebtedness, the extent of his liability and the amount of his indebtedness presented to either the respondent or to Government. That apart, the clear procedure laid down for the deduction of pensions, etc. was not followed. Furthermore, the trial court which was possessed of no iota of evidence as to how the N12,227.41 surcharged came about, made the following far-reaching findings in its judgment absolving the appellant from all blames:

"We have seen from the passage of the panel report set out earlier above, the amount of loss involved exceeds N32,000.00. Further, as the only defence witness admitted, the plaintiff was on a salary above level 09 at the material time. In view of this paragraph 1501 could not have been applied to the plaintiff."

And further down in its judgment, the trial court stated more pungently:

"As we have seen from the evidence of the defence witness, he does not know how the amount of surcharge was arrived at and there is (sic) evidence before me to show how the Board of Management arrived at the amount. The only conclusion one can draw from the evidence before the court is that it is an arbitrary surcharge not arrived at after the appropriate procedure that must be followed. In view of this, the defendant has not established appropriate basis for the surcharge and accordingly, I find the surcharge against the defendant (sic) irregular and unlawful."

Finally, in concluding its judgment wherein the trial court considered the relevance of sections 18 and 19 of the Pensions Act, No.102 of 1979 to this case it held as follows:-

"These sections clearly prevent the defendant from making any deductions from the plaintiff's retirement benefits except for the two pur-

poses mentioned in section 18 which, without doubt, do not apply to this case. It has not been canvassed before me that the defendant i.e. the University College Hospital, is synonymous with the Federal Military Government. It is certainly not. There is no doubt, however, that the Pensions Act applies to the defendant as the defendant is listed in Schedule 2 of the B Act as a public service for the purpose of the Act

This change, which section 18 brought about, is deliberate and is meant to preserve pension and gratuity of public officers. In view of the foregoing, I am satisfied that even if the surcharge is valid (which I have held is not), the defendant had no right to recover it from the retirement C benefits of the plaintiff."

With the overwhelming evidence on record, it looks to me a miscarriage of justice that the court below on appeal could (notwithstanding the two misconceived and misplaced issues) formulated for its determination came to the irrelevant conclusion it did to the effect, inter alia, that - D "The conduct of the inquiry itself which found that there were irregularities and fraudulent practices in the department where the defendant was a functional head is not being challenged by the respondent in this appeal, nor did the respondent plead in the lower court that the institution of the enquiry was purely for administrative purposes; not (sic), indeed, E was there any pleading that the procedure laid down Federal Government Financial Regulations had not been adopted. In any case, as already observed above the respondent had provided no pertinent answer to the learned appellant's submissions. I uphold the submission."

I must observe from the quotation above that with regard to irregularities F and fraudulent practices observed in the department where the appellant was a functional head, if it is borne in mind that appellant only testified as a witness before a panel of inquiry in that respect, and that his conduct was never at any time called to question personally; nor still was he accused of embezzling any amount of money involved hence the appellant could not G have been required to provide "pertinent answer" thereto. It is in this respect above anything else, that the setting aside of the decision of the High Court which awarded the appellant his claims and proceeded to set same aside, amounted to an obvious miscarriage of justice and I so hold.

It is for these reasons and the fuller ones contained in the judgment H of my learned brother Belgore, J.S.C. that I too allow this appeal, set aside the decision of the court below and restore the decision of the trial court.

ADIO JSC

I have read, in advance, the judgment just delivered by my learned brother, Belgore, J.S.C., and I agree that the appeal succeeds. I allow it and abide by the consequential orders, including the order for costs.

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IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Belgore, J.S.C. and I agree entirely that there is merit in this appeal and that the same should be allowed.

The facts of the case are fully set out in the said leading judgment C and no useful purpose will be served in my repeating them all over again. It suffices to state that the main question for determination in this appeal is whether or not there was proof of the plaintiff's indebtedness to the defendant to warrant the deduction of N12,227.41 in issue from his retiring benefits.

D

The case for the plaintiff on the pleadings is a total denial of the alleged indebtedness. The plaintiff stressed this point when in paragraph 6 of his reply to the statement of Defence and Counter-Claim, he pleaded that he did not owe the defendant or any authority any amount and that any order of surcharge was invalid, illegal and of no effect. He further E added that the Disciplinary Procedure as laid down in his condition of service was never complied with by the defendant.

The defendant on the other hand, claimed that the said N12,227.41 was the amount of surcharge imposed on the plaintiff upon the acceptance and implementation of the findings and recommendations of the Committee of Enquiry that investigated allegation of irregularities and fraudulent F practices in the Stores and Supplies Department of the defendant and of which the plaintiff was the functional head.

On the strength of the pleadings, it is clear that the onus was on the defendant to establish the plaintiff's indebtedness to the said defendant G to the tune of N12,227.41. I will now examine how the defendant sought to establish this simple issue of fact.

The relevant recommendations of the Panel, Exhibit 5, read thus:-

"The panel is convinced that losses amounting to N32,573.93 had been incurred by the Hospital between June, 1977 and September, H 1978 as a result of the incompetence of members of the Supplies Department. In the circumstances, the Panel has no choice but to recommend that Chapter 15 Section 1501 of the Federal Government of Nigeria Financial Regulations 1976 should be invoked on all the officers of the Supplies

Department who were involved in the purchases of the items investigated. The level of surcharge attributed to each officer may be determined by an implementation committee which the Board may wish to set up."

(Underlining supplied for emphasis) .

D.W.1, the sole defence witness, in his evidence stated-

B ".....A panel of inquiry was set up to investigate alleged irregularities and fraudulent practices in the supplies department where the plaintiff was the functional head. As a result of the report of the panel, the Board of Management accepted the findings and retired the plaintiff..... Plaintiff was surcharged a little over N12,000.00. I was
C in the defendant's employment at the time, I am not aware that any implementation committee was set up in accordance with the panel's recommendations. I don't know how the amount of the surcharge was arrived at. The amount was communicated to the plaintiff. The issue of surcharge and what followed were decisions of the board of Management."

D (Underlining supplied for emphasis)

It is clear that the Panel recommended that the procedure laid down in the Financial Regulations, Chapter 15, Section 1501 be applied to the officers concerned in addition to the setting up of an implementation committee to determine the level of surcharge to be attributed to each
E officer. There is however no evidence that these recommendations were carried out. Indeed, D.W.1 was, infact, not aware that any implementation committee was set up at any time as recommended. He did not even know how the alleged surcharge of N12,227.41 was arrived at. There is also no evidence before the court to establish how the Board of Management ar-
F rived at the N12,227.41 surcharge now in issue.

In this regard, the trial court had this to say -

*"The only conclusion one can draw from the evidence before the court is that it is an arbitrary surcharge not arrived at after the appropriate procedure that must be followed. In view of this, the defendant has not
G established appropriate basis for the surcharge and accordingly, I find the surcharge against the defendant irregular and unlawful. With this conclusion, it is really not necessary for me to consider the question of whether, if the surcharge had been lawful, it could have been properly deducted from plaintiff's retirement benefits."*

H I entirely agree with the above observations of the trial court which, in my view, are irresistibly warranted by the evidence. I think the Court of Appeal, with respect, was in definite error when it held that the issue before it was not whether the plaintiff was lawfully surcharged by the defendant or whether the surcharge was arbitrary, irregular and unlawful. Those were the

major issues it was called upon to resolve. It is clear to me, on the evidence, that the defendant failed to discharge the onus placed on it by the law to establish that the plaintiff owed it the sum of N12,227.41 as claimed. To uphold that figure in the absence of precise evidence as to how it was arrived at would amount to an exercise in speculation which courts of law must at all times resist. See *George Ikenye and Another v. Akpala Ofune B and others* (1985) 2 NWLR (Pt.5) 1.

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Belgore, J.S.C. that I, too, allow this appeal. I hereby set aside the judgment and orders of the court below and restore those of the trial court. I abide by the order for costs contained C in the said judgment.

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