

SUPREME COURT OF NIGERIA
 20TH DECEMBER, 1996. SC. 188/1991
CORAM:- A. B. WALI, M. E. OGUNDARE,
E. O. OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC.

UNIVERSITY OF CALABAR APPELLANT
 AND
 DR. OKON J. ESSIEN RESPONDENT

COURTS - Case not set up by plaintiff- Where court suo motu sets up a case for a party - Whether judgment to that effect will stand.

MASTER & SERVANT - Contract of service - Where plaintiff relied on a document and Decree as governing it - Whether the lower court rightly applied a different Act.

MASTER & SERVANT - Termination of appointment - Where not in breach of the parties contract - Plaintiff's case was rightly dismissed by trial court.

MASTER & SERVANT - Fair hearing - Whether plaintiff was given a fair hearing - Before his appointment was terminated.

MASTER & SERVANT - Misconduct - Whether plaintiff was rightly terminated for misconduct.

FACTS

The plaintiff/respondent was a lecturer in the Calabar Campus of the University of Nigeria up till July, 1976, when he transferred his services to the University of Calabar. Few weeks thereafter, plaintiff fell aggrieved by what he termed "Irregularities in the Administration of University of Calabar". He issued a press release to that effect and called on the Federal Government to order a judicial enquiry into the administration of the University. The Vice Chancellor called on the plaintiff to show cause why disciplinary action should not be taken against him. Plaintiff replied in a very bad language which compelled the VC to suspend him from duty without pay. The University Council set up a committee to look into this matter which said committee gave plaintiff a good hearing.

The Council found plaintiff guilty of acts prejudicial to good order and discipline. Plaintiff was asked to do certain things before re-

turning to his job after three months suspension. Instead of complying, plaintiff filed an action against the defendant claiming N828,522.00 as special and general damages. Plaintiff's appointment was subsequently terminated following his suit against the defendant. He sought a declaration that his suspension and termination is null and void. The trial court dismissed the claim. Plaintiff's appeal to the Court of Appeal was allowed based on a different case suo motu set up by that court. Being dissatisfied, the defendant has appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"Where, in an action for wrongful termination of employment, plaintiff had a duty to plead his conditions of service and the relevant Cutes governing his contract of service and to prove that the said conditions and statutes were breached, but neglected to do so was the Court of Appeal right in making the case for him? Etc, see p. 2199

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

Contract of service

1. It is crystal clear from the above that plaintiff made Exhibit 6 and Decree No. 80 of 1979 the basis of his contract of service and not the University of Nigeria Act. An examination of his Brief before the Court below also confirm this conclusion. That being the position taken by the plaintiff both lie trial and on appeal to the Court below, is the Court below justified in applying the University of Nigeria Act 1978 as governing plaintiffs contract of appointment with the Defendant University? I rather think not. It is a cardinal principle of our jurisprudence that where a trial is by pleadings the judgment of the court must be based on the pleadings. It is not the business of the court to make a case for the parties different from the case up by them in their pleadings. (p. 2205 A)

Case not set up by plaintiff

It is precisely what this Court warned against in all these and other cases that the Court below has again done in the case in hand. It was never plaintiff's case that his contract of service with the Defendant was based on a breach of section 15 (or any other section) of the University of Nigeria Act 1978. I do not know what canon of construction would make a statutory provision enacted for the benefit of members of the academic, administrative and technical staff of the University of Nigeria to apply to such members of staff of another independent University without clear provisions in the Act to that effect. I must conclude that the

judgment of the Court below, based, as it were, on a purported breach of section I University of Nigeria Act - a case not set up by the Plaintiff either at the trial or on appeal to the Court below - cannot be allowed to stand. (p. 2206 G)

Termination of appointment

3. Plaintiff based his case on Exhibit 6 and the University of Calabar Act. As rightly found by the Court below the Act would not apply to govern his contract of service as it was not in force during the period of that service. It has not been shown that his suspension from duty and the subsequent termination of his service with the Defendant were in breach of Exhibit 6. The trial High Court was right in dismissing his action. (p. 2207 B)

Fair hearing

4. By plaintiffs showing, both in his pleadings and evidence, it cannot be said that he was not given a fair hearing. It was the result of the hearing the Council of the University directed him to do certain things before resumption of duty, id est, withdraw his offensive letter and apologize to the Vice-Chancellor for his “acts of gross disrespect and indiscipline.” Plaintiff refused to carry out the directive. I do not know what other option the Council had in the circumstance then to terminate his employment if order and good discipline were to prevail among staff and students of the institution. His refusal amounted to misconduct. (p. 2207 C)

Master & Servant - Misconduct

5. The Defendant had power in Exhibit 6 to terminate for misconduct. In the circumstance, therefore, I do not see that the Defendant acted capriciously in terminating plaintiff’s employment. From all I have been saying above, I answer the three questions that call for determination in this appeal in the negative. Consequently I allow this appeal, set aside the judgment of the Court below and restore the judgment of the trial High Court dismissing Plaintiffs case. (p. 2207 F)

NOTABLE POINTS INTEREST

OGWUEGBU JSC

1. Court not to pick points suo motu without hearing the parties

In my view, the procedure adopted by the Court of Appeal was most irregular. It was in error to have picked a point and used it for the consideration of the appeal without giving both sides the opportunity to be heard

on the point. The court below in the circumstance descended into the arena and having taken sides got itself bruised by the criticisms of the defendant in its brief. In a civil suit the function of a judge in this country and other common law jurisdictions is to decide cases on the evidence that the parties think fit to call before it. (p. 2213 G)

IGH JSC

2. When wilful disobedience amounts to a misconduct

The long and short of the issue, quite clearly, is that wilful disobedience of lawful and reasonable order of an employer amounts to misconduct which may justify the dismissal or termination of an employee by his employer. As was aptly put by Obaseki, J.S.C. and I agree entirely with him, that the only course of action open to a servant who conceives that he has grown too big to obey his master is clearly to resign his appointment than expose himself to possible instant dismissal or removal from office. (p. 2224 D)

How to dismiss an employee on ground of misconduct

Where an employer dismisses or terminates the appointment of an employee on ground of misconduct, all that the employer needs establish to justify his action is to show that the allegation was disclosed to the employee, that he was given a fair hearing, that is to say, that the rules of natural justice were not breached and that the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation. (p.2224 E)

PRESENTATION

P. O. Jimoh-Lasisi with K. I. Essien for the Respondent
Appellant is not represented by counsel

CASES REFERRED TO

Kalio v. Kalio (1975) 2 SC 15 G

Akpene v. Barclays Bank of Nigeria Ltd (1977) 1 SC 47

Gombe v. P. W. (Nig.) Ltd (1995) 7 KLR 1321

Saude v. Abdullahi (1989) 7 SCNJ 216

Okpiri v. Jonah (1961) All N.L.R. 102 at 104-105

Benmax v. Austine Motor Co. Ltd (1955) A. C. 370

Emegwara v. Nwaimo 14 W.A.C.A. 347 at 348

Commissioner for Works Benue State v. Devcon Development consultants Ltd. (1988) 3 N.W.L.R. (Part 83) 407

Ogunlowo v. Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624

Atanda v. Lakanmi (1974) 3 S.C. 109

Ebba v. Ogodo (1984) 4 S.C. 84 at 112

Jenkins v. Shelley (1939) 2 K.B. 137 at 145

R. v. Grant (1957) 1 W.L.R. 906

National Electric Power Authority v. El-Fandi (1986) 3 N.W.L.R. (Part B 32) 884

STATUTES REFERRED TO

University of Nigeria Act 1978 ss. 24(1), 15

Decree No. 80 of 1979 C

C

LEAD JUDGMENT BY OGUNDARE.JSC

Dr. Okon J. Essien (hereinafter is referred to as the plaintiff) was a lecturer in the Department of Economics of the University of Nigeria, Nsukka, Calabar Campus from October 1974. On the establishment of the University of D Calabar, in 1976, he opted to transfer his services to the latter University. The transfer of service took effect on 1st July 1976. He acted for a while as head of the Department of Economics, a position he vacated on 17/8/76. Soon things fell apart. On 27/8/76 he lodged a complaint with the Public Complaints Commission, Calabar about alleged wrongdoings going on in the University. Not E satisfied with the pace the Commission was handling his complaint he, on 12/12/77, issued a 6 page press release to all news media titled “Irregularities in the Administration of the University of Calabar” and the same was carried in the Nigeria Herald of January 6, 1978. In news media titled “Irregularities in the Administration of the University of Calabar” and the same was carried in the F Nigeria Herald of January 6, 1978. In it he called on the Federal Government to order a judicial enquiry into the administration of the University.

The press release came to the notice of the Vice Chancellor of the University on 23/12/77 and the latter by a letter dated 23rd December 1977 called on the plaintiff to show cause not later than 31/12/77 why disciplinary G action should not be taken against him for contravening the directive in a University circular of 10th November 1976 which defined the procedure for channelling of grievances and forbade resort to “persons and bodies outside the University without first giving the legitimate university authorities the opportunity to look into their grievances.” The plaintiff replied to the Vice H Chancellor’s letter and because of the language of his reply the Vice Chancellor by his letter dated 9th January 1978 suspended him from duty without pay pending the determination of his matter by the Council of the University. The plaintiff by a letter dated January 23, 1978 and addressed to the Chairman of Council petitioned against the Vice Chancellor’s decision to suspend him.

The Council met and set up an ad hoc committee of council to look into plaintiff's allegations of irregularities in the administration of the university. He was invited to appear before the Committee to substantiate his allegations. He appeared before the committee and was given a hearing to air his grievances. He even cross-examined the Vice-Chancellor who also testified. The Committee reported its findings to the Council B which met to consider the report and in consequence of the decision reached by council a letter dated March 23, 1978 was addressed to the plaintiff conveying the decision of council to him. The penultimate paragraph of the letter reads.

"In consideration of the report against you, council has found C that you are guilty of acts prejudicial to good order and discipline in the University. In order to put a stop to indiscipline, council has decided as follows:

1. You will remain on suspension for three months on half pay with effect from 9th January, 1978 when you were placed on suspension D on the orders of the Vice-Chancellor. You will report back to your Head of Department on 9th April, 1978 for your assignments.

2. You will immediately withdraw in writing your letter to the Vice-Chancellor, Professor E.A. Ayandele and apologise to him satisfactorily for your acts of gross disrespect and indiscipline. Copies of your E letter withdrawing your allegations and of your apology to the Vice-Chancellor must be circulated to the various persons and the news media to whom you had sent your original letter. Evidence of your compliance with this instruction must be submitted to the Secretary to Council within seven days of your receipt of this letter."

F Rather than withdraw his offensive letter and apologise to the Vice-Chancellor as directed in the said letter, plaintiff on 12/4/78 instituted the action leading to this appeal claiming, as per paragraph 23 of his amended statement of claim:-

23. The Plaintiff therefore claims from the defendant general G and special damages amounting to N828,522.00.

PARTICULARS OF SPECIAL DAMAGE

1. Unpaid salary for the period January, 1978 to June, 1978

..... N3,492.00

2. Loss of salary for 20 years from July, 1978 to December 1998 H

..... N136,188.00

3. Loss of Rent subsidy for 20 years N116, 100.00

4. Medical Benefit for 20 years at N2,000.00 per year.

N40,000.00

5. *Loss of car allowance for 20 years at N600.00 per year*
 N12,000.00
6. *Loss of Research grant at N4,000.00 a year for 20 years*
 N80,000.00
7. *Loss of conference fund at N2,000.00 a year for 20 years*
 B N40,000.00
8. *One year's leave entitlement and allowance* N742.00
 428,522.00
- General damages* 400,000.00
 828,522.00
- C (1) *The plaintiff therefore claims the said sum of N828 .522.00.*
 (2) *A declaration that the suspension and termination of the plaintiff's employment is wrongful and is null and void."*
- The plaintiff's appointment was terminated by letter dated 21st June, 1978.
 Hence the necessity for him to file, with leave of the trial High Court, an
 D amended statement of claim in which he pleaded, inter alia, as follows:
- "1. *The plaintiff was at all material time a lecturer in the University of Calabar in the Department of Economics. The plaintiff was originally employed by the University of Nigeria, Nsukka to teach at the Calabar campus and at the trial of this action the plaintiff will rely on*
 E *letter No. UN/G.6/FSS/Econs of the 9th of October, 1974 and another letter dated the 18th of July, 1975.*
2. *Later, following the establishment of the University of Calabar, the plaintiff on the request of the defendant transferred his services to the University of Calabar (the defendant) and at the trial the plaintiff*
 F *will rely on letters from the defendant No. UC/VC.2 of the 15th of January, 1976 and UC/R.31 of the 20th of May, 1976.*
7. *On the 9th of January, 1978 the Vice Chancellor wrote to the plaintiff and without any lawful reason or excuse purported to suspend the plaintiff from the service of the defendant without pay "for the impu-*
 G *udence, insolence and impertinence of your communication to me on the 4th of January, 1978."*
9. *The plaintiff appeared before the adhoc Committee but the plaintiff was grossly disappointed that the Committee acted both as prosecutor against the plaintiff and as a defence team for the University Adminis-*
 H *tration. On arrival the plaintiff was ordered to go ahead and prove his allegations - yet the Adhoc Committee did not formulate any of the allegations, the plaintiff was ordered to prove. When the plaintiff wanted to know if the allegations were those contained in the press release or those contained in the letter addressed to the members of Council on the 24th*

of January, 1978, the panel said it had no knowledge of the latter; whereby the plaintiff produced a copy and submitted to the Committee.

10. When the plaintiff arrived he was initially shown a document referred to as the terms of reference and this paper called for investigation as to the complaints about the plaintiff and to recommend disciplinary action. The plaintiff however proceeded to explain the allegations contained in the Press Release and in the letter of the 24th of January, 1978 and the plaintiff tendered a number of documents and cited a number of witnesses. Indeed instead of the committee endeavouring to appreciate the contents of these documents the committee issued challenges on the plaintiff as to how he had access to these documents. When the plaintiff explained his allegations with regard to an improper appointment of someone as a Reader, one of the members of the Panel produced a paper and said it was written from the University of Ibadan and that the paper falsified the plaintiff's allegation. B C

10(a) At the trial the plaintiff shall also rely on a letter dated 18th August, 1976 from Doctor Enyenihi, Doctor Uya and M.P.E.B. Inyang to the Vice Chancellor. The plaintiff will also rely on a memo from the Assistant Registrar, Mr. Ime W. Etuk to the Vice-Chancellor dated 23rd August, 1976 and new appointment and arrival report in respect of Doctor Tayo Olafioye. D E

11. After the plaintiff had completed his explanations the Vice-Chancellor came in and he was requested to say what he knew about the plaintiff's allegations and the plaintiff was later asked to cross-examine the Vice-Chancellor. The Vice-Chancellor answered the first question directly from the plaintiff. When the second was asked the Vice-Chancellor protested and directed the plaintiff to put his questions through the Committee, which suggestion the committee readily endorsed. When the plaintiff asked the Vice-Chancellor questions about appointments and promotions the Chairman of the Committee said they were not there to investigate appointments and promotions. F G

12. Without more the Chairman on the same day informed the plaintiff that he was guilty and directed the plaintiff to write and apologise to the Vice-Chancellor. On the 3rd of March, 1978 the plaintiff addressed a further communication to the Chairman of the Adhoc Committee and reaffirmed the allegations contained in the press release. At the trial the plaintiff will further contend that the Vice-Chancellor has shown considerable bias against his critics and the plaintiff shall tender and rely on a document titled "An address to the Entire University of Calabar Community by the Vice-Chancellor, Professor E. A. Ayandele on Thursday, 9th H

March, 1978," for the opinion and sentiments expressed by him. The plaintiff shall also seek to rely on the report of the Tambiah Commission of Enquiry which the defendant has consistently withheld from the plaintiff and other members of the University staff and the public at large in order to cover the defendant's commissions and/or omissions.

B 13. On the 23rd of March, 1978 the defendant wrote to the plaintiff confirming what confrontations the plaintiff was subjected to on the 2nd of March and confirmed the plaintiff's suspension from service and directed that it should continue for 3 months on half pay and this because Council had found the plaintiff guilty of acts prejudicial to good order C and discipline in the University. On the 30th of March, 1978 the defendant again wrote to the plaintiff and directed that the plaintiff's suspension would be without pay.

14. On the 5th of April, 1978 the plaintiff through his solicitor wrote to the defendant notifying the defendant that the plaintiff had D taken action in a court of Law seeking to nullify the order of suspension on the plaintiff and requesting the defendant to stop any further action in the matter until the determination of the suit.

15. Notwithstanding paragraph 14 above the defendant apparently acting in contempt of court wrote to the plaintiff by letter UC/ E R.202/S.4 of the 17th of April, 1978 and purported to suspend the plaintiff from service indefinitely.

16. At the trial the plaintiff will contend that the order suspending the plaintiff without pay is in breach of the plaintiff's contract of service with the defendant. It will also be urged by the plaintiff that the F Adhoc Committee of the defendant's council was bound to keep to the principles of natural justice in its trial of the plaintiff.

17. At the hearing of this action, it will further be urged in favour of the plaintiff that the council of the University is responsible for its administration; that the plaintiff's allegation was in the main G against the Council and the Vice-Chancellor and that it was repugnant to natural justice, equity and good conscience for the Council whose administration was being called to question by the plaintiff and as the judge in its own cause. At the trial the plaintiff shall call for the minutes of the Ad Hoc Committee in its deliberations over the plaintiff; he will H equally call for the tape recorded proceedings of the said deliberations and the terms of reference for the Adhoc Committee.

20. The defendant had not served the plaintiff any notice of termination before the 9th of January, 1978 nor had the defendant paid the plaintiff the salaries in lieu of notice prior to that date. The plaintiff

will contend that the reasons given by the defendant for terminating the plaintiff's appointment, are ill-conceived and malicious and that the termination is wrongful having regard to the conditions of service between the plaintiff and the defendant.

21. *The plaintiff is 40 years old and he would have served in the defendant's employment until he should retire at the age of 60. The plaintiff had worked with the University of Nsukka for a period of 2 years before his services were transferred to the defendant at its request.*

22. *The plaintiff is married with many children. He has aged parents who depend on him for livelihood and he also has other relatives dependent on him for support. By the suspension and termination herein complained of the plaintiff has been isolated from the academic world, he has been denied access to research facilities funds, secretarial assistance and equipment. He has suffered considerable indignity and humiliation and the plaintiff shall at the trial tender the Nigerian People Newspaper of 23rd of January, 1978.*"

In its statement of defence the defendant pleaded, inter alia, thus:

"2. *The defendant admits paragraph 1 of the statement of claim.*

3. *Save that the defendant denies that it ever requested the plaintiff to transfer his services, the defendant admits paragraph 2 of the statement of claim. The defendant says that the plaintiff was given the option either to return to the University of Nigeria or transfer his services to the new University of Calabar and the plaintiff willingly informed the Vice Chancellor in writing that he would wish his services transferred to the New University of Calabar. The plaintiff's letter to that effect and the defendant's letter to the plaintiff dated the 20th of May, 1976, referenced as VC/R.31 will be relied upon at the trial.*

11. *The defendant admits that a query dated the 23rd of December, 1977 was sent to the defendant by the Vice-Chancellor as alleged in paragraph 6 of the Statement of Claim and adds that the plaintiff's reply did not contain satisfactory explanation of his conduct. Furthermore, the reply of the plaintiff was so insolent, impudent and impertinent that the Vice Chancellor of the Defendant was compelled to exercise his power under paragraph 11 subparagraph (viii) of the "conditions of service for Senior Staff" to suspend the plaintiff, pending the presentation of a full report to the council of the defendant. At the trial of this action the defendant will rely on the plaintiff's letter dated the 4th of January, 1978 and the letter of 9th January, 1978 written by the defendant's Vice-Chancellor to the plaintiff.*

14. *The defendant, in further answer to paragraph 8 of the State-*

ment of Claim says that the plaintiff appeared before the Adhoc Committee of its Council fully prepared to reply to questions on the allegations he had made in his press release. Indeed, as stated in paragraph 10 of his Statement of Claim, he tendered a number of the documents and mentioned names of witnesses. It also says that the plaintiff never asked for B further time to be given to him to prepare his case but rather apologised to the Adhoc Committee that he was not able to substantiate any of the allegations contained in his Press Release. Indeed, he withdrew some of these allegations before the committee and apologised for having made them in the first instance. The plaintiff further agreed that the language C he used in his reply to the Vice-Chancellor's query dated the 23rd of December, was offensive and agreed to withdraw the letter and to apologise to the Vice-Chancellor in writing. At the trial, the defendant will rely on the defendant's letter to the plaintiff dated 23rd March, 1978.

21. Save and except that the defendant denies that it acted in D contempt of court when it suspended the plaintiff indefinitely, it admits paragraph 15 of the statement of claim. The defendant says that in the letter dated 30th March, 1978 the plaintiff was informed that his reporting back to work on 9th April, 1978 was conditional on his fulfilling all the conditions laid down in the letter of 23rd March, 1978, reference as E UC/R.202/S.4, and that since the plaintiff refused and/or neglected to fulfill the said conditions, and also failed to report back to work, he was suspended indefinitely.

22. The defendant denies that by suspending the plaintiff it committed any breach of contract as alleged in paragraph 16 of the State- F ment of Claim.

23. Save that the defendant denies that its council is responsible for its administration and that in exercising its power to discipline its staff it acted against the rules of natural justice, it says that it is not in a position to admit or deny paragraph 17 of the Statement of Claim.

G The action proceeded to trial and at the conclusion of evidence on both sides and after addresses by learned counsel for the parties, the learned trial Judge in a reserved judgment found –

1. That “Exhibit 6 was the Conditions of Service of the Senior Staff of the defendants and the plaintiff was a member of the Senior H Staff and was bound by the provisions of Exhibit 6.”

2. That “the plaintiff refused (as was also admitted by him) to carry out the directives of the council”.

3. That “the refusal of the plaintiff to comply with the directives of council amounted to misconduct.”

4. *That the termination of plaintiff's appointment was not wrongful.*

5. *That even if plaintiff had proved his case, "he did not specifically and strictly prove special damages."*

He dismissed plaintiff's claims.

Being dissatisfied with this judgment, the plaintiff appealed to the Court of Appeal upon one original (the omnibus ground) and five additional grounds of appeal. Because of what I will say later in this judgment I will set out the grounds of appeal, without their particulars. They read:

1. *The judgment is against the weight of evidence*

2. *Misdirection:*

The learned trial judge misdirected himself in law in holding, 'I would however, like to say this, if I may that the evidence before me is that the plaintiff refused (as was admitted by him) to carry out the directives of the Council. I do not therefore agree with the submission that the termination for that reason was wrongful- there was misconduct.

3. *Misdirection:*

The learned trial judge misdirected himself in law in holding I do not think that the allegation of fair hearing etc. as raised by the plaintiff does arise at all.

4. *Error in Law:*

The learned trial judge erred in law when he failed to consider the whole of the appellant's case and thus acted to the prejudice of the appellant.

5. *Error in Law:*

The learned trial judge erred in law in holding I shall not therefore continece (sic) the plaintiff's claim for special damages because even if he had proved his case, he did not specifically and strictly prove special damages.

6. *Error in Law:*

The learned trial judge erred in law when he held "As far as general damages is concerned, he did not give this court any guidance for his (sic) court to be in a position to assess the general damages in the event of this action succeeding."

In his written brief of argument in the Court of Appeal the plaintiff set out the following issues as calling for determination in his appeal, that is to say:

"(1) Whether on a proper appraisal of the evidence in this case, the learned trial judge could have found the appellant guilty of misconduct.

(2) Whether the respondent's Council properly observed the rules of fair hearing and natural justice before proceeding to terminate the

employment of the appellant.

(3) *Whether the learned trial judge made proper findings on the issues before him.*

(4) *Whether the learned trial judge failed to consider the whole of the appellant's case before him and, if he did not, what is the legal effect.*

B (5) *Whether having regard to the answers to question 3 and 4 above, there are Grounds for the appellate court to interfere and make its own findings*

(6) *Whether the learned trial judge was right in his failure to award the appellant's claim for special damages.*

C (7) *Whether the learned trial judge was right in his failure to assess and award the appellant's claim for general damages."*

The defendant, in its own brief in the court below, formulated the questions thus:

"1. *Where the appellant's appointment was terminated for his deliberate refusal to obey lawful instructions can he complain that such termination was unlawful and wrongful?*

2. *Where the appellant was qualified to be summarily dismissed, could he complain that he was not given a fair hearing when his appointment was terminated?*

E 3. *Whether the appellant strictly established that his condition of service was governed by Decree No.80 of 1979, promulgated one year after his termination.*

F 4. *Whether the appellant was entitled to damages where he failed to establish a case for wrongful termination, and the monetary contents of his conditions of service."*

The Court of Appeal allowed plaintiff's appeal, set aside the judgment of the trial High Court and ordered -

G "that the plaintiff be reinstated to his employment under the defendant effective from 9 January, 1978 and that he be paid all his full salary and entitlements from that date."

The defendant has now appealed against that judgment to this court upon three grounds of appeal which read:

Ground 1:

H *The learned Justices of the Court of Appeal misdirected themselves in law in holding that the conditions of service of the respondent was regulated by the University of Nigeria Decree No. 1 of 1978 and that failure to comply with S.15(1) of the said Decree amounted to a breach of the respondent's contract of employment with the appellant.*

Particulars:

(a) *The respondent neither pleaded in his statement of claim, canvassed orally at the trial nor submitted to the appeal by Decree No. 1 of 1978. It was not even in issue. Where the Court of Appeal raised the matter suo moto, it ought to have invoked Order 3 Rule 2(6) of the Court of Appeal Rules, which provision requires mandatory compliance.*

(b) *Respondent's letter of appointment Exhibit 4 dated 20/5/76 provided B as follows:-*

"The Conditions of service remains as at present in force in the University or as approved from time to time by appropriate University authorities. For the Court to find that it was Decree No.1 of 1978 which regulated that service, it was mandatory that the respondent adduced evidence to establish that at the time of Exhibit 4 he believed that the said Decree applied to his appointment and when he complained, about wrongful breach of that appointment, it was the breach of the Decree's provisions which he complained about. There MUST be certainty about the respondent's claim."

(c) *Where the Court of Appeal held the law creating the University D of Nigeria continued to protect the employees of the University of Nigeria who transferred their service to the appellant until the law creating the appellant was passed. Could that law be Decree No. 1 of 1978 passed after the respondent had left the service of the University of Nigeria or the law that regulated the affairs of the University of Nigeria at the time E of respondent's transfer to the appellant's University (University) of Nigeria Law of 1963 Cap. 127 Laws of Eastern Nigeria).*

Ground 2

The learned Justices of the Court of Appeal erred in law when they held that under the circumstances of this case non compliance with F S..15(1) of the University of Nigeria Decree No.1 of 1978 nullified the termination and made said termination unlawful.

Particulars

(a) *S.15(1) of the University of Nigeria Decree No. 1 of 1978 is a provision-meant for compliance only when the Council is not seized of G the facts and the issues need be established. But where the respondent misconducts himself in the face of the Council and disobeys legitimate instructions issued by the Council, S.15(1) of the Decree will not apply as the respondent could be summarily dismissed.*

(b) *The circumstances, facts and issues in the present action is H fundamentally different from the issues in Olaniyan v. University of Lagos (1985) 2 NWLR (Pt. 9) 599, Eperokun v. University of Lagos (1986) 4 NWLR (Pt. 34) 162 and Shitta-Bey v. Federal Civil Service Commission (1981) 1 SC. 40 at 56 which decisions were relied heavily upon by the*

Court of Appeal in holding that compliance with S.15(1) of the University of Nigeria Decree 1 of 1978 was mandatory.

(c) At the time of the termination of the appointment of the respondent herein, his employment was regulated by the Common Law and Exhibit 6 (Senior Staff Conditions of Service) as the law establishing the University of Calabar and the University of Nigeria Decree of 1978 were yet to be promulgated without the respondent's employment with the appellant in contemplation.

Ground 3

The learned Justices of the Court of Appeal erred in law in awarding the respondent a relief not sought in his Statement of Claim nor orally at the trial when such is not and cannot be a consequential relief.

Particulars

(a) The Appeal Court ordered that the respondent be re-instated to his employment under the appellant effective from 9th January, 1978 and that he be paid all his full salary and entitlements from that date when this re-instatement was neither claimed in the main or as an alternative in the writ and/or statement of claim.

(b) Appeals succeed or fail on the ground filed, canvassed and argued in the brief of argument at the Court of Appeal. No ground of appeal as filed and argued by the respondent was held to have succeeded to predicate the order of re-instatement made in his favour.

(c) The Court abandoned its role of an impartial arbiter and descended into the arena of the litigant and ground the respondent's grievances on S.15(1) of the University of Nigeria Decree of 1978 and regulating the respondent's employment, sought and awarded in the process, a relief not claimed by the respondent (re-instatement).

Pursuant to the rules of this Court, the parties filed and exchanged their respective Briefs of argument. At the oral hearing of the appeal, the defendant was not represented by counsel. The appeal was taken as argued on the briefs -vide Order 6 rule 8(6) of the Supreme Court Rules. Mr. Jimoh-Lasisi, learned leading counsel for the plaintiff/respondent proffered a short oral argument after he had first withdrawn the preliminary objection he raised, and argued in the respondent's Brief, to the Notice of Appeal and in respect of which defendant filed a Reply Brief. The said preliminary objection is hereby struck out.

In the appellant's Brief the defendant raised the following questions as calling for determination in this appeal. They are:

"1. Where, in an action for wrongful termination of employment, the plaintiff had a duty to plead his conditions of service and the

relevant statutes governing his contract of service and to prove that the said conditions and statutes were breached, but neglected to do so, was the Court of Appeal right in making the case for him?

2. *Where the parties to this Appeal fought their case at the trial and the appeal on Exhibit 6, was the Appeal Court in order when they held that the respondent's appointment was regulated by Decree No.1 of 1978 which was neither canvassed nor alluded to by the respondent throughout the trial and the appeal?*

3. *Was the Court of Appeal right in holding that the respondent's appointment was in fact governed by the University of Nigeria Act No.1 of 1987"*

C

The plaintiff, in his brief reframed the questions thus:

"(i) Whether the provisions of the University of Nigeria Act No. 1 of 1978 governed the plaintiff's employment under the defendant between 1st July, 1976 and 28th September 1979.

(ii) Whether the judgment of the Court of Appeal that the plaintiff was entitled to a hearing was correct in law.

(iii) If the University of Nigeria Act No.1 of 1978 is not applicable to the contract of service between the plaintiff and the defendant (not conceded) is the plaintiff not entitled to a hearing before the termination of his contract"

E

Having regard to the judgment appealed against and the grounds of appeal I think the questions as formulated in the appellant's Brief are more appropriate and I adopt them accordingly. Because the arguments on them dovetail into each other. I shall consider them together.

The court below, in the lead judgment of Oguntade, JCA (with F which the other Justices agreed) has this to say:

"In this judgment I think that the first issue I should solve is the question of the law or the contract agreement which formed the basis of plaintiff's employment under the defendant. It seems to me that a lot of efforts were misdirected by the failure of all the parties concerned to direct attention to this basic matter. As soon as the issue is resolved, the seemingly knotty issues in the matter will dissolve into nothingness. It is a case of much ado about nothing.

After examining the facts relating to how the plaintiff transferred his services from the University of Nigeria, Nsukka to the University of Calabar H in 1976, the learned Justice of Appeal observed:

"The University of Calabar Act No. 80 of 1979 which created the defendant was not passed until 28th September, 1979 when it also came into force. The plaintiff was employed by the defendant on 1st July,

1976; and terminated on 21st June, 1978. On those two dates, the University of Calabar Act had not been passed. Strictly speaking therefore, the defendant was not yet in existence by law as a University. So then, what is the status of plaintiff's relationship with the defendant? Was it an ordinary master/servant relationship or one specially protected by statute?

B If the latter, which statute?"

Answering the questions posed by him Oguntade, J.C.A reasoned thus:

"I think that it was never the intention of parties that the plaintiff was to lose his security of tenure simply because he had transferred from one University to another. It has to be borne in mind that the latter employment of plaintiff was merely a continuation of the former. Both Universities were owned by the Federal Government and created by the Legislations of the Federal Government. It certainly could not be the intention of the Federal Government that the lecturers in its various Universities should have varying conditions of service. It would seem D that the fair way to approach the matter is to treat the University of Calabar under which plaintiff was employed on 1st July, 1976 as at that date up till the time the University of Calabar Act was passed on 28th September, 1979 as still a campus of the University of Nigeria, Nsukka. The arrangements by which plaintiff was employed and other things done E would appear to be no more than the preliminary steps made in advance of the statute setting up the University. That being so, my view is that the law creating the University of Nigeria continued to protect the employees of the University of Nigeria who transferred their service to the defendant until the law creating the defendant was passed.

F If I were to treat the situation otherwise, I would come to the conclusion that the plaintiff who enjoyed protection of tenure under the law creating the University of Nigeria lost that protection by transferring to the defendant; and that were he not sooner terminated, he reverted to the same statutory protection from 28 September, 1979 when the University G of Calabar Act No. 80 of 1979 was passed. That would clearly be contrary to the agreement of the parties that the period of service of the plaintiff under the University of Nigeria would be credited to the plaintiff under the defendant.

I therefore hold that the provisions of the University of Nigeria H Act No.1 of 1978 governed plaintiff's employment under the defendant between 1st July, 1976 and 28th September, 1978."

This passage is the crux of the defendant's complaint in this appeal.

The defendant contends in its Brief:

"It is settled law that the duty of a Court is to determine a matter

on issues properly raised before it. In the High Court, such determination is circumscribed and limited strictly to the pleadings of the parties. In the appellate Courts, determination of such issues are based strictu sensu on the Grounds of appeal and on the issues canvassed in the Briefs of the parties.

The corollary is that Court of Appeal should only deal with and B undertake a dispassionate consideration of issues submitted to it and make pronouncements on such issues which pronouncements must reflect and demonstrate such dispassionate exercise. Authorities on this point are Legion, but it suffices to refer to: Okonji & Ors. v. Njokana & Ors. (1991) 7 NWLR (Pt. 202) 131 at 146 and Ebba v. Ogodo & Anor. (1984) 1 SCNLR 372. C

On those exceptional circumstances when an appellate Court in its desire to do justice formulates its own issues, it is enjoined, ex debito justitiae, to invite parties before it to address it on such issues it suo motu formulates. On numerous occasions where the Court of Appeal had on its own framed issues for determination not contemplated or canvassed by the parties before it, and proceeded to determine the appeal on the issue as framed D by it, the Supreme Court has often deprecated such a course, holding as it were, that such was an unwarranted infraction of the parties "right to fair hearing."

I do not think anyone can seriously fault the above passage as representing the law. It is argued in the Brief that the plaintiff predicated his appeal in the Court below on Decree No. 80 of 1979 titled "The University of Calabar Decree" and that the defendant joined issue with him on that in that in its own Brief the defendant contended that the Decree did not apply to plaintiff's contract. The court below, however, found that it was F not Decree No. 80 of 1979 that applied but the University of Nigeria Act No.1 of 1978 that applied. Defendant submits that -

".... the Court of Appeal misdirected itself in following the above course and thereby came to a grave error in allowing the respondent's G appeal. At no stage of the proceedings did the plaintiff canvass that his employment was governed by the University of Nigeria Act. The Court cannot set up a case for the plaintiff. The plaintiff's conditions of service must be distinctly pleaded and its breach and the provisions breached fully set out and evidence adduced in support.

Very fundamental in this appeal is the fact that even though the H Court of Appeal determined the appeal before it upon issues it formulated and of which it hadn't the advantage of hearing from the parties, it failed to invoke the Provisions of Order 3 Rule 2(6) of the Court of Appeal Rules, which said provisions demand strict compliance. The Court

equally failed to advert its mind to the myriads of case law as settled by the Supreme Court regarding issues it suo motu formulates.”

It is further submitted that the plaintiff’s case in the High Court was based on Exhibit 6 - Conditions of Service for Senior Staff and not on any Decree (or Act).

B The plaintiff, on the other hand, submits that as at the time the defendant appointed the plaintiff, the University of Calabar was still a campus of the University of Nigeria by virtue of section 24(1) of the University of Nigeria Act, 1978. It is further submitted that “the conditions of service remain as at present in force in the University or as approved from time
C to time by appropriate University authority’ contained in Exhibit 4 (page 148 could only be interpreted to mean the conditions in the University of Nigeria). This is so because the University of Nigeria Act No. 1 of 1978 was not promulgated until 19th January, 1978. The net effect of Exhibit 4 was when the contract (of) service between the plaintiff and the defendant was concluded it was the intention of the parties by agreement that
D the conditions of service obtaining in the University of Nigeria will be applicable between the plaintiff and the defendant.”

I think the plaintiff’s contention that the conditions of service applicable in the University of Nigeria governed his contract of service
E with the defendant is an after-thought. It was never his case at the trial nor in the Court below. At no time did he allege a breach of the University of Nigeria Act in his suspension and/or termination of appointment. His case at the trial was built around the following premises -

*1. that the order suspending him without pay is in breach of his contract
F of service - see: paragraph 16 of the amended statement of claim;*

2. that it was repugnant to natural justice, equity and good conscience for the Council whose administration was being called to question by the plaintiff to sit as the prosecutor against the plaintiff and as the Judge in its own cause - see: paragraph 17;

G *3. that the defendant maliciously and wrongfully and in utter contempt and disrespect of the High Court of Justice, purported to terminate the plaintiff’s appointment and retrospectively - see paragraph 19;*

*4. that the reasons given by the defendant for terminating the plaintiff’s appointment, are ill-conceived and malicious and that the termination is wrongful having regard to the conditions of service between
H the plaintiff and the defendant - see paragraph 20.*

Although he pleaded his letter of appointment to the service of the University of Calabar he did not plead what his conditions of service were. His letter of appointment (Ex. 4) reads:

Dear Sir,

APPOINTMENT TO THE UNIVERSITY OF CALABAR

I write to inform you that, following your letter/memorandum addressed to the Vice-Chancellor and informing him that you would wish your services with the University of Nigeria transferred to the University of Calabar, approval has been given to effect the transfer of your services to the University of Calabar from 1st July, 1976. Your period of previous service with the University of Nigeria will be recognised by the University of Calabar.

The conditions of service remain as at present in force in the University or as approved from time to time by appropriate University Authorities.

Yours faithfully,
(O.A. Ufot)
for: Registrar”

D

In his evidence at the trial he testified thus:

“At the time of my employment I was not given any conditions of service. It was upon my suspension that I received the conditions of service of the University. This was around the 1st and 2nd week of January 1978. This is the condition of service. Mr. Isikalu has no objection - Exhibit 6.”
‘Cross-examined reiterated –

When I was appointed I was not aware of the conditions of service. I see Exhibit 4 in court. It was the letter appointing me. I did not protest. It took me time to look for the conditions of service. It is not to my knowledge whether there were conditions of service in existence at the time I was suspended. After I had been suspended in (sic) the conditions of service were circulated. After my suspension my conditions of service were regulated in Exhibit 6”

The reasonable inference to be drawn from plaintiff’s evidence is that he knew that his conditions of service were governed by Exhibit 6 and this must be the basis upon which he instituted his action. This inference is reinforced by the submissions of his counsel at the trial. In his final address, Dr. Ekanem learned leading counsel for the plaintiff submitted as follows;

“At the time of his employment the plaintiff was not given any conditions of service which was a violation of S.7(1) of the Labour Act - Decree No. 21 of 1974. This requires within 3 months for conditions of service to be given. He was given the conditions of service on the date of his suspension being 9th January, 1978. On that day the plaintiff was

suspended as evidenced by Exhibit 10.”

On the validity of plaintiff’s suspension, learned counsel submitted:

“Does the suspension of the plaintiff by the defendant defeats the plaintiff’s right to remuneration? The answer is definitely No. It does not. Suspension without pay etc. is not supported by Labour Act. It is not B also supported by Judicial Decisions.”

On the validity of the notice of termination Dr. Ekanem submitted:

“Another question is - was the Notice of the termination of the plaintiff (Exhibit 20) proper, reasonable and lawful? The answer is No - definitely not. The plaintiff received no notice of termination before the C 9th of January; 1978. Plaintiff also received pay in lieu of notice before 9th January, 1978. The Notice of termination - Exhibit 20 was retrospective - see the date 21st June, 1978. Retrospection termination of the plaintiff is not recognized by law. It is not supported by Exhibit 6 - See N.D.C. Limited v. David O. William (1975) NMLR page 204. The termination of D the appointment was invalid.” (Underlining is mine).

On fair hearing, learned counsel submitted:

“The fifth question is did the plaintiff receive a fair hearing for (sic) the defendant Counsel? The answer is clearly that he did not. Plaintiff’s appointment carried a legal status which entitled him to a E hearing. The Committee of the Council which invited the plaintiff by Exhibit 13 did not disclose to the plaintiff as required by S.15 of Decree No. 80. No formal charges or reasons given as required by Exhibit 6 refers to Decree No. 80, 15(1)(a) 2(b). When the plaintiff appeared he was not allowed to put questions to the Vice-Chancellor.

F It was pleaded at paragraph 11 of Statement of Claim and they admitted it in paragraph 18 of Statement of defence. The plaintiff did not receive a fair hearing - Adedeji v. Federal Public Service Commission (1968) NMLR page 102 at page 107. Also to Olatunbosun v. Nisser (sic) (1986) NWLR (Pt. 29) page 435. Exhibit 13 merely invited the plaintiff G to come and answer to allegations he made against the University. Exhibit 13 was issued to the plaintiff on the same day that the Committee sat. This is confirmed in Exhibit 17. If Exhibit 13 was issued on that day then he was not given opportunity as stipulated in Decree No. 80 S.15(1)(a) and (b). Submits that the Council was biased.”(Underlinings are mine)

H On the final question posed by him, Dr. Ekanem submitted:

“The final question is - were the allegations made by the plaintiff against the University confirmed? The answer is that the allegations were confirmed in Exhibit 29 at pages 113 - 118. They were also confirmed in Exhibit 20 - Tambiah Report - that the defendant acted wrongly. Refers

Court to Exhibit 6 page 8(iii). The plaintiff did nothing wrong by writing things that were going wrong in the University.”(Italics mine).

It is crystal clear from the above that plaintiff made Exhibit 6 and Decree No. 80 of 1979 the basis of his contract of service and not the University of Nigeria Act. An examination of his Brief before the Court below also confirms this conclusion.

That being the position taken by the plaintiff both at the trial and on appeal to the Court below, is the Court below justified in applying the University of Nigeria Act 1978 as governing plaintiffs contract of appointment with the defendant University? I rather think not. It is a cardinal principle of our jurisprudence that where a trial is by pleadings the judgment of the court must be based on the pleadings. It is not the business of the court to make a case for the parties different from the case set up by them in their pleadings - see: Incar (Nig.) Ltd. v. Benson Transport Ltd. (1975) 3 SC. 117; Solana v. Olusanya (1975) 6SC. 55; Metal Construction (W.A.) Ltd. v. Migliore (1979) 6-9 SC. 163; Dumbo v. Idugboe (1983) SCNLR 29.

This Court has in a number of cases strongly deprecated the practice of a court taking up a point suo motu and make it the basis of its decision without hearing the parties on it. In Adeosun v. Babalola (1972) 5 Sc. 292 this Court held that it is improper for a court to give a decision on a point not argued before it. Sir Udoma, J.S.C, delivering the judgment of the Court observed at page 302 thus:

“As a general rule this Court has always regarded with disfavour the practice of a court giving a decision on a point not argued before it. In Obazke Ogiamien & Anor. v. Ohahon Ogiamien (1967) NMLR, 245 this Court said at page 248 and 249:-

“This Court has pointed out on several occasions that it is wrong for a Judge to give a decision on a point which opportunity was not afforded counsel to argue at the hearing and particularly a point which throughout the hearing was not raised.”

(See also The Registered Trustees of Apostolic Church Lagos Area v. Rahman Akindele (1967) NMLR 263

Again, in Kuti v. Jibowu (1972) 6 Sc. 147 at page 172-173, Fatayi-Williams, J.S.C. (as he then was) observed:

“It is, in our view, not open to the Court of Appeal to raise H issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. There may be occasions during the hearing of an appeal, however, when the genuineness of any document tendered during the hearing of case may appear to the court hearing the appeal to be

in doubt. In such a case, and only if it is material to the determination of the appeal, the party or parties who were supposed to have executed the document in question should be given an opportunity to explain the discrepancy before any opinion is expressed as to the genuineness of the document."

In *Lahan v. Lajoyetan* (1972) 6 SC. 190, at page 200, Sowemimo, B J.S.C (as he then was) delivering the judgment of this Court also observed:

"We regret we cannot but repeat, that a procedure whereby a Court of Appeal takes up a point before parties or their counsel are heard and decides the issue is most inappropriate and irregular. We have often in the past drawn attention to the impropriety of dealing with an appeal in this way and it is our hope that this practice will be discontinued."

And in *Kuti v. Balogun* (1978) 1 SC. 53 at pp. 60-61 Eso, J.S.C. yet again reiterated:

"It is not open to a Court of Appeal to raise issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. There could be instances however when a point which has not been raised is material to the determination of the appeal. When a court of appeal feels inclined to raise such point, parties must be given an opportunity to make their comments thereupon before the Court takes a decision on the point."

E Uwais, J.S.C. (as he then was) in a similar vein, observed in *Olusanya v. Olusanya* (1983) 1 SCNLR 134 at page 139:

This Court has said on a number of occasions that although an appeal court is entitled, in its discretion, to take points suo motu if it sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. Where the points are taken the parties must be given the opportunity to address the appeal court before decision on the points is made by the appeal court - see *Kuti & Anor v. Jibowu & Anor.* (1972) 1 All NLR (Pt. 11), p. 180 at p. 192; *Salawu Ajao v. Karimu Ashiru & Ors.* (1973) All NLR (Pt. 11) p. 51 at p. 63; *Atanda & Anor. v. Lakanmi* (1974) 1 All NLR. (Pt. 1) p. 168 at p. 178 and *Kuti v. Balogun* (1978) 1 LRN 353 at p.457."

It is precisely what this Court warned against in all these and other cases that the Court below has again done in the case in hand. It was never plaintiff's case that his contract of service with the defendant was based on a breach of section 15 (or any other section) of the University of Nigeria Act, 1978. I do not know what cannon of construction would make a statutory provision enacted for the benefit of members of the academic, administrative and technical staff of the University of Nigeria to apply to such members of staff of another independent University without clear

provisions in the Act to that effect. I must conclude that the judgment of the Court below, based, as it were, on a purported breach of section 15 of the University of Nigeria Act - a case not set up by the plaintiff either at the trial or on appeal to the court below - cannot be allowed to stand.

Plaintiff based his case on Exhibit 6 and the University of Calabar Act. As rightly found by the court below the Act would not apply to govern his contract of service as it was not in force during the period of that service. It has not been shown that his suspension from duty and the subsequent termination of his service with the defendant were in breach of Exhibit 6. The trial High Court was right in dismissing his action. By plaintiff's showing, both in his pleadings and evidence, it cannot be said that he was not given a fair hearing. It was the result of the hearing that the council of the University directed him to do certain things before resumption of duty, id est, withdraw his offensive letter and apologise to the Vice-Chancellor for his "acts of gross disrespect and indiscipline" Plaintiff refused to carry out the directive. I do not know what other option the Council had in the circumstances than to terminate his employment if order and good discipline were to prevail among staff and students of the institution. His refusal amounted to misconduct as defined in Exhibit 6 as meaning -

"any conduct prejudicial to the good discipline and proper administration of the University. Without prejudice to the generality of this definition, misconduct 'includes corruption, dishonesty, false claims against the University, insolence, insubordination, negligence of duty, falsification of accounts or records, conviction of a criminal offence, absence from duty without lawful excuse and the committing of all other acts which are inconsistent with the proper performance of the duties for which the member of staff was employed."

The defendant had power in Exhibit 6 to terminate for misconduct. In the circumstance, therefore, I do not see that the defendant acted capriciously in terminating plaintiff's employment.

From all I have been saying above, I answer the three questions that call for determination in this appeal in the negative. Consequently I allow this appeal, set aside the judgment of the Court below and restore the judgment of the trial High Court dismissing plaintiff's case. I award to the defendant/appellant N1,000.00 costs of this appeal and N500.00 costs of the appeal in the Court below.

WALI JSC

I have had the privilege of reading in advance, a copy of the lead judgment of my learned brother Ogundare, J.S.C. and I agree with his reasoning and conclusion for allowing the appeal.

In the plaintiff’s amended Statement of Claim, he averred as B follows:-

“1. *The plaintiff was at all material time a Lecturer in the University of Calabar in the Department of Economics. The plaintiff was originally employed by the University of Nigeria, Nsukka to teach at the Calabar Campus and at the trial of this action the plaintiff will rely C on letter No. UNP/G.6/FSS/Econs of the 9th of October, 1974 and another letter dated the 18th of July, 1975.*

2. *Later, following the establishment of the University of Calabar, the plaintiff on the request of the defendant transferred his services to the University of Calabar (the defendant) and at the trial the plaintiff will D rely on letters from the defendant No. UC/VC.2 of the 15th of January, 1976 and UC/R.31 of the 20th of May, 1976.”*

The plaintiff made various allegations in writing against the institution to wit the University of Calabar, through the Vice Chancellor and later to the Public Complaints Commission. He finally went to the press E and published to the whole world the allegations of irregularities and mal-administration against the University.

As a result of these publications the Vice Chancellor wrote a letter dated 23rd December, 1977 and asked him to show cause why disciplinary action should not be taken against him for contravening the F circular letter No. U.C.R. 97/S. 3 of 10th November, 1997 which prohibited taking of the University matters outside without first complaining to the University Authorities.

The plaintiff wrote a rude reply letter to the Vice Chancellor as a result of which the Vice Chancellor wrote a letter dated 9th January, G 1988 informing him that he had been suspended without pay from the services of the University and that his matter would be laid before the Council of the University for consideration and determination.

The plaintiff was invited before the Adhoc Committee of the University Council to substantiate the allegations he labelled against the H University. He averred in paragraph 10 of the Amended Statement of Claim that he:-

“.....proceeded to explain the allegations contained in the Press Release and the letter of 24th January, 1978 and the plaintiff tendered a number of documents and cited a number of witnesses.”

After hearing both sides, the plaintiff was found guilty of misconduct by the Ad Hoc Committee and was directed to write a letter of apology to the Vice Chancellor. The plaintiff did not write the letter of apology as directed but addressed a further letter to the Chairman of the Ad Hoc Committee affirming the allegations contained in his press publications. The defendant then wrote a letter dated 21st June, 1978 addressed to the plaintiff informing him of B termination of his appointment with the University.

At the end of the hearing of the case the learned trial Judge reviewed the evidence before him and concluded:-

“Having regard to all the foregoing, it is my view after considering the facts put forward by the plaintiff that they are not facts C which would entitle him to succeed. It therefore fails and it is hereby dismissed accordingly.”

The plaintiff appealed against the judgment to the Court of Appeal which after hearing the appeal agreed that Exhibit 11, the letter written by the plaintiff to the Vice Chancellor, “was written in a language calculated to offend especially from an employee to his boss.” After this damaging statement to the plaintiff’s case the Court of Appeal went off the track and considered the issue of the University of Nigeria Act No.1 of 1978 with particular reference and emphasis on S. 15(1) of the Act, and opined thus:-

“It seems to me that the lower Court having found that the plaintiff E misconducted himself as alleged by the defendant should have gone further to determine whether in terminating the plaintiff for such misconduct the defendant complied with the relevant law.”

X X X X X X X X X

Since the defendant did not follow the terms of S. 15(1) of the University F of Nigeria Act No.1 of 1978 in removing the plaintiff from its employment it follows that plaintiff’s termination was unlawful, null and void.”

The plaintiff did not plead S. 15(1) of the University of Nigeria Act No.1 of 1978 or any other section of the Act as part of his condition of Service. The defendant did not plead the same either to enable the plaintiff G take advantage of it. What the plaintiff pleaded was Exhibit 6. The learned trial Judge made a finding “that..... Exhibit 6 was the conditions of Service of the Senior Staff of the Department and the plaintiff was a member of the Senior Staff and was bound by the provisions of Exhibit 6.” There was no appeal by the plaintiff against this finding. H

The issue of the University of Nigeria Act No.1 of 1978 was first introduced into the case by Counsel for the plaintiff in his final address to the trial court before judgment.

The Court of Appeal was therefore wrong in basing its conclu-

sion on what was not pleaded and also on what was not appealed against. A court will not base its decision on matters not pleaded, nor will it exercise a jurisdiction which it does not have in proceedings before it. If it proceeds to do so, its judgment will be void and null. See *Kalio v. Kalio* (1975) 2 SC 15, *Akpene v. Barclays Bank of Nigeria Ltd.*(1977) 1 SC 47; *B Gombe v. P.W. (Nig) Ltd.* (1995) 6 NWLR (Pt. 401) 402, *Sadue v. Abdullahi* (1989) 7 SCNJ. 216 and *Ebba v. Ogodo & Anor.* (1984) 4 SC 84.

It is for these and the more detailed reasons contained in the lead judgment of my learned brother Ogundare, J.S.C. that I also hereby allow the appeal set aside the judgment of the Court of Appeal and restore the order of dismissal of the plaintiff's claim by the High Court.

I abide by the consequential orders relating to costs made in the lead judgment.

D **OGWUEGBU JSC**

I had the privilege of reading in draft the judgment just read by my learned brother, Ogundare, J.S.C. and I agree with his reasoning and conclusion.

The plaintiff instituted an action against the defendant in the Calabar Judicial Division of the High Court of Cross River State claiming the sum of N828,522.00 as special and general damages for wrongful termination of his employment and a declaration that the suspension and termination of his employment are wrongful, null and void.

The plaintiff's claims were dismissed by the learned trial Judge after a full hearing. He appealed to the Court of Appeal Enugu Division and his appeal was allowed. The defendant who was dissatisfied with the decision, appealed to this court. The appellant submitted the following three issues for determination in the appeal:-

G *"1. Where in an action for wrongful termination of employment, the plaintiff had a duty to plead his conditions of service and the relevant statutes governing his contract of service and to prove that the said conditions and statues were breached, but neglected to do so, was the Appeal Court right in making the case for him?"*

H *2. Where the parties to this Appeal fought their case at the trial and the appeal on Exhibit 6 was the Appeal Court in order when they held that the respondent's appointment was regulated by Decree No. 1 of 1978 which was neither canvassed not alluded to by the respondent throughout the trial and the appeal?"*

3. Was the Court of Appeal right in holding that the respondent's appointment was in fact governed by the University of Nigeria Act No. 1 of 1978?"

The Court of Appeal in its judgment per Oguntade, J.C.A. observed us follows:

"In this judgment, I think that the first issue I should solve is the question of the law or the contract agreement which formed the basis of the plaintiff's employment under the defendant."

After considering various documents tendered at the trial which relate to the plaintiff's employment with the defendant, the court found as follows:

"That being so, my view is that the law creating the University of Nigeria continued to protect the employees of the University of Nigeria who transferred their service to the defendant until the Law creating the defendant was passed I therefore hold that the provisions of the University of Nigeria Act No.1 of 1978 governed plaintiff's employment under the defendant between 1st July, 1976 and 28th September, 1979."

It was the contention of the learned counsel for the appellant that the court below was in grave error in coming to the above conclusion when the plaintiff did not at any stage canvass that his employment was governed by the University of Nigeria Act, 1978. The plaintiff in paragraph 20 of his amended statement of claim averred thus:

"20. The defendant had not served the plaintiff any notice of termination before the 9th of January, 1978 nor the defendant paid the plaintiff the salaries in lieu of notice prior to that date. The plaintiff will contend that the reasons given by the defendant for terminating plaintiff's appointment, are ill-conceived and malicious and that the termination is wrongful having regard to the conditions of service between the plaintiff and the defendant."

In the course of his evidence, the plaintiff tendered the Conditions of Service of the University of Calabar as Exhibit "6". The University of Nigeria Act No.1 of 1978 which the court below relied on in allowing the plaintiff's appeal was not alluded to by either party in their pleadings, evidence and final addresses in the court of trial. In fact, both learned counsel referred to Decree No. 80 of 1979 (The University of Calabar Act, 1979).

In the Court of Appeal, the plaintiff who was the appellant in that court complained of non-compliance with section 15 of Decree No. 80 of 1979 by the defendant before his termination. In paragraph 5 of the appellant's brief of argument in the Court of Appeal, the learned appellant's counsel submitted as follows:

“The respondent is created, established and governed by Decree No. 80 of 1979. Section 15 provides for the removal and discipline of the appellant as a member of the academic staff.....Section 15(1) (a) of Decree No. 80 of 1979 clearly states that the Council shall give notice of those reasons to the person in question to be removed from office or employment for misconduct. For the appellant to be removed for misconduct, the procedure provided in section 15 of Decree No. 80 of 1979 should have been followed, and to do otherwise was ultra vires of the respondent.”

The learned defendant/respondent’s counsel in paragraph 6.04 C of the respondent’s brief argued as follows:

“It is submitted with respect that Decree No. 80 of 1979 did not apply to the contract of the appellant, the Decree not having a retrospective effect and which could not have taken into consideration a contract of employment which was entered into and terminated long before the Decree D was enacted.”

From the above excerpts, the University of Nigeria Act No.1 of 1978 was not raised as an issue in the respective briefs of argument. Rather, the Court of Appeal was invited to determine whether or not Decree No. 80 of 1979 was applicable to the plaintiff’s contract of employment.

E In the course of its judgment and after considering Exhibits “2”, “3” and “4”, the court below held as follows:

“The University of Calabar Act No. 80 of 1978 which created the defendant was not passed until 28 September, 1979 when it also came into force. The plaintiff was employed by the defendant on 1st July, 1976; F and terminated on 21st June, 1978. On those two dates, the University of Calabar Act had not been passed. Strictly speaking therefore, the defendant was not yet in existence by law as a University. So then, what is the status of plaintiff’s relationship with the defendant. Was it of ordinary servant relationship or one specially protected by statute?It would seem G that the fair way to approach the matter is to treat the University of Calabar under which the plaintiff was employed on 1st July, 1976 as at that date up till the time the University of Calabar Act was passed on 28th September, 1979 as still a Campus of the University of Nigeria, NsukkaI therefore hold that the provisions of the University of H Nigeria Act No. 1 of 1978 governed plaintiff’s employment under the defendant between 1st July, 1976 and 28th September, 1979.”

Exhibit “4” is a letter conveying the approval of the transfer of the services of the plaintiff from the University of Nigeria to that of Calabar. In it, he was informed that the period of his previous service

with the University of Nigeria will be recognised by the University of Calabar. The last paragraph of Exhibit “4” reads:

“The Conditions of Service remain as at present in force in the University or as approved from time to time by appropriate University Authorities.”

From the time Exhibit “4” came into existence, the plaintiff’s B conditions of employment ceased to be those of the University of Nigeria and the Conditions of Service existing in the University of Calabar are contained in Exhibit “6”. The plaintiff’s employment was from that moment governed by Exhibit “6”.

Despite the fact that the plaintiff denied knowledge of the C existence of Exhibit “6” in his evidence until after his suspension, paragraph 20 of his amended statement of claim shows clearly that he based his claim on non-compliance with the provisions of Exhibit “6”. There are no other Conditions of Service in the University of Calabar for Senior Staff other than Exhibit “6”. D

The University of Calabar Act No. 80 of 1979 which came into force on 28th September, 1979 could not have applied to the plaintiff whose appointment was terminated with effect from 9th January, 1978. There is no where in the proceedings in the High Court where the University of Nigeria Act of 1978 was canvassed or alluded to by the parties. It was E not reflected in the pleadings, evidence or addresses of counsel. The parties in the Court of Appeal did not mention let alone rely on it in their briefs of argument. The Court of Appeal suo motu raised the issue of the University of Nigeria Act, 1978 and relied on it to determine the appeal.

“The judgment of the court below was based on the application F of that law raised by it and which law was not canvassed by the learned counsel for the plaintiff/appellant. When a court raises a point suo motu the parties must be given an opportunity to be heard on the point, particularly, the defendant’s counsel whose client may suffer punishment as a result of the point raised. See Kuti v. Balogun (1978) 1 SC. 53, Atanda v. Lakanmi (1974) 1 All NLR (Pt. 1) 170, Odiase v. Agho (1972) 1 All NLR (Pt. 1) 70, Ochonma v. Unosi (1965) NMLR 321, Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410, Kuti v. Jibowu (1972) 6 Sc. 147 at 172-173. In my view, the procedure adopted by the Court of Appeal was most irregular. It was in error to have picked a point and used it for the consideration of the appeal without H giving both sides the opportunity to be heard on the point. The court below in the circumstance descended into the arena and having taken sides got itself bruised by the criticisms of the defendant in its brief. In a civil suit the function of a Judge in this country and other common law

jurisdictions is to decide cases on the evidence that the parties think fit to call before it. See Fallon v. Calvert (1960) 2 Q.B. 201. In re Enoch v. Zaretsky Bock & Co's Arbitration (1910) 1.K.B. 327 Jones v. National Coal Board (1957) 3 All E.R. 155 and Omoregbe v. Lawani (1980) 3-4 S.C. 108 at 120-121. Therefore, the judgment of the court below which is based on a point it raised suo B motu, canvassed and expounded without affording the parties an opportunity of being heard cannot be allowed to stand.

The plaintiff failed to show that his suspension and termination were not in accordance with the provisions of Exhibit "6". I agree with the learned trial Judge that a case of misconduct was made out against C the plaintiff. Misconduct is defined at page 6 of Exhibit "6" to mean:-

".....any conduct prejudicial to the good discipline and proper administration of the University. Without prejudice to the generality of this definition, misconduct includes corruption, dishonesty, false claims against the University, insolence, insubordination, negligence of D duty..... " " "

The court below also observed that the contents of Exhibit "11" written to the Vice-Chancellor by the plaintiff was in most unacceptable language which did not reflect well on the plaintiff and calculated to offend especially from an employee to his boss.

E An Ad Hoc Committee set up to investigate the disregard of official communication and the use of impolite language in his communication after its hearing, found the plaintiff guilty of acts prejudicial to good order and discipline. It recommended that the plaintiff should remain in suspension for three months on half pay, withdraw his letters to the Vice-Chancellor F and apologise to him among other recommendations. The Governing Council considered the recommendations and directed as follows:

"(i) that Dr. Essien should remain on suspension for three months without pay;

(ii) that he should submit to the Vice-Chancellor a relevant and G satisfactory apology in writing withdrawing his previous letters to the Vice-Chancellor within seven days of the Council's decision being communicated to him;

(iii) that if no apology were received from Dr. Essien within the stipulated period of seven days he should continue under suspension with- H out pay " " "

The plaintiff did not comply with the directives of the Governing Council of the University. The learned trial Judge found that the refusal of the plaintiff to comply with the above directives amounted to misconduct as defined at page 6 of Exhibit "6".

The plaintiff as P.W.1 testified in part:

“After writing I did not hear from the Council until 2nd March, 1978 when I received a letter from one Chief I.H. Bassey Chairman of the Ad Hoc Committee of the Council inviting me to appear before his Commission immediately to testify against the allegations I had made against the University. I appeared before the Commission. I was given a seat at one end of the University halls. I was then asked to go ahead and prove my allegations.....I wanted to know which procedure to adopt. I decided to adopt my own system which they accepted having produced a letter dated 24th January, 1978. I proceeded to prove my allegations at the end of the poor ordeal which they had put me, mentioned witnesses, finally they invited the Vice-Chancellor to come in for examination. I cross examined him. They asked him two questions They put questions to me in respect of the language of communication with the Vice Chancellor.There and then the Chairman of the Committee said I was guilty and that I should go and apologise to the Vice Chancellor. I did not apologise because I did nothing wrong.”

I am satisfied that the defendant acted within the provisions of Exhibit “6” in terminating the appointment of the plaintiff. I do not see any breach of the rules of natural justice having regard to the above procedure adopted by the Ad Hoc Committee of the University Council during its enquiry. From the nature of the enquiry, the plaintiff knew its nature as well as the subject matter. He had notice of the hearing. The plaintiff was also given the opportunity to confront and cross-examine the Vice-Chancellor. The plaintiff had a fair hearing.

For the above reason and the fuller reasons contained in the leading judgment of my learned brother, Ogundare, J.S.C., I also allow the appeal, set aside the judgment of the court below and restore the judgment of Ecoma, J., as he then was, delivered on 23: 10:87. I abide by the order as to costs made in the leading judgment.

G

MOHAMMED JSC

The employment of the respondent, Dr. Okon J. Essien, with the University of Calabar was terminated for acts of gross disrespect and indiscipline. In consequence, he filed an action before the High Court of Cross River State, sitting in Calabar, and sought for a declaration that the suspension and termination of his employment was wrongful, null and void. He also claimed general and special damages.

The trial High Court at the conclusion of the trial and in a well

considered judgment, dismissed the claim of the respondent. On appeal, the court below, per the judgment of Oguntade, J.C.A. with which Katsina-Alu and Uwaifo, JJCA concurred, the decision of the High Court on the issue of termination of the respondent's employment was set aside. The termination of the employment was declared wrongful, null and void. B Dissatisfied with that decision, the University of Calabar came before this court and urged that the whole judgment of the Court of Appeal be set aside and the claim of the respondent dismissed.

My learned brother, Ogundare J.S.C., in his judgment, which I have had the privilege to read in draft, considered all the issues raised in C this appeal and allowed the appeal. I agree entirely with him. It is plain that the decision of the Court of Appeal was based on an error of law and I too would set it aside and allow the appeal.

The issues formulated by the learned counsel for the appellant are apt and pertinent for the determination of this appeal. They read as follows:

- D *"1. Where, in an action for wrongful termination of employment, the plaintiff had a duty to plead his conditions of service and the relevant statutes governing his contract of service and to prove that the said conditions and statutes were breached, but neglected to do so, was the Court of Appeal right in making the case for him?"*
- E *2. Where the parties to this appeal fought their case at the trial and the appeal on Exhibit 6, was the appeal court in order when they held that the respondent's appointment was regulated by Decree No. 1 of 1978 which was neither canvassed nor alluded to by the respondent throughout the trial and the appeal?"*
- F *3. Was the Court of Appeal right in holding that the respondent's appointment was infact governed by the University of Nigeria Act No. 1 of 1978?"*

In an action where a party seeks for a declaration that the termination of his employment was wrongful, null and void the most fundamental issue to G put before the court is the condition of service. The aggrieved party must aver it as a cardinal point in his pleading and adduce evidence before the trial court on non-compliance with the terms of the condition of service in effecting the termination of his employment. If the conditions have been pleaded it is important to plead also that the disciplinary proceedings have not been con- H ducted fairly. The employee may assert that his employer was in breach of his fundamental right to fair hearing. The right to fair hearing is founded mainly and solely on rules of natural justice. See *Olatunbosun v. N.I.S.E.R. Council* (1988) 3 NWLR (Pt. 80) 25 (1988) 1 NSCC 1025.

The respondent, in the case in hand, put up a case that when he

was employed he was not given any condition of service. His counsel argued that under section 7(1) of Labour Act - Decree No. 21 of 1974, the respondent must be given a copy of the condition of his service. He was not given until the date of his suspension. It is clear however that Exhibit 6 was the condition of service which regulated the contract of service of the respondent. Indeed, at the time of his employment with the appellant, the University of Calabar Decree, No. 80 of 1979, had not come into force. So it would not apply to his contract of employment. His services with the University of Nigeria, Nsukka had been transferred to the University of Calabar since 1976. Respondent's employment with the appellant could not therefore be governed by the University of Nigeria Act. It is the respondent who had to prove the condition of service of his employment. He refused to accept that Exhibit 6 was the condition of service that governed his employment.

The lacuna in the respondent's case, which is quite open, is a big dent to his case. The Court of Appeal was in error when it held that the provisions of the University of Nigeria Act No. 1 of 1978 governed the respondents employment between 1976 and 1979 when as a matter of fact, he had transferred his services from that University to the University of Calabar since 1976. This is not the case of the respondent before the court. Throughout the proceedings the respondent did not canvass that his employment was governed by the University of Nigeria Act. This decision alone knocked the bottom out of the case of the respondent.

For these reasons and the fuller reasons in the lead judgment this appeal succeeds and it is allowed. The judgment of the Court of Appeal is set aside. The judgment of the trial High Court in which it dismissed the respondent's claim is restored. I abide by all the consequential orders made in the lead judgment.

IGUHJSC

I have had the advantage of a preview of the judgment just delivered by my learned brother, Ogundare, J.S.C. I agree with the reasoning and conclusion reached by him that this appeal be allowed.

The respondent as plaintiff before the trial court had claimed against the defendant/appellant a declaration that the Suspension and termination of his employment is wrongful and null and void together with the sum of N828,522.00 special and general damages for wrongful termination of his employment. At the conclusion of trial on the 23rd October, 1987, Ecoma, J., as he then was, dismissed the plaintiff's claims in their entirety. The appeal against

this decision was on the 14th day of February, 1990 allowed by the Court of Appeal, Enugu Division which ordered the reinstatement of the plaintiff and payment of his full salary and entitlements with effect from the 9th January, 1978. The defendant has now appealed to this court.

The following three issues were raised by the defendant/appellant for the determination of this court, namely -

“3.01 Where, in an action for wrongful termination of employment, the plaintiff had a duty to plead his conditions of service and the relevant statutes governing his contract of service and to prove that the said conditions and statutes were breached, but neglected to do so, was the Court of Appeal right in making the case for him?”

3.02 Where the parties to this appeal fought their case at the trial and the appeal on Exhibit 6, was the Appeal Court in order when they held that the respondent's appointment was regulated by Decree No. 1 of 1978 which was neither canvassed nor alluded to by the respondent throughout the trial and the appeal?

3.03 Was the Court of Appeal right in holding that the respondent's appointment was infact governed by the University of Nigeria Act No. 1 of 1978?”

The above issues are sufficiently adequate for the determination of this appeal. I shall accordingly adopt them in my determination of the appeal. I may add that these issues seem to me interrelated and I propose to deal with all three together.

A close study of the amended statement of claim together with the plaintiff's evidence before the trial court unmistakably reveals that his conditions of service were governed by Exhibit 6. The plaintiff, quite clearly, pleaded and relied on his conditions of service with the University of Calabar, Exhibit 6, and Decree No. 80 of 1979 which established the said University as the basis of his contract of service in issue. In this regard, the plaintiff testified as follows –

“At the time of my employment, I was not given any condition of service. It was upon my suspension that I received the condition of service of the University. This is the condition of service - Mrs Isikalu has no objection - Exhibit 6”

A little later in his evidence, the plaintiff testified thus -

“According to the conditions of service, I would have worked until I am 60 years old.”

It cannot be in dispute, therefore, that it was on the basis of Exhibit 6 that the plaintiff computed his claims as set out in paragraph 23 of his amended statement of claim.

There is also paragraph 20 of the plaintiff's amended Statement of Claim wherein it was pleaded as follows-

".....The plaintiff will contend that the reasons given by the defendant for terminating the plaintiff's appointment are ill conceived and malicious and that the termination is wrongful, having regard to the conditions of service between the plaintiff and the defendant". B

The only evidence in respect of any Conditions of Service between the plaintiff and the defendant before the trial court is Exhibit 6. It was on the basis of the said Exhibit 6 that both parties fought their case both in the High Court and the Court of Appeal.

The learned trial Judge, on the totality of the evidence led before him, had no difficulty in accepting that Exhibit 6 was the Conditions of Service governing the Senior Staff in the University of Calabar of which the plaintiff was one. Said he- C

"I hold that for one purpose, Exhibit 6 was the Conditions of Service of the Senior Staff of the defendants and the plaintiff was a member of the Senior Staff and was bound by the provisions of Exhibit 6". D

The above is a vital findings of fact by a trial court which an appellate court, such as the court below, would not ordinarily interfere with except in well know exceptional circumstances such as where the trial court failed to make proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings are perverse. See Okpiri v. Jonah (1961) All NLR 102 at 104-105; (1961) 1 SCNLR 174; Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370; Maja v. Stocco (1968) 1 All NLR 141 at 149; Woluchem v. Gudi (1981) 5 S.C. 291 at 295 - 296. Without doubt, no such exceptional circumstances exists in the present case. E

The Court of Appeal nonetheless proceeded to hold that Exhibit 6 was not the applicable conditions of service governing the plaintiff's employment with the defendant. It said - F

"It would seem that the fair way to approach the matter is to treat the University of Calabar under which plaintiff was employed on 1st July, 1976 as at that date up till the time the University of Calabar Act was passed on 28th of September, 1979 as still a campus of the University of Nigeria, Nsukka". G

A little later in its judgment, the Court of Appeal concluded - H

"I therefore hold that the provisions of the University of Nigeria Act No.1 of 1978 governed plaintiff's employment under the defendant between 1st July, 1976 and 28th September, 1979".

It then proceeded to allow the plaintiff's appeal holding as follows:-

"Since the defendant did not follow the terms of Section 15(1) of the University of Nigeria Act No.1 of 1978 in removing the plaintiff from his employment, it follows that plaintiff's termination was unlawful, null and void ..."

B The point that cannot be over emphasized is that at no stage of the proceedings, whether at the court of trial or before the court below did the plaintiff contend or canvass that his employment was governed by the University of Nigeria Act No.1 of 1978. Parts of the plaintiff's Statement of Claim and his evidence before the trial court on the point
C have already been referred to in this judgment. On the contrary, the case for the plaintiff was based entirely on his Conditions of Service, Exhibit 6 and Decree No. 80 of 1979.

The issue was made clearer in various areas of the plaintiff's brief of argument as appellant in the Court of Appeal. In this regard, the
D plaintiff's brief of argument at page 206 et sequentia of the record of proceedings stated thus

"What constitutes a misconduct is defined in section 15(2) of Decree No. 80 of 1979 and in the Conditions of Service for Senior Staff of the respondent (Exhibit 6) The respondent is created, established and governed by Decree No. 80 of 1979. Section 15 of the said Decree No. 80 of 1979 provides for the removal and discipline of the appellant as a member or the academic staff For the appellant to be removed for misconduct, the procedure provided by section 15 of Decree No. 80 of 1979 should have been followed"

F At page 221, the plaintiff argued -

"The respondent's notice of termination of the appellant's employment dated 21st June, 1978 (Exhibit 20) was retrospective, and such retrospective termination of employment is neither supported by Decree No. 80 of 1979 nor by the appellant's conditions or service (Exhibit 6) with the respondent."

G The brief, at page 227 continued as follows -

*"The appellant was a lecturer in Economics at the respondent's University where he was to serve to the age of 60 years. He had not breached any of the conditions contained in Exhibit 6. He was entitled to
H enjoy the security of service."*

It concluded at page 230 thus -

"The learned trial Judge failed to advert properly to the Statute Decree No. 80 of 1979 which created the respondent and the procedure set out to be followed regarding discipline, suspension and termination

of employment of the academic staff of which the appellant is a member.....”

I have gone thus far to reproduce the above contentions of the plaintiff before the Court of Appeal in further establishment of the fact that his case in both courts below was that his employment was governed by both Exhibit 6 and Decree No. 80 of 1979. B

With the greatest respect to the Court of Appeal, it is neither permissible nor the duty of any court of law to endeavour by examination of the evidence to deduce what it conceives ought to be or might be the true nature of the claim and then proceed to hand down a decision which the plaintiff has not, specifically sought and may not infact desire. It C would be improper for the court so to do unless it were prepared to order an amendment of the pleadings in which case it would be necessary to give the defendant an opportunity of what would be an entirely different case. See *Emegwara v. Nwaimo* 14 WACA 347 at 348. In the same vein, it is not the function of a court of law by its own exercise or ingenuity to D supply or imagine evidence or work out the mathematics of arriving at an answer to a case before it which only admissible evidence tested under a cross-examination could supply. See *George Ikenye & Another v. Akpala Ofune and other* (1985) (Pt.5) 2 NWLR 1. On the contrary, it is an elementary and fundamental principle of the determination of disputes E between parties that judgment must be confined to the issues raised by the parties in their pleadings. It is not competent for the court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before him. See Commissioner for Works, Benue State & Another v. F Devcon Development Consultants Ltd. and another (1988) 3 NWLR (Pt.83) 407; Nigerian Housing Development Society Ltd. v. Yaya Mumuni (1977) 2 S.C. 57; Adeniji and others v. Adeniji and others (1972) 1 All NLR (Pt.1) 278. To act otherwise may well result in the denial to one or the other of the parties of the right to fair hearing. See Metalimpex v. A.G. G Leventis and Co. Ltd. (1976) 2 S.C. 91; Kalio v. Kalio (1977) 2 S.C. 15; George v. Dominion Flour Mills Ltd. (1963) 1 S.C.N.R. 242; (1963) 1 SCNLR Alhaji Ogunlowo v. Prince Ogundare (1993) 7 NWLR (Pt.307) 610 at 624. Even where, H for whatever reason, a court is obliged to raise a point suo motu, the law is well settled that the parties must be given an opportunity to be heard on the point, particularly the party that may suffer as a result of the point having been raised suo motu. See Odiase v. Agho (1972) 1 All NLR (Pt.1) 170; Ajao v. Ashiru (1973) 11 S.C. 23; Atanda v. Lakanmi (1974) 3 S.C. 109; Ejowhomu v. Edok-Eter Mandilas Ltd. (1986) 5 NWLR (Pt.39) 1; Adegoke v.

Adibi (1992) 5 NWLR (Pt.242) 410 at 420 etc. Accordingly decisions of courts of law must never be founded on any ground in respect of which it has neither received argument from or on behalf of the litigants before them, nor even raised by or for the parties or either of them. See Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40; Saude v. Abdullahi (1989) 7 SCNJ 216 at B 229; (1989) 4 NWLR (Pt.116) 387 Chief Ebba v. Chief Ogo and Another (1984) 4 S.C. 84 at 112. As Eso, J.S.C. put it in Chief Ebba v. Chief Ogo and Another (1984) 4 S.C. 84 at 112; (1984) 1 SCNLR 372-

“With utmost respect, it should be plain to the Court of Appeal that when an issue is not placed before it, it has no business whatsoever C to deal with it..... “

In the present case, the Court of Appeal discountenanced the issues in respect of which the plaintiff fought his action in both courts below. These are to the effect that his employment was governed by the terms and provisions of Exhibit 6 and the University of Calabar Decree D No. 80 of 1979. The plaintiff’s case was that the defendant was in breach of his conditions of service as stipulated in the said Exhibit 6 and Decree No. 80 of 1979. The discovery was that of the Court of Appeal that it was rather the terms and provisions of the University of Nigeria Act No.1 of 1978 that governed the plaintiff’s employment and not the University E of Calabar Decree No. 80 of 1979.

This entirely different issue from those upon which the plaintiff founded his action was raised by the court suo motu and was neither an issue raised by the parties in their pleadings nor canvassed by them in the trial court or before the Court of Appeal. Neither of the parties was given F an opportunity to be heard on this new issue which is totally different from those raised by the plaintiff in his pleadings and at the trial. The court next proceeded to examine the provisions of the University of Nigeria Act No.1 of 1978 and came to the conclusion that since the defendant did not comply with the provisions of the University of Nigeria Act G No. 1 of 1978 in removing the plaintiff, the termination was unlawful.

In my view, the above conclusion of the court below in the circumstances of this case was entirely misconceived, untenable and grossly erroneous on point of law. The case of the plaintiff was based on Exhibit 6 as his terms and conditions of employment and the Court of H Appeal, with profound respect, was in gross error in setting up for the plaintiff, a case neither pleaded nor supported by evidence, address of counsel or in any way by his brief of argument.

Turning now to the issue of liability, it is clear that Decree No. 80 of 1979 which established the University of Calabar made provisions

in section 15 for the removal of and discipline of academic, administrative and professional staff on the ground of misconduct or inability to perform the functions of his office. It must however be emphasised that the said Decree No. 80 of 1979 cannot be applicable to the plaintiff as his contract of employment had come to an end long before the Decree was promulgated and came into force. There is however Exhibit 6 under which the defendant had ample powers to terminate the plaintiff's employment for misconduct. The next question must be what the word "misconduct" really means.

"Misconduct" is defined at page 6 of the plaintiff's Conditions of Service with the defendant University of Calabar, Exhibit 6, as follows

"Misconduct" means any conduct prejudicial to the good discipline and proper administration of the University. Without prejudice to the generality of this definition, misconduct includes corruption, dishonesty, false claims against the University, insolence, insubordination, negligence of duty, falsification of accounts of records, conviction of a criminal offence, absence from duty without lawful excuse and the committing of all other acts which are inconsistent with the proper performance of the duties for which the member of staff was employed."

Without doubt, the word "insubordination" connotes "disobedience" and willful disobedience to a lawful order or command of a superior officer has been judicially interpreted, and, quite rightly in my view, as "insubordination". See *Jenkins v. Shelley* (1939) 2K.B. 137 at 145 and *R. v. Grant* (1957) 1 W.L.R. 906.

In *Tellat Sule v. Nigerian Cotton Board* (1985) 6 S.C. 62; (1985) 2 NWLR (Pt.5) 17 at 38 the law was restated that disobedience of an employer's lawful order and/or insubordination by an employee is an act of misconduct which may justifiably attract the penalty of summary dismissal, termination or compulsory retirement of the employee concerned. Obaseki, J.S.C. in an illuminating judgment exposed the law on the issue as follows-

"When a servant grows too big to obey his master, the honourable course open to him is to resign in order to avoid unpleasant consequences should an occasion which calls for obedience be serviced with disobedience. Both common law and statute law book no disobedience of lawful order from any servant, high or low, big or small. Such conduct normally and usually attracts the penalty of summary dismissal. Disobedience ranks as one of the worst form of misconduct in any establishment."

When therefore the plaintiff embarked on a course of disobedience of lawful orders, it must have been the Christian spirit that worked on the Board to persuade the Board not to visit the conduct with the penalty of dismissal. The fact that in addition to the disobedience, there

is the insubordination helps to emphasise the magnanimity of the Board in the sacrifice it made in conferring full retirement benefits on the plaintiff. It would have been otherwise if the plaintiff had committed no act of misconduct”

In his own judgment, Aniagolu, J.S.C. expressed his opinion in the following words -

“I agree that the appellant should count himself lucky not to have been dismissed. In the circumstances, it is idle for him to claim that his retirement from service was unlawful, when the punishment which his conduct rightly deserved was instant dismissal”.

And Oputa, J.S.C. in no mistaken terms in his judgment asserted thus -

“I cannot conceive of any “Terms and Conditions of Service”, be it the civil service conditions or the Boards, that will legalise disobedience to lawful order and instruction or tolerate insubordination”

Speaking for myself, I entirely agree that the above expositions of the law on the issue cannot be more happily put. The long and short of the issue, quite clearly is that willful disobedience of lawful and reasonable order of an employer amounts to misconduct which may justify the dismissal or termination of an employee by his employer. As was aptly put by Obaseki, J.S.C. and I agree entirely with him, that the only course of action open to a servant who conceives that he has grown too big to obey his master is clearly to resign his appointment than expose himself to possible instant dismissal or removal from office.

Where an employer dismisses or terminates the appointment of an employee on ground of misconduct all that the employer needs establish to justify his action is to show that the allegation was disclosed to the employee, that he was given a fair hearing, that is to say, that the rules of natural justice were not breached and that the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation. See *National Electric Power Authority v. Alhaji S.I. El-Fandi* (1986) 3 NWLR (Pt.32) 884.

In the present case, the unchallenged finding of the courts below is that following alleged misconduct on the part of the plaintiff, he was issued with the query, Exhibit 8, to which he replied by Exhibit 11. The defendant then suspended him by Exhibit 10 and he was invited to appear before a Disciplinary Committee - an adhoc committee of the defendant University Governing Council. The Committee’s report is Exhibit 29. The Governing Council of the University having found the plaintiff guilty of acts prejudicial to good order and discipline in the University

directed the plaintiff to withdraw his offending communications and apologise to the Vice Chancellor. Exhibit 11, in particular, was found even by the court below as follows -

“I have no doubt that Exhibit 11 was written in a language calculated to offend especially from an employee to his boss”.

The trial court also held, and this was not challenged, that the B Governing Council was obliged to impose its directives on the plaintiff “in order to put a stop to indiscipline”.

The plaintiff, however, bluntly refused to comply with the directives of the Governing Council of the University or apologise to the Vice Chancellor as ordered. The trial court was of the opinion that this refusal C of the plaintiff to comply with the directives of the Council was an act of willful disobedience of lawful order which amounted to misconduct as defined in Exhibit 6. I must say that I am in entire agreement with this view of the trial court.

On the question of fair hearing, the plaintiff admitted that he ap- D peared before the Ad Hoc Committee of the University Governing Council to testify as to the allegations he made against the University. He was at the end of this exercise found guilty of acts prejudicial to good order and discipline in the University and I am unable to hold that he did not receive a fair hearing when he was being investigated by the said Governing Council. E

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Ogundare, J.S.C., that I too, allow this appeal. I hereby set aside the judgment of the Court of Appeal together with the order for costs therein made and restore the judgment of the trial court. I F abide by the order for costs made in the leading judgment.

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