

SUPREME COURT OF NIGERIA
TUESDAY 25TH JUNE, 1996. SC. 223/1990
CORAM:- M. L. UWAI, A. B. WALI,
M. E. OGUNDARE, S. U. ONU, A. I. IGUH, JJSC

ALHAJI LASISI YUSUF APPELLANT

AND

UNION BANK OF NIGERIA LTD. RESPONDENT

APPEALS - *Ground of appeal - Where leave was not obtained to argue round of mixed law and fact - Whether that ground is incompetent.*

FAIR HEARING - *Disciplinary proceedings - Person that may be affected thereby - Nature of notice that must be given to him.*

MASTER & SERVANT - *Summary dismissal - Fair hearing - Whether appellant was summarily dismissed without fair hearing.*

MASTER & SERVANT - *Gross misconduct - Whether employee must be before a court - For gross misconduct bordering on criminality - Bern' he can be summarily dismissed.*

PLEADINGS - *Appeals - Issue that was not pleaded before the trial court - Cannot be raised on appeal without leave.*

FACTS

The plaintiff/appellant was at all material time an employee of the defendant/respondent. In the course of his job, plaintiff handled some aspects of his assignment in a manner the defendant deemed to be tantamount to gross misconduct. Plaintiff was given a query and demoted from a senior post to that of a clerk on account of his incompetence. He was subsequently dismissed summarily as his reply to the query was found to be unsatisfactory.

Plaintiff filed this action before the High Court of Justice claiming inter alia declaration that his dismissal was wrongful and damages for wrongful dismissal. Plaintiff's action was dismissed by the trial court which found that he was rightly dismissed for gross misconduct. Plaintiff's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 2 issues which the Honourable Court narrowed down to a single issue.

ISSUE FOR DETERMINATION

Did the application for leave to file and argue additional ground 3 simpliciter which was granted by the Court of Appeal, give the appellant the right to argue issue or issues not raised in the pleadings or canvas the trial court but contained in that ground and being raised for the first time, without specifically applying and obtaining leave of the Court of Appeal to that effect?

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

Where leave was not obtained to argue ground

1. Looking at and examining the ground of appeal with its supporting particulars, I have no difficulty in coming to the conclusion that particulars A and B thereof raise issues of fact while particular C and D raise issues of law. The combined effect of these particulars therefore makes it a ground of mixed law and fact. The mere fact that the appellant described the ground as a ground of law, would not render it to be so. Since the ground of appeal complained against does not fall under the provisions of 213(1) and (2) of the said Constitution, leave of either the Court of Appeal or the Supreme Court is a condition precedent to its competency, and this leave not having been obtained, I am left with no alternative but to sustain the preliminary objection and declare the ground incompetent. It is hereby so declared and struck out. The argument contained in the brief in support of that ground therefore goes to no issue and shall be ignored in deciding the appeal. (p. 1256 G)

Issue that was not pleaded before the trial court

2. The conclusion of the Court of Appeal that “Issues 3(a) and (b) were not pleaded nor were they an issue at the trial court cannot, without leave, be entertained on appeal”, cannot be faulted. Counsel for the appellant did not deny that the question of breach of fair hearing by the respondent was not raised in the appellant’s Statement of Claim, but proceeded under misconception to regard that the leave as granted by Court of Appeal to file ground 3 was tantamount to a grant of leave by that court, to raise and argue the new points. Leave to file and argue additional ground simpliciter did not per se clothe the appellant with authority to argue issues being raised for the first time in the Court of Appeal, which were not pleaded and canvassed in the trial court, (p. 1259 H)

Summary dismissal - Fair hearing,

3. On the issue of fair hearing which the appellant belatedly introduced, it is my considered view that before an employer can dispense with the services his employee under the common law all he needs to do is to afford the employee an opportunity of being heard before exercising his power of summary dismissal, even where the allegation for which the employee is being dismissed involves accusation of crime. In the case in hand, the respondent had done that. See Exhibit B wherein the respondent called upon the appellant to give comprehensive explanation of the three accusations of misconduct and impropriety levelled against him. These were replied by the appellant in Exhibit C most unsatisfactorily. (p. 1260 C)

Gross misconduct

4. It is not necessary, nor is it a requirement under s. 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality. I may go further to say that the provisions of s. 33 supra have no application to the facts of this case. (P1260 E)

Fair hearing - Disciplinary proceedings

5. To satisfy the rule of natural justice and fair hearing a person likely to be affected directly by disciplinary proceedings must be given adequate notice of the allegation against him to enable him make representation in his own defence. The complaint against him must not necessarily be drafted in the form of a formal charge. It is sufficient if the complaint as formulated conveys to him the nature of the accusation against him. (p. 1260 G)

NOTABLE POINTS INTEREST***ONU JSC******1. Raising of new issue on appeal - Flexibility of the rule***

The rule stated above that an appellant will not be allowed to raise on appeal a point or question which was not raised or argued in the court below, is not an inflexible and rigid rule. It is subject to the demands of justice. Thus where, as here, the question involves a substantial point or points of law - either substantial, to wit: allegation of want of fair hearing guaranteed under section 33 of Constitution of the Federal Republic of Nigeria, 1979 as herein, or procedural - the court in its discretion is competent to entertain the appeal on them especially where it is plain that no

further evidence could have been adduced which would affect the decision and thus prevent an obvious miscarriage of justice. (p. 1262 D)

IGUH JSC

B 2. *Right of employer to dismiss an employee for gross misconduct*

There can be no doubt that where an employee is guilty of gross misconduct, he can be dismissed summarily without notice and without wages. Gross misconduct has been described as conduct that is of a grave and weighty character as to undermine the relationship of confidence which should exist between the employee and his employer. Working against the deep interest of the employer amounts to gross misconduct which entitles the employer to summary dismissal of the employee. (p. 1265 G)

REPRESENTATION

A. B. Odunsi for the Appellant

D Bode Wilford for the Respondent

CASES REFERRED TO

Onifade v. Olayiwola (1990) 11 SC J 10 at 201

Ojemen v. Momodu 11 (1983) 3 SC 173 at 211

E Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141 at 161

Bray v. Ford (1896) AC 44 at 49

Chidiak v. Laguda (1964) 1 NMLR 123

Ukwunnanyi v. The State (1989) 4 NWLR (Pt. 114) 131 at 144

Ransome-Kuti v. A.G. Federation (1985) 2 NWLR (Pt. 6) 211

F Abinabina v. Chief Enyimodu (1953) 12 WACA 171

Afolabi v. The State (1986) 2 NWLR (Pt. 24) 581

Salati v. Shehu (1986) NWLR 198

Russell v. Duke of Norfolk (1949) 1 All ER 109 at 118

Ogbechie v. Onochie (1988) 1 NWLR (Part 70) 370 at 402)

G Nwadike v. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718

Bankole v. Mojidi Pelu (1991) 8 NWLR (Part 211) 523 at 547

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

Abinabina v. Enyimadu (1953) 12 W.A.C.A. 171

Adio v. The State (1986) 2 N.W.L.R. (Part 24) 581

Orogan v. Soremekun (1986) 5 NWLR (Part 44) 688

H Kotoye v. C.B.N. (1989) 1 NWLR (Part 98) 419 at 448

Dweye v. Iyomahan (1982) 2 S.C.N.L.R. 138

Amusa v. The State (1986) 2 NWLR (Pt. 24) 581

Salati v. Shehu (1986) NWLR 198

Maja v. Leandro Stocco (1968) 1 All N.L.R. 141 (1968) N.M.L.R. 372

Onibudo v. Akibu (1982) 7 S.C. 60

Abaye v. Ofili (1986) 1 N.S.C.C. 94

Shonekan v. Smith (1964) 1 ALL NLR

Dweye v. Iyomahan (1982) 2 S.C.N.L.R. 135 at 138

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STATUTE REFERRED TO

Constitution of Nigeria 1979 ss. 213(3) 33

LEAD JUDGMENT BY WALI JSC

The plaintiff's claims as set out in paragraph 15 of the Statement of Claim are as follows:-

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"Whereof the plaintiff claims against the defendants the following:

(a) A declaration that the plaintiff's purported dismissal by the defendants was wrongful, null and void.

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(b) An order that the plaintiff be reinstated in his employment and position as a staff of the defendants.

(c) An order that the plaintiff be paid arrears of his salary and entitlements from the date of his purported dismissal to the date of judgment of this suit.

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(d) N50,000.00 being general damages for wrongful dismissal, plus

(e) The cost of this suit."

The claims were denied by the defendant, particularly in paragraphs 8(a) and 10 of the Amended Statement of Defence reproduced hereunder:-

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"8(a) The defendant denies paragraphs 8, 9, 10, 11 and 12 of the Statement of Claim and will contend at the trial of this suit that the plaintiff misconducted himself in the service of the defendant by engaging in irregular and negligent practices in respect of cash, records, returns or Customer's Account and the defendant therefore discharged the plaintiff from its service.

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Particulars

(a) That on the 21st January, 1983, the plaintiff irregularly and/or negligently signed a paying in slip on general customer's paying in slip in respect of the sum of N4,665.00 kobo which should have been credited to the account of Salihu Abioye but which the plaintiff diverted to the account of Mallam Salami Yekini his friend. The aforesaid transaction was irregularly made in that it was not internally passed for counter-signature by two Authorized signatories of the Bank one of whom must be an officer

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of the “A” category.”

b.

C.

d.

B “8(b) With further reference to paragraphs 4 and 8 of the state-
ment of claim, the defendants plead plaintiffs letter dated 25th April, 1984
addressed to the defendant’s Baga Branch Manager captioned “Memo on
the Charges of Misappropriation and Irregular Sales of Traveller Cheques”
and will found upon same at the trial of this action to establish the fact
that contrary to the plaintiff’s averments contained in the said paragraphs,
C plaintiff was infact demoted for two and half years from a Senior post to
that of a clerk on account of his incompetence.”

XX

“10. The defendant denies paragraphs 13, 14 and 15 of the statement of claim and will contend at the trial that the plaintiff’s action is misconceived on facts and groundless in context and that the same be dismissed with substantial costs.”

At the trial, the plaintiff gave evidence in support of his case while the defendant called one witness in defence. At the end of the trial, the learned trial Judge painstakingly considered the issues raised and concluded:-

E *“In the final result I hold that the plaintiff was guilty of gross misconduct which justified his summary dismissal by the defendant. Accordingly therefore, the plaintiff’s action is hereby dismissed with costs which I assess and fix at N150.00 to the defendant.”*

Dissatisfied with the judgment of the trial court the plaintiff lodged an appeal to the Court of Appeal against it.

In a reserved and unanimous judgment of the Court of Appeal delivered by Ndoma-Egba, J.C.A., the appeal was dismissed.

The plaintiff has now further appealed to this court.

G In the brief filed in support of the appeal by learned counsel for the plaintiff/appellant the following two issues were raised for consideration by this court:-

“1. Whether the Court of Appeal rightly upheld the rejection of Exhibit F by the trial court.

H 2. Whether the Court of Appeal was in duty bound to consider and/or make findings on all the Grounds of Appeal duly filed and argued by the appellant in his written brief and if so has the failure of the Court of Appeal to consider the complaint on lack of fair hearing occasioned grave miscarriage of justice”?

Learned counsel for defendant/respondent also filed a brief in which

the following two issues were formulated:-

“(a) Whether the determination by both the trial court and the court below that Exhibit ‘F’ was irrelevant to the issues submitted for adjudication before the court (is) synonymous with a rejection of Exhibit ‘F’.

(b) What is the effect (if any) of the failure of the court below to consider and pronounce upon one of the grounds of appeal argued before it by the appellant herein.” B

The set of two issues formulated in the plaintiff and the respondent's briefs respectively are identical in substance, though differently worded.

Before I proceed to consider the appeal on its merit, it is pertinent to deal with the preliminary objection raised by learned counsel for the defendant/respondent in his brief against ground one of the grounds of appeal. The preliminary objection reads:- C

“It is the respondent's contention that ground one of the grounds of appeal raises questions of mixed law and fact. This is so because the question whether a piece of evidence which has been admitted is relevant or irrelevant to the issues before a court involves a consideration of the probative value or weight to be attached to such evidence. Whether a piece of evidence is admissible or not is essentially a question of law. A finding that such evidence is irrelevant to the issues before the court is a question of fact. And a ground of appeal challenging such finding will at best be a ground of mixed law and fact.” D E

Learned counsel argued that ground one of the grounds of appeal raises issue of mixed law and fact in that the question whether a piece of evidence which has been admitted is relevant or irrelevant to the issues before a court involves a consideration of the probative value or weight to be attached to such evidence and submitted that: F

(a) Whether a piece of evidence is admissible or not is essentially a question of law; while

(b) A finding that such evidence is irrelevant to the issues before the court is a question of fact;

and as such, he further submitted, leave of the Court of Appeal or the Supreme Court as the case may be, is required before it is filed. He cited S.213(3) of the 1979 Constitution of Nigeria and the cases of Onifade v. Alhaji Olayiwala (1990) 11 SCNJ 10 at201; (1990) 7 NWLR (Pt.161) 130 and Ojemen & Ors. v. Momdu 11 (1983) 1 SCNLR 188; (1983) 3 SC 173 at 211 among others, in support. He urged the court to declare ground one incompetent and to strike it out. G H

Learned counsel for the plaintiff/appellant, though served with respondent's brief containing the preliminary objection, did not consider it fit to file a reply to it. Also on the day the appeal was called for hearing

learned counsel for both parties appeared in court, but counsel for the defendant/respondent did not specifically move his preliminary objection. In fact he said nothing other than adopting and relying on the brief he filed on behalf of the defendant/respondent.

B As stated earlier, learned counsel for the plaintiff/appellant did not reply to the preliminary objection by filing a reply brief after being served with respondent's brief containing the preliminary objection, and did not apply to do so while addressing us.

C With the position as it is, I shall proceed to consider the preliminary objection raised and argued in the respondent's brief as if it were a brief requiring a reply to which none was filed or orally presented, as the issue raised therein is fundamental.

It appears to me that there is substance in the objection taken by learned counsel for the respondent against ground one of the grounds of appeal already filed and argued. The particular ground reads as follows:-

D *"1. The learned Justices of the Court of Appeal erred in law by holding that it was proper for the trial Judge to reject Exhibit F (tendered without objection) as irrelevant at the judgment stage and then apply the common law inspite of the attitude of the parties to the applicability of Exhibit F as the agreement governing the terms of the plaintiff's employment with the defendant.*

E *Particulars and Nature of Error*

A. The parties are not in issue on the state of the pleadings as to the relevance and applicability of Exhibit F as the agreement covering plaintiff's employment with the defendant.

F *B. None of the parties raised the issue of duration of Exhibit F at the trial but the trial Judge raised the issue of duration suo motu during judgment without hearing the parties on the issue.*

C. Exhibit F is a relevant and admissible evidence within the context of the law of evidence

G *D. The Court of Appeal equated relevancy with weight of evidence and thereby mis-applied the dicta of Fatayi-Williams J.S.C. in Ayeni v. Dada (1978) 3 S.C. 35 at 61"*

H Looking at and examining the ground of appeal with its supporting particulars, I have no difficulty in coming to the conclusion that particulars A and B thereof raise issues of fact while particular C and D raise issues of law. The combined effect of these particulars therefore makes it a ground of mixed law and fact. The mere fact that the appellant described the ground as a ground of law, would not render it to be so. See Onifade v. Alhaji Olayiwola (1990) 11 SCNJ 10 at 20; (1990) 7 NWLR (Pt.161) 130 and Ojemen v. Momodu II (1983) 1 SCNLR 188; (1983) 3 S.C. 173 at 211

wherein Obaseki, J.S.C. stated thus:

"The mere description of a ground of appeal as a ground complaining of Error in Law when in fact, the particulars show clearly that the complaint or the substance thereof is against the evaluation, assessment, weight of evidence, findings of fact or a complaint of misdirection on the facts or mixed law and fact." B

S. 213(3) of the 1979 Constitution of Nigeria provides as follows:-

"(3) Subject to the provisions of subsection (2) of this section an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court." C

Since the ground of appeal complained against does not fall under the provisions of 213(1) and (2) of the said Constitution, leave of either the Court of Appeal or the Supreme Court is a condition precedent to its competency, and this leave not having been obtained, I am left with no alternative but to sustain the preliminary objection and declare the ground incompetent. It is hereby so declared and struck out. The argument contained in the brief in support of that ground therefore goes to no issue and shall be ignored in deciding the appeal. D

The second issue raised in this appeal is related to ground two of the grounds of appeal with particular reference to particular two of that ground. For ease and convenience of following the arguments in this appeal, I deem it pertinent to reproduce hereunder both the ground two in this court and the additional ground 3 in the Court of Appeal. E

"2. The learned justices of the Court of Appeal misdirected themselves in law and proceeded on faulty steps when they observed as follows:

(i) (not relevant) F

(ii) Issues Nos. 3(a) and (b) were not pleaded nor were they in issue at the trial court; they cannot without leave be entertained on appeal, they are struck out.

Particulars and Nature of Misdirection

A. Three additional grounds of appeal were filed by the plaintiff (as appellant) on 15th July, 1988 pursuant to the leave of court to so do granted on 6th July 1988 upon hearing motion on notice filed on 1st July, 1988. G

B. The two grounds of appeal quoted by the court as the additional grounds filed with leave of the court are not the additional grounds filed by the plaintiff/appellant on 15th July 1988, pursuant to the leave granted on 6th July, 1988. H

C. The third additional grounds of appeal filed on 15th July, 1988 raised the issue of the constitutionality of the procedure adopted in dismiss

ing the plaintiff/appellant.

D. Issue 3(a) and 3(b) formulated by the appellant in his amended brief dated 6th July, 1988 and filed on 15th July, 1988 related to the additional ground No.3 filed on 15th July, 1988 as aforesaid.

B E. The Appeal Court before hearing arguments in the substantive appeal on 14th September, 1989, granted leave to the plaintiff/appellant to argue the points on additional grounds No.3 dated 6th July, 1988 without objection upon the hearing of motion on notice dated 3rd October, 1988 and filed on 3rd May, 1989.

C F. The Appeal Court failed to consider issue No.3(a) and 3(b) raised before it."

In the Court of Appeal, the additional ground 3 reads thus:-

"3. The learned trial judge erred in law by closing his eyes to the Constitutionality of the procedure of dismissing the plaintiff in spite of the nature of the allegation against him.

D Particulars of Error

(a) Misappropriation, a criminal offence under section 308 and section 309 of the Penal Code was the reason given for the plaintiff's dismissal by the defendant.

E (b) The plaintiff was neither found guilty by any court of law recognised by the Nigerian Constitution nor any Tribunal set up by law.

(c) The allegation of misappropriation was made by Exhibit 'E' (Query) written and signed by the D.W. 1 Mr. C.N. Onovo. Exhibit 'C' (the reply to query) was addressed to Mr. C.N. Onovo. Exhibit 'D' (letter of suspension) and Exhibit 'E' (letter of dismissal), were written and signed by Mr. C.N. Onoyo after he received Exhibit 'C'"

F It was the argument of learned counsel that the Court of Appeal was wrong when it refused to consider additional ground 3 above on grounds that issues 3(a) and (b) were not pleaded nor raised in the trial court and no prior leave of that court was obtained to argue and urge fresh issues not raised in the trial court, when leave to argue the ground had been earlier granted by the same Court of Appeal. Learned counsel referred to pages 75 - 76 and 99 - 100 of the record. He contended that the omission to consider this ground of appeal by the Court of Appeal was a serious misdirection of denying the appellant his constitutional right to fair hearing which occasioned miscarriage of justice. Learned counsel cited the following cases in support - *Udeze & Ors. v. Chidebe & Ors.* (1990) 1 NWLR (Pt.125) 141 at 161; *Bray v. Ford* (1896) AC 44 at 49; *Chidiak v. Laguda* (1964) NMLR 123 and *Sofekun v. Akinyemi & Ors.* (1980) 5 - 7 SC 1 at 20-21. He urged the court to allow the appeal.

In reply to the argument and submissions of the appellant's counsel, learned counsel for the respondent contended that the complaint of the appellant that he was dismissed for "*misappropriation of collection proceeds*" which constituted Criminal offences chargeable under S. 308 and S. 309 of Penal Code applicable to Borno State was ill-founded and a complete misconception of the role of pleading in civil proceedings. He submitted that since the issue of constitutionality or otherwise of the procedure adopted in dismissing the appellant was never raised in the pleading and no leave was sought and obtained to argue the same in the Court of Appeal as an issue not raised and canvassed in the trial court, it would be an exercise in futility for the Court of Appeal to have considered it. He also relied on the following cases among others cited:- *Ukwunnenyi v. The State* (1989) 4 NWLR (Pt. 114) 131 at 144; *Olale v. Ekwelendu* (1989) 4 NWLR (Pt.115) 326 at 360 and *Ransome-Kuti v. A-Federation* (1985) 2 NWLR (Pt.6) 211. He argued further that since the appellant was dismissed by the respondent for gross misconduct, both the trial court and the Court of Appeal were right in dismissing the appellant's case. He urged this court also to dismiss the appeal and affirm the two lower courts' decisions.

The main question that falls to be considered and answered in this appeal, having regard to the arguments of learned counsel, is -

Did the application for leave to file and argue additional ground 3 simpliciter which was granted by the Court of Appeal, give the appellant the right to argue issue or issues not raised in the pleadings or canvassed in the trial court but contained in that ground and being raised for the first time, without specifically applying and obtaining leave of the Court of Appeal to that effect?

S. 213(3) of the Constitution of Nigeria 1979 makes it mandatory that with the exception of cases that fall within S.213(1) - (2) of the said Constitution, prior leave to appeal either to the Court of Appeal or the Supreme Court as the case may be is a pre-requisite. Where an appellant is seeking leave of the court to raise and canvass issues for the first time in the appellate court and which were not raised in the trial court leave of the appellate court must specifically be sought and obtained to that effect. The application must contain a prayer that the issue or issues are being raised for the first time in the Court of Appeal, and same not having been canvassed in the trial court, as in the present appeal.

The prayers contained in the appellant's Motion filed in the Court of Appeal on 1st July, 1988 did not contain a prayer for leave to raise the fresh issue for the first time, relating to fair hearing. The conclusion of the Court of Appeal that "*Issues 3(a) and (b) were not pleaded nor were they*

an issue at the trial court cannot, without leave, be entertained on appeal", cannot be faulted. Counsel for the appellant did not deny that the question of breach of fair hearing by the respondent was not raised in the appellant's statement of claim, but proceeded under misconception to regard that the leave as granted by Court of Appeal to file ground 3 was tantamount to a grant of leave by that court, to raise and argue the new points. Leave to file and argue additional ground simpliciter did not per se clothe the appellant with authority to argue issues being raised for the first time in the Court of Appeal, which were not pleaded and canvassed in the trial court. The order was not a blanket authority. See *Stool of Abinabina v. Chief Kojo Enyimadu* (1953) 12 WACA 171 and *Amusa Opoola Adio v. The State* (1986) 2 NWLR (Pt.24) 581 and *Bakin Salati v. Shehu* (1986) 1 NWLR (Pt.15) 198.

On the issue of fair hearing which the appellant belatedly introduced, it is my considered view that before an employer can dispense with the services of his employee under the common law all he needs to do is to afford the employee an opportunity of being heard before exercising his power of summary dismissal, even where the allegation for which the employee is being dismissed involves accusation of crime. In the case in hand, the respondent had done that. See Exhibit B wherein the respondent called upon the appellant to give comprehensive explanation of the three accusations of misconduct and impropriety levelled against him. These were replied by the appellant in Exhibit C most unsatisfactorily. Instead of answering the accusations, he went about accusing the respondent of trying to destroy him and rudely proposing questions for the respondent to answer.

It is not necessary, nor is it a requirement under S. 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality. I may go further to say that the provisions of S.33 *supra* have no application to the facts of this case. See: *Ransome-Kuti v. A.-G. of the Federation* (1985) 2 NWLR (Pt.6) 211.

To satisfy the rule of natural justice and fair hearing a person likely to be affected directly by disciplinary proceedings must be given adequate notice of the allegation against him to enable him make representation in his own defence. The complaint against him must not necessarily be drafted in the form of a formal charge. It is sufficient if the complaint as formulated conveys to him the nature of the accusation against him. See *Russell v. Duke of Norfolk* (1949) 1 All ER 109 at 118.

Having regard to all that I have said above, this appeal is com

pletely devoid of any merit and is accordingly dismissed with N1,000.00 costs to the respondent.

The judgments of the lower court and the court below respectively are equally affirmed.

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UWAIS CJN

I have had the opportunity of reading in draft the judgment of my learned brother Wali, J.S.C. I agree that this appeal has no merit. It is accordingly hereby dismissed with N1,000.00 costs to the respondent.

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OGUNDARE JSC

I agree with the judgment of my learned brother Wali, J.S.C. just read. I have nothing more to add. I too dismiss the appeal with costs as assessed by him.

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ONU JSC

I was privileged to read before now the judgment of my learned brother Wali, J.S.C. just delivered and I am in entire agreement with him that this appeal is lacking in merit and ought therefore to fail.

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I wish to say briefly a word or two by way of emphasis on the matter which has indeed been fully considered in the lead judgment to need any further in-depth treatment.

The two issues submitted to this court for our consideration and which, but for their wording, are identical with those formulated by the respondent, query:

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"1. Whether the Court of Appeal rightly upheld the rejection of Exhibit 'F' by the trial court.

2. Whether the Court of Appeal was in duty bound to consider and/or make findings on all the grounds of appeal duly filed and argued by the appellant in his written brief and if so has the failure of the Court of Appeal to consider the complaint on lack of fair hearing occasioned grave miscarriage of justice?"

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The first issue collapsed under the weight of a preliminary objection that it being an issue founded on a ground of mixed law and fact (Ground 1), and leave of neither the Court of Appeal nor that of this court having been sought and obtained (See *Ogbechie v. Onochie* (1988) 1 NWLR (Pt. 70) 370 at 402) it has been rightly, in my view, accordingly declared

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incompetent and struck out. See *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67)718.

In respect of issue 2 predicated on ground 2 in the Court below and additional ground 3 filed in this court, it being contended that the application to argue same without leave to raise the fresh issue or issues for the first time in the appellate court and the same not having been canvassed in the trial court where nothing thereto was raised in the pleadings or therein canvassed, leave of the appellate court must be specifically sought and obtained pursuant to order 6 rule 6(1)(b) Supreme Court Rules, 1985; indeed fresh evidence will not be allowed by a Court of Appeal without an amendment of the pleadings. See: *Onibudo v. Akibu* (1982) 7 S.C. 60; *Adeleke v. Aserifa* (1990) 3 NWLR (Pt.136) 94 and *Abaye v. Ofili* (1986) 1 N.S.C.C. 94; (1986) 1 NWLR (Pt.15) 134.

The basic duty of the Supreme Court and the Court of Appeal being the correction of errors made for which, see *John Bankole v. Mojidi Pelu & Ors.* (1991) 8 NWLR (Pt.211) 523 at 547 (per Karibi-Whyte, J.S.C.), the rule stated above that an appellant will not be allowed to raise on appeal a point or question which was not raised or argued in the court below, is not an inflexible and rigid rule. It is subject to the demands of justice. Thus where, as here, the question involves a substantial point or points of law - either substantial, to wit: allegation of want of fair hearing guaranteed under section 33 of Constitution of the Federal Republic of Nigeria, 1979 as herein, or procedural - the court in its discretion is competent to entertain the appeal on them especially where it is plain that no further evidence could have been adduced which would affect the decision and thus prevent an obvious miscarriage of justice. See: *Akpene v. Barclays Bank of Nigeria Ltd.* (1977) 1 S.C. 47; *Shonekan v. Smith* (1964) 1 All NLR 168; *Stool of Abinabina v. Enyimadu* (1953) 12WACA 171; *Adio v. The State* (1986) 2 NWLR (Pt.24) 581; *Dweye v. Iyomahan* (1983) 2 SCNLR 135 at 138 and *Orogan v. Soremekun* (1986) 5 NWLR (Pt.44) 688. This is irrespective of the fact that the question of breach of fair hearing alleged herein was not raised in appellant's statement of claim but albeit proceeded under a misconception to regard that leave was granted him by the court below to file ground 3 from which, as has transpired, new points have emanated to give rise to the point or points herein.

On the issue of fair hearing which the appellant raised albeit rather belatedly which I have no option but to consider, it being a rule of common law that before an employer can dispense with the services of his employee, all he needs is to afford the employee an opportunity of being heard before exercising his power of summary dismissal even where the allegation for which the employee is being dismissed involves accusation of crime. For as

Nnaemeka-Agu, J.S.C. said in *Kotoye v. CB.N.* (1989) 1 NWLR (Pt.98) 419 at 448:

"For the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard before deciding had in fact been given an opportunity of hearing. Once an appellate court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity of a hearing the order/judgment thus entered is bound to be set aside."

In the instant case, the respondent afforded appellant a full opportunity of fair hearing in that it first issued the appellant with a query (Exhibit B) wherein it requested him (appellant) to give a full explanation of three allegations as pleaded and given in evidence through D.W.1 (Mr. C.N. Onovo) which included, inter alia, that on 21st January, 1983 he (appellant) irregularly and/or negligently signed a paying in slip on general customer's paying in slip in respect of the sum of N4,665.00 which had been credited to the account of one Salihu Abioye but diverted into the account of his (appellant's) friend - one Salami Yekini by him; that he was demonstrably found to have been guilty of misappropriation of respondent's money under sections 308 and 309 of the Penal Code applicable to Borno State, as well as irregular sales of travellers' cheques leading at one time, to his demotion for two and half years from a senior post to that of a clerk on account of his incompetence. That the reply to Exhibit B was Exhibit C in which the appellant's explanation was far from being satisfactory. That this in turn, led to his suspension by the respondent suspending him when he was written Exhibit D. Following the letter of suspension (Exhibit D), the respondent finding his (appellant's) conduct intolerable, dismissed him by writing Exhibit E summarily terminating his appointment. See: *Oladipo Maja v. Leandro Stocco* (1968) 1 All NLR 141; (1968) NMLR 372.

The trial court in finally dismissing the appellant's claim held as follows:-

"In the final result I hold that the plaintiff was guilty of gross misconduct which justified his summary dismissal by the defendant. Accordingly therefore, the plaintiff's action is hereby dismissed with costs which I assess and fix at N150.00 to the defendants."

The court below wasted no time in affirming the learned trial Judge's decision. I am of the opinion that that decision is unassailable. Finding support for its (court below) view in the case of *Olatunbosun v. NISER* (1988) 5 NWLR (Pt.80) 25 at 55 wherein this court held that:-

"Under the Common Law and Statute Law disobedience of law

ful order from any servant high or low, big or small is viewed with seriousness. Such conduct normally and usually attracts the penalty of summary dismissal as disobedience ranks as the worst form of misconduct in any establishment."

- B That court held in that regard in conclusion thus:
"Indeed the respondent need not prove misconduct sufficient if it proves the reasons in the alternative. In this case, the emphasis is on "misconduct" of the appellant in the service of the respondent which has been amply proved. The conclusion of the learned trial Judge that the plaintiff's conduct in the circumstance of this case amount to misconduct is therefore supportable. Misappropriation need not to be pressed although there is inferential evidence to support that allegation."

I see no reason to differ here given the facts of this case.

- D For these reasons and the fuller ones contained in the judgment of my learned brother Wali, J.S.C. I too dismiss the appeal and affirm the decision of the court below. I also make the same order as to costs as set out in the said judgment.

IGUH JSC

- E I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Wali, J.S.C. and I agree that there is no substance in this appeal.

- F Even considering this appeal from the facts as pleaded and testified to by the parties, it remains clear that it is totally devoid of any merit.
 The appellant's claim before the trial court was founded in unlawful dismissal. On the merits of the case, the appellant who had been in the employment of the respondent was dismissed from service with effect from the 19th February, 1985 for gross misconduct. This was in connection with his involvement, firstly, in the misappropriation of a certain Banker's payment, otherwise also called collection proceeds for N4,665.00 and, secondly, in some irregularity in sales of traveller cheques at the respondent's Maiduguri branch.

- H At the conclusion of trial, Ikeotuonye. J. after an exhaustive evaluation of the evidence found that the allegation of irregularity in the sale of traveller's cheques in the respondent's Maiduguri branch was not established against the appellant.

On the appellant's action with regard to the Banker's payment, he observed -

"On the other hand. there is some evidence of misconduct on the part of the plaintiff in the performance of his duties as the servant of the

defendant in relation to the defendant's customer's account. The evidence of the abortive attempt made by one Alhaji Sakare to open a current account with the defendant's Maiduguri branch was given by the plaintiff himself. Alhaji Sakare could not open a current account with the defendant because he could not fulfill the defendant's requirements for doing so. B The purpose of his wanting to open the account was because the Banker's payment could not be encashed over the counter. The plaintiff therefore caused the Banker's Payment to be paid into the account of a well known customer of the defendant, one Yekini Salami, also called Salami Yekini by the parties after endorsing his name and that of Yekini Salami on the reverse side of the Banker's payment." I find the plaintiff guilty of misconduct, the degree whereof I shall quantify later in this judgment. " C

A little later in his judgment, the learned trial Judge went on-

"In the case in hand, the defendant had found Alhaji Sakare unfit to open a current account with it because he could not fulfill its requirements. The plaintiff was aware of this fact, and yet he proceeded to lodge the same Alhaji Bakare's payment into the account of Yekini Salami in the defendant bank, and in doing so acting as both the customer and the cashier of the defendant. What is more, the banker's payment did not in fact belong to Alhaji Bakare, and the procedure adopted by the plaintiff in making the lodgment was not in accordance with the defendant's banking practice in dealing with such documents. " D E

He concluded -

"In the final result I hold that the plaintiff was guilty of gross misconduct which justified his summary dismissal by the defendant. Accordingly therefore, the plaintiff's action is hereby dismissed with costs which I F assess and fix at N150,00 to the defendant. "

The Court of Appeal for its own part, affirmed the decision of the trial court to the effect that the appellant on the above facts was guilty of gross misconduct. It accordingly dismissed the appellant's appeal.

There can be no doubt that where an employee is guilty of gross misconduct, he can be dismissed summarily without notice and without wages. Gross misconduct has been described as conduct that is of a grave and weighty character as to undermine the relationship of confidence which should exist between the employee and his employer. Working against the deep interest of the employer amounts to gross misconduct which entitles H the employer to summary dismissal of the employee. See Babatunde Ajayi v. Texaco Nigeria Ltd. and others (1987) 3 NWLR (Pt.62) 577; Olaniyan v. University of Lagos (1985) 2 NWLR (Pt.9) 599; Boston

Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch. D. 339; Teliat Sule v. Nigerian Cotton Board (1985) 2 NWLR (Pt.5) 17 etc.

In the present case, the act of the appellant was not only against the deep interest of the respondent, it was of a grave and weighty character, bordering on outright fraud or dishonesty, as to undermine the confidence which should exist between an employee and his employer. It is therefore an act of gross misconduct which clearly entitled the respondent to dismiss the appellant summarily as it did.

This appeal is altogether unmeritorious and it is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Wali, J.S.C. that I, too, dismiss it. I subscribe to the order as to costs therein made.

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