

**SUPREME COURT OF NIGERIA**  
24TH APRIL, 1998. SC.68/1992  
**CORAM: A. B. WALI, M. E. OGUNDARE, E. O. OGWUEGBU,**  
**U. MOHAMMED, S. U. ONU, JJSC.**

J. E. A. SHUAIBU ..... APPELLANT  
AND  
NIGERIA-ARAB BANK LTD. .... RESPONDENT

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***APPEALS** - Judgments - Where by an accidental slip a justice who did not partake in the appeal - Appeared in the record as delivering a concurring judgment - The judgment is not incompetent in view of the provisions of s. 258(3) of the 1979 Constitution.*

***APPEALS** - Remark by a Justice - Which did not amount to a decision within s. 277 (1) of the 1979 Constitution - Cannot be made the subject of appeal.*

***APPEALS** - Findings of court - Arguments that findings were not based on evidence - Is misconceived - As the court thoroughly considered the evidence - And came to an unimpeachable conclusion.*

***MASTER AND SERVANT** - Summary dismissal - Where the servant is guilty of misconduct - Summary dismissal is justified.*

**FACTS**

The plaintiff/appellant at the Bauchi High Court claimed against the defendant/respondent: a declaration that his dismissal is wrongful, unlawful, unconstitutional, contrary to the rules of Natural justice, and the conditions of service as per the collective agreement; and that he is entitled to be paid the arrears of his salary and allowances; or alternatively; damages for unlawful dismissal. The Plaintiff was employed by the defendant in May 1980 and he rose to the rank of Manager 'B' in January 1987. On 25/11/87 the then Area Manager North of the defen-

dant came to Bauchi branch with a cheque of N1 million in favour of Cotos Nigeria Ltd (hereinafter called "the Company") which was paid into its account. The Area Manager, accompanied by the Secretary and General Manager of the Company instructed the plaintiff to pay the sum of N200,000.00 out of the account of the company, which is irregular. Before instructing the plaintiff, the Area manager furnished him with facts and documents which shows that the Area Manager has been appointed Director and Chairman of the company, and that his colleagues at head office were aware of the affairs of the company. The Area Manager signed the payment voucher not only for the company but also for the defendant as its Area Manager authorizing the payment of the said N200,000.00 to him for use by the company. The plaintiff made the said payment. The plaintiff was subsequently asked by the Executive Director at the Lagos head office to brief him on this transaction. He was thereafter dismissed from the defendant's employment.

At the conclusion of hearing, the learned trial judge entered judgment for the plaintiff against the defendant. Dissatisfied with the decision, the defendant appealed to the Court of Appeal Jos Division which set aside the judgment of the trial court. The plaintiff has now appealed to the Supreme Court raising 6 issues. However issues 4 and 5 were struck out as being based on incompetent grounds.

#### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was properly constituted when Judgment was delivered on 10th April, 1991.*

*2. Whether the issue of cost arose as a ground of Appeal before the Court of Appeal and whether it was even canvassed as an issue in that court.*

*3. Whether the Court of Appeal did not rely on facts unsupported by evidence in coming to certain conclusions and if it did whether that did not occasion a miscarriage of Justice.*

*6. Was the Court of Appeal right on the pleadings and evidence to have concluded that in the circumstances of this case the Appellant was given a fair hearing by the Respondent before his summary dismissal."*

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

***Appeals - Judgments***

1. Sub-section (3) supra clearly provides a solution to a situation like the one at hand in this case as it stated that where the decision of the court consists of more than one judge, the concurring opinion expressed by the majority justices shall be the binding judgment. The sudden appearance of the name of Adio JCA as delivering a concurring judgment must be without doubt a genuine mistake made in the course of compiling the record. Generally a court possesses the inherent power to amend its clerical slip in order to avert any misapprehension that may arise therefrom. This court has equally the inherent as well as statutory power under s. 22 of the Supreme Court Act, 1960 to correct such a slip made by the courts below. See Asiyanbi v. Adeniji (1967) 1 ALL NLR 82 and A.G. of Oyo State & Ors. v. Fairlakes Hotel Ltd. & Anor. (1988) 12 SCNJ (Pt. 1) 1 at 12. What was recorded as concurring judgment of Adio JCA if excluded, would not affect the validity of the majority judgment of Ndoma-Egba and Okezie JJCA even if it were to be taken that Mukhtar JCA delivered a dissenting decision. See s. 258 (3) of the 1979 Constitution (supra) and s. 9 of the Court of Appeal Act, 1976. The prime duty of any court in taking any decision is to do substantial justice. The wheel of justice could no longer be allowed to be clogged with technicalities<sup>2</sup>. See Joseph Afolabi and 2 Ors v. John Adekunle & Ors. (1983) 2 SCNLR 150 particularly at p. 149 where Aniagolu JSC delivering the lead judgment of the Court with what Irikefe and Bello JJSC (as they

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<sup>2</sup> It is interesting that the Supreme Court has for some time now been emphasizing the shift from technical justice to substantial justice. We call upon trial courts to also adopt this commendable shift in the administration of justice so that certain technical non compliance with some rules of practice and procedure should no longer be allowed to clog the wheel of justice. See the following recent Supreme Court decisions on the issue of doing substantial justice. Mohammed v. Olawunmi (B) (1993) 5 KLR 37; Onyekwuluje v. Animashaun (1996) 3 KLR (pt 39) 494; Odu'a Investment Co. Ltd v. Talabi (1997) 7 KLR (pt 54) 1628.

then were) and Idigbe and Obaseki, JJSC all agreed, opined thus:-

"..... it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in whirligig of technicalities, to the detriment of the determination of substantial issues between them."

See also Gwonto v. The State (1983) 1 SCNLR 142. In the light of the reasons above, I am unable to accept the argument of learned counsel for the appellant that because of the mix-up or accidental slip the judgment of the Court of Appeal is rendered incompetent, null and void. (p. 908 F)

### ***Appeals - Remark by a Justice***

2. Reading the excerpt above, I am in agreement with the Learned counsel for the respondent that what was stated therein was a mere passing remark by Ndoma-Egba, JCA. It did not amount to a decision within S. 277 (1) of the 1979 Constitution. It was emphasized in Wilson v. Osin (1988) 4 NWLR (Pt. 88) 324 that it is not every pronouncement made by a judge that can be made the subject of appeal, but only such that qualifies as a decision under s. 277(1) of the 1979 Constitution. The point is totally misconceived and is lacking in substance. See also A. G. Oyo State v. Fairlakes Hotels Ltd. (1988) NWLR (Pt 92); Oredoyin v. Arowolo (1989) 4 NWLR (Pt 114) 172 and Eliochin (Nig.) Ltd. v. Mbadiwe (1986) NWLR (Pt. 14) 47. The remark complained of did not affect the decision of the Court of Appeal and no miscarriage of justice resulted.(p.910E)

### ***Appeals - Findings of court***

3. I agree with the learned counsel for the respondent that the arguments by learned counsel for the appellant misconceived the judgment of the Court of Appeal. The question of banking practice of the Respondent was pleaded by both the appellant and the respondent in paragraph 10 of the Amended Statement of Claim and paragraph 8 of the Statement of Defence respectively. The learned Justice of the Court of Appeal after thoroughly considering the evidence came to the following unimpeachable conclusion in his judgment:-

*"It is not disputed that an Area Manager could only approve credit facilities to the limit of N50,000.00 while the respondent in his status, is confined to N1,500.00 ceiling.*

*The use of an internal voucher instead of a cheque for the withdrawal of the sum of money complained of, was, undeniably, contrary to the prevailing Banking practice in the appellant's establishment. The irregularity of the transaction was therefore total, and on the part of the respondent, grossly negligent and disquieting.*

*The only defence raised by the respondent was a plea, in Military Par- lance, of "superior order" of the Area Manager. Respondent could not resist the latter's representation, even if it was apparently irregular and indefensible.*

*The representations made, according to the respondent, by the Area Manager, (Abdulkadir) that he was the incumbent Chairman of the Company (Cottos) by virtue of his position in the appellant's Bank and a Director of it (Cottos) were not true and the documents presented to the respondent in support of the claim were, according to D.W.I, fictitious, a situation that could have been easily and quickly verified from the Head Office of the Bank in Lagos.*

*From the evidence on record, it seems to me that there was some scheming. The respondent appears to have withheld the whole truth about the transaction in question."*

The issue is answered in the affirmative and ground 5 of the Grounds of Appeal to which it is hinged fails. (p. 911 G/913 G)

### ***Summary dismissal***

4. The Learned Justice of the Court of Appeal in his lead judgment came to the following conclusions and rightly too in my opinion -

*"There is yet another phase to Issue C in the appellant's brief of argument. This is equally important in the determination of this appeal. It poses the question was the dismissal of the respondent wrongful?"*

*Exhibit C, the collective agreement of Association of Banks, Insurance and Allied Institutions, etcetera is, at best, a "gentlemen's agreement"; and extra-legal document totally devoid of sanctions. It is a product of*

trade Unionist's pressure.

The respondent claimed both in his pleadings and in his evidence adduced in support of them, that the tenure and security of his employment with the appellant rest on Article (c) of Exhibit G. It reads:

B "Before either summary dismissal or warning letter is effected, the employee shall be given a query and afforded the opportunity of defending himself in writing except where the employee has absconded.

C There is no evidence that the appellant as an employee of labour subscribed to the foregoing. Even if Exhibit G had the quality and force of law as they say "properly so called", that is, it was brought about by known process of lawmaking, then the provision of Article 4 (II) that an employee may be summarily dismissed "for wilful disobedience of lawful order or serious negligence" is noticeable. The respondent ought to have  
D taken this into account in his pleadings and evidence. He appears to have conveniently avoided that."...

In summary, any act outside the scope of an employee's duties in his employer's establishment which is prejudicial to the latter's interest is  
E wilful misconduct<sup>3</sup>, considering the nature of the business and service in which his master is bound to provide to the customers. Applying the principles stated to the situation of the present appeal, the respondent did not prove his mettle to the end. If he did earlier, he subsequently soiled  
F it....

These are findings well supported and justified by the evidence with which I find no reason to interfere. See Joshua Ogunlaye v. Babatayo Oni (1990) ALL NLR 341 and Tanbani Majamma v. The State (1964) NNLR 205. (p. 915 G/917 H)

G

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<sup>3</sup> See other recent Supreme Court authorities on summary dismissal based on gross misconduct under Water Eng. Co. Ltd. v. Dubefon (1995) 6 KLR 1295. Nwobosi v. ACB Ltd (1995) 7 KLR 1410. Unival v. Essien (1996) 12 KLR (Pt 46) 2184. But see Fakuade v.

H O.A.U. Teaching Hospital (1993) 6 K.L.R. 102 where termination based on alleged misconduct was rejected by the court.

**NOTABLE POINTS OF INTEREST****OGUNDARE JSC***1. Appeals - When irregularity will not vitiate the proceedings*

The correct position, therefore, is that the complaint of the Appellant B before us that Adio JCA participated in the judgment when he did not join in the oral hearing is, at best, a complaint of irregularity which, unless it occasions a miscarriage of justice, will not vitiate the proceedings of the Court below.

Now Section 258(3) of the constitution provides:

*"A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members."*

Of the three Justices that heard the appeal on February 20, 1991, two, that is, Ndoma-Egba and Okezie JJCA ruled in favour of allowing the appeal before them. They constituted a majority of the three Justices that heard the appeal. What it means is that even if Mukhtar JCA had dissented, her dissent would have had no effect on the judgment that the appeal was allowed. Therefore, in my respectful view and having regard to the circumstances, the participation of Adio JCA in the judgment of the court below regrettable as it is, did not vitiate the proceedings of the court below. The position would have been other wise had Okezie JCA or Ndoma-Egba JCA had dissented and Adio JCA had joined either of them to form a majority. (p. 921 G)

**ONU JSC***2. Summary dismissal for gross misconduct*

As the Appellant was rightly dismissed for his disregard or disobedience of his employer's official instructions contained in Exhibit 'J' and he failed to prove his case on the balance of probability, his summary dismissal for gross misconduct founded on Exhibit "A" and under the common law of master and servant but not under Exhibit "G", discharged the respondent from all liability. See Olatunbosun v. NISER (1988)5 NWLR (Part 80)25 and University of Calabar v. Dr. Okon J. Essien (1996)10 NWLR 225 at 262. (p. 927 E)

**REPRESENTATION**

Bawa Pyiki Esq for the Appellant

M. A. O. Okulaja Esq. for the Respondent

**B**

**CASES REFERRED TO**

Ekpan v. Uyo (1986) NWLR (Pt. 26) 63 at 76

Ige v. Olunloyo (1984) 1 SC NLR 158

Madukolu v. Nkemdilim (1962) 1 ALL NLR 587 at 595

**C**

U.B.A. Ltd v. Edet (1993) 3 NWLR (Pt. 335) 640 at 655

Asiyanbi v. Adeniji (1967) 1 ALL NLR 82

A.G. of Oyo State v. Fairlakes Hotel Ltd. (1988) 12 SCNJ (Pt. 1) 1 at 12.

Joseph Afolabi v. John Adekunle (1983) 2 SCNLR 150

**D**

Gwonto v. The State (1983) 1 SCNLR 142

Wilson v. Osin (1988) 4 NWLR (Pt. 88) 324

A. G. Oyo State v. Fairlakes Hotels Ltd. (1988) NWLR (Pt 92); Oredoyin v. Arowolo (1989) 4 NWLR (Pt 114) 172

**E**

Eliochin (Nig.) Ltd. v. Mbadiwe (1986) NWLR (Pt. 14) 47.

Ogunlaye v. Oni (1990) ALL NLR 341

Majamma v. The State (1964) NNLR 205.

Olatunbosun v. NISER (1988)5 NWLR (Part 80)25

**F**

University of Calabar v. Essien (1996)10 NWLR 225 at 262.

**STATUTES AND RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979 ss. 213 (2) and (3);

258 (1) (2) and (3); 258 (1) (2) and (3); 277 (1), 226

**G**

Court of Appeal Act, s. 9

Supreme Court Act, s.22

Supreme Court Rules O. 8 r. 2(3) & (4)

**H**

**LEAD JUDGMENT BY WALI JSC**

The appellant as plaintiff in the trial court claimed against the Respondent/Defendant in paragraphs 20 and 21 of his Amended Statement of Claim the following reliefs:-



*"20. Whereof by reason of his dismissal, the Plaintiff has suffered loss and damages and thereby claim as follows:-*

*(i) A declaration that his dismissal is wrongful, unlawful, unconstitutional, contrary to the rules of Natural Justice, and the conditions of service as per the collective Agreement and therefore Null and Void and of no effect whatsoever.* B

*(ii) A declaration that his dismissal being wrongful, unlawful and of no effect whatsoever he is entitled to be reinstated to his job and to be paid the arrears his salary and allowances from 31/8/88 till the date of Judgment as per paragraph 18 above.* C

*21. Alternatively, special Damages for wrongful dismissal as follows:-*

*(a) Annual salary from 31/8/88 for 25 years which is the retirement age amounting to N525,600.00.* D

*(b) December Bonus of N1,745.33 for 25 years amounting to N43,633.25.*

*(c) Leave Allowance of N1047.20 for 25 years amounting to N26,180.* E

*(d) Housing Allowances of N6,000.00 for 25 years amounting to N150,000.00.*

*(e) Transport allowance of N300.00 per month for 25 years amounting to N90,000.00.* F

*(f) Entertainment allowance of N600.00 for 25 years amounting to N15,000.00.*

*Total for special Damages is N838,413.25.*

*(ii) General Damages of N161,586.75.*

*Grand Total = N1 million."* G

At the conclusion of settlement of pleadings by the parties the case proceeded to trial. The plaintiff gave evidence during which some documents were put in as Exhibits to support his case. In this judgment I shall refer to some of these documents where I deem it necessary. H

In defence of the case put up by the plaintiff the defendant called 2 witnesses. At the conclusion of the hearing learned counsel for the parties addressed the court.

The learned trial judge considered the evidence adduced before him and came to the following conclusions:

B  
C  
D  
"For all the reasons above mentioned, I have no difficulty in coming to the conclusion that the Dismissal of the plaintiff was unlawful and wrongful because it was contrary to the rules applicable in that regard as per Exhibit "G" between the Plaintiff and the Defendant, and because it was contrary to the elementary principles of Natural Justice. I therefore hold that since the procedure adopted by the Defendant in summarily dismissing the Plaintiff a confirmed, permanent and Pensionable officer was not only contrary to the agreed procedure as contained in Exhibit "G" but was also contrary to the elementary rules of Natural Justice, the said letter of Dismissal i.e Exhibit "F" dated 31st August 1988 is Null and Void and of no effect whatsoever. By this I must not be taken as formally declaring that the contract between the Plaintiff and the Defendant is still subsisting. I have not been asked by the Plaintiff so to do."

E "The Plaintiff's service with the Defendant must therefore be treated as having come to an end on 31/8/88 and the Plaintiff's remedy lies in a claim for damages which I shall now endeavour to assess."

"I therefore hold that the plaintiff at the time of his dismissal by the Defendant still had 25 years of service but for the said, wrongful dismissal by the Defendant. The Plaintiff at the time of his dismissal was earning an Annual salary of \_\_\_\_\_ indeed all the claim contained in paragraph 18(a) to (f) of his said amended statement of claim though supported by the Plaintiff's evidence were not challenged or controverted by the Defendant. I therefore accept the figures contained therein as true for the purposes of assessing the quantum of Damages the plaintiff shall be entitled to."

H  
*"The measure of Damages/payable to the Plaintiff therefore for his wrong-  
 ful dismissal by the Defendant as indeed rightly claimed by him should  
 be" the amount he would have earned under the said contract of service*

*with the Defendant Bank for the period until the Defendant could lawfully have terminated it."*

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*"Although the Plaintiff gave evidence in support of his special damages based on 25 years he would still have served and which I accept as true, I will proceed, following the principles laid down in Salt Vs. Power Plant Company Ltd. Supra, Adejumo Vs. U.C.H Board of Management (1972) 2 U.I.L.R. 145 at page 179-181 and also considering the possibility of the Plaintiff securing an alternative employment also where probably after the stigma arising from the said unlawful dismissal has been rubbed off, and inspite of the sum of N838,413.25 claimed as Special Damages, representing the Plaintiff's salary and sundry Allowances for 25 years to and do hereby award only a lump sum of N155,000.00 in satisfaction of all the claims of the Plaintiff in terms of special Damages."*

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*"I accept and find that the plaintiff is entitled to some measure of General Damages. This breach of contract as perpetrated by the Defendants who were in a position to know the limits of their powers vide Exhibit "G" left much to be desired. I hereby do award to the plaintiff the sum of N18,500.00 (Eighteen thousands and five hundred Naira only) as General Damages.*

*In the circumstances, there will be judgment for the plaintiff against the Defendant Bank for the sum of N173,500.00 made up as follows -*

*(1) N155,000 being Special Damages, and (2) N18,500 being General Damages for wrongful Dismissal."*

Dissatisfied with the decision and the reliefs granted thereof to the plaintiff by the trial court, the defendant appealed to the Court of Appeal, Jos Division. In a considered judgment prepared and delivered by Ndoma-Egba JCA with which both Mukhtar and Okezie JJCA agreed, the appeal was allowed. The judgment of the trial court was set aside and order for dismissal of the plaintiff's claim was substituted. The plaintiff has now appealed to this court.

Henceforth the plaintiff and the respondent shall be referred to in this judgment as the appellant and the respondent respectively. In com-

pliance with the Rules of this court the appellant and the respondent filed and exchanged briefs of argument. In the appellants' brief the following 6 (six) issues have been raised for determination-

B *"1. Whether the court of Appeal was properly constituted when Judgment was delivered on 10th April, 1991.*

*2. Whether the issue of cost arose as a ground of Appeal before the Court of Appeal and whether it was even canvassed as an issue in that court.*

C *3. Whether the Court of Appeal did not rely on facts unsupported by evidence in coming to certain conclusions and if it did whether that did not occasion a miscarriage of Justice.*

*4. Did the Court of Appeal properly treat Exhibit J with due regard to its evidential value.*

D *5. Was it Exhibit 'A' the Appellant's letter of Employment or Exhibit 'G' that governed the conditions of service of the Appellant with the Respondent with due reference to the state of pleadings and the evidence adduced at the trial court.*

E *6. Was the Court of Appeal right on the pleadings and evidence to have concluded that in the circumstances of this case the Appellant was given a fair hearing by the Respondent before his summary dismissal."*

F While in that of the respondents' brief these two issues have been identified:

*"a. Whether the Court of Appeal was properly constituted in the hearing and determination of the Appeal;*

G *b. Whether the Court of Appeal was correct in holding that the dismissal of the Appellant was justified."*

H The two issues raised in the respondents' brief have been sufficiently covered by the six issues formulated by the appellant and I shall adopt the issues raised by the appellant in deciding this appeal. Where I find it convenient some of the issues will be taken together.

Mr. M.A.O. Okulaja of J.B. Majiyagbe & Co. Chambers and representing the respondent filed a Notice of Preliminary objection against the competency of the Notice of Appeal in that -

*"1. The Notice of Appeal in this matter is incompetent and therefore null and void;*

*2. All the grounds of Appeal in the Notice of Appeal are incompetent as they do not meet the requirements of the law, particularly with regard to Order 8 Rule 2(3) & (4) of the Supreme Court Rules, and Section 213 (2) and (3) of the Constitution;*

*3. The particular to Ground 1 of the Grounds of Appeal are erroneous and consequently do not support the ground of appeal it was meant to support;*

*It is to be observed that the Justices of the Court of Appeal who heard the appeal are listed on page 121 of the record of proceedings while the Justices who sat and gave judgment on 10th April, 1991, are listed on page 122 of the record of proceedings.*

*4. The method adopted by the appellant in amending Ground 1 of the Grounds of Appeal whereby he formulated another particular in his brief is improper."*

Before going into the arguments on the merit and demerit of the appeal, I shall deal with the preliminary objection raised by learned counsel for the respondent as reproduced above.

Learned counsel for the appellant conceded that ground 4 of the grounds of Appeal is not a ground of law and having filed the same without leave, it is incompetent and it was struck out without further ado. As regards the other grounds, i.e grounds 1, 2, 3, 5, 6 and 7 having gone through these grounds, I hold the opinion that grounds 1, 2, 5 and 7 are grounds of law while grounds 3 and 6 are either of fact or mixed law and fact. The preliminary objection therefore partially succeeds and grounds 3 and 6 which were filed without leave contrary to S. 213(3) of the 1979 Constitution, are hereby struck out.

Issue 4 of the appellant's brief is hinged to grounds 3 and 6 while Issue 5 is related to ground 4. Since grounds 3, 4 and 6 are held to be incompetent and struck out, issues 4 and 5 are equally incompetent and are hereby struck out.

It is pertinent to give a brief account of the facts involved in this case as contained in the following paragraphs of the Further Amended

Statement of Claim:

"3. The Plaintiff was employed by the Defendant in May 1980 on a salary of N5,000 per annum vide a letter of appointment Reference No. 4020/ADM/FIN dated 23/5/80 herein pleaded and the Plaintiff accepted the offer.

4. The Plaintiff's appointment was subsequently confirmed by a letter reference No. 418 dated 12/1/81 with effect from 1st January, 1981 and simultaneously conferred with signatory 'B' powers. The said letter of confirmation is herein pleaded.

5. The plaintiff performed his duties diligently and satisfactorily and rose to the rank of Manager 'B' in January, 1987 as per the letter of promotion reference No. 172/Admin/Fin dated 29th January, 1987 which the Plaintiff will rely upon at the trial.

6. On 25/11/87 the then Area Manager North of the Defendant came to the Bauchi branch with a cheque of N1 million in favour of Cotos Nigeria Limited which was paid into its account.

7. On the said 25/11/87 the said Area Manager, Late Alhaji S. B. Abdulkadir, accompanied by the Secretary and General Manager of Cotos Nigeria Limited, instructed the Plaintiff to pay the sum of N200,000,00 out of the account of Cotos Nigeria Limited.

8. Before instructing the Plaintiff aforesaid, the said Alhaji S. B. Abdulkadir furnished the Plaintiff with the following facts and documents:-

(a) A copy of the Board of Directors Resolution of Cotos Nigeria Ltd appointing him Director and Chairman of the Company and removing the former Chairman. The Plaintiff shall found on the Resolution at the trial.

(b) A certified (sic) true copy of Form Co. 7 filed in the Companies Registry in which the said Alhaji S. B. Abdulkadir was appointed a Director of Cotos Nigeria Ltd.

(c) A letter reference No. SEC/221/87-24 of 14/9/89 appointing Alhaji S. B. Abdulkadir as Director and Chairman of Cotos and the latter's letter of acceptance of the offer dated 16/9/87.

(d) The said Alhaji S. B. Abdulkadir informed the plaintiff that

*his colleagues at the Head Office were aware of the affairs of Cotos Nig. Ltd.*

*(e) The said Alhaji S. B. Abdulkadir signed, the payment Voucher not only for Cotos Nigeria Ltd also for Nigeria-Arab Bank Ltd as its Area Manager authorising the payment of the said N200,000.00 to him for use by the Company.* B

*9. The Plaintiff having satisfied himself as to the genuineness of the documents presented and in obedience to the instruction of his superior officer made the said payment. The Plaintiff will rely on the aforementioned documents at the trial.* C

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*11. On 13/7/88 the Plaintiff was instructed to proceed on his annual leave preparatory to assuming a new station and upon resumption, was requested to proceed to Lagos for an attachment course of about 6 weeks at the Head Office.* D

*12. Whilst in Lagos he was asked by the Executive Director to brief him on the transaction regarding the payment of N200,000.00 from Cotos Nigeria Limited Account. So as to enable him properly discuss with the former Chairman of Cotos Nigeria Limited who would be coming for a discussion the next day.* E

*13. After the said briefing, the plaintiff was requested to put it into writing and the plaintiff did so after pointing out that he would provide a more comprehensive write up, after going through the records at the Bauchi Branch.* F

*14. On the 25/8/88, the Plaintiff was served with a letter transferring him to the credit and marketing Department but before he could assume duty, he received another letter reference 7786/Admin/Fin dated 31/6/86 dismissing him from the Defendant's employment. The said letters are hereby pleaded."* G

The remaining Issues to be considered are 1, 2, 3 and 6.

Issue 1. This is related to ground 1 in which the complaint is H that the Court of Appeal judgment was a nullity because a justice who did not partake in the hearing of the appeal wrote a concurring judgment.

In his effort to satisfy this court that the proper panel that sat

over the appeal and delivered judgment was composed of Justices Ndoma-Egba, Mukhtar and Okezie of the Court of Appeal, Jos Division, Mr. Okulaja of Counsel for the respondent referred this court to page 121 of the record dated 20/2/91 wherein the constitution of the court that heard the appeal and reserved the judgment to 10/4/91 was recorded as follows:-

IN THE COURT OF APPEAL

JOS JUDICIAL DIVISION

HOLDEN AT JOS

ON WEDNESDAY THE 20TH FEBRUARY, 1991

BEFORE THEIR LORDSHIPS

HON. JUSTICE E. T. NDOMA EGBA JUSTICE, COURT OF APPEAL

HON. JUSTICE A. M. MUKHTAR JUSTICE, COURT OF APPEAL

HON. JUSTICE O. A. OKEZIE JUSTICE, COURT OF APPEAL

Learned Counsel also referred to S. 258 (3) of the 1979 Constitution [as amended] and the decisions in Ekpan v. Uyo (1986) NWLR (Pt. 26) 63 at 76; Ige v Olunloyo (1984) 1 SC NLR 158; Madukolu v. Nkemdilim (1962) 1 ALL NLR 587 at 595, U.B.N Ltd v. Edet (1993) 3 NWLR (Pt. 335) 640 at 655 and urged the court to hold that the appearance of the name of Justice Adio JCA (as he then was) and his concurring judgment in the appeal was a genuine mistake resulting from mixed - up occasioned by the registry when compiling the record or by the Secretary of Adio JCA when typing his judgments. Learned counsel further referred the Court to page 122 in which the same panel that heard the appeal was recorded to have delivered a unanimous judgment on 10/4/91.

In presenting his argument on the issue, learned counsel for the appellant, Bawa Pyiki Esq. submitted that "the court was no longer properly constituted when Adio JCA became a member of the panel that delivered judgment on 10th April, 1991. When the Appeal was argued on 20th February, 1991, Mukhtar JCA was a member of the panel. She however did not contribute to the judgment of 10th April, 1991 thereby leaving only two Justices contrary to the express provisions of section 9



of the Court of appeal Act, 1976. The composition of the court having changed, the court has become incompetent and any judgment given is therefore a nullity. See Sken-Consult (Nig.) Ltd. & Ors. v. Okey (1981) 1 SC 6. It does not matter that the judgment was in all respect correct as to the issues raised. See also Madukolu v. Nkendilim (1962) 1 ALL NLR B 587 at p. 594". Learned counsel therefore submitted that s. 253 (3) of the 1979 Constitution is irrelevant and urges the court to declare the judgment of the Court of Appeal in the case and delivered on 10/4/91 as null and void.

From the argument and submissions of Learned counsel on both sides it is common ground that the panel that heard the appeal was constituted by Ndoma-Egba, Mukhtar and Okezie JJCA. On page 122 the record shows as follows-

"IN THE COURT OF APPEAL

JOS JUDICIAL DIVISON

HOLDEN AT JOS

ON WEDNESDAY THE 10TH APRIL, 1991

BEFORE THEIR LORDSHIPS

HON. JUSTICE E.T. NDOMA-EGBA JUSTICE COURT OF APPEAL

HON. JUSTICE A. M. MUKHTAR JUSTICE COURT OF APPEAL

HON. JUSTICE O.A. OKEZIE JUSTICE COURT OF APPEAL

APPEAL NO. CA/J/147/90

BETWEEN:

J. E. A. SHU'AIBU .. .. . RESPONDENT

AND:

NIGERIA-ARAB BANK LTD. .. .. . APPELLANT

Kayode Olatunji, Esq., for the appellant

Bawa Pyiki Esq., for the respondent.

Judgment: - Read by me. Appeal Unanimously allowed.

(S.G.D)

E. T. NDOMA-EGBA

JUSTICE, COURT OF APPEAL

10/4/91"

The above excerpt of the record shows that the judgment was delivered

by the correct panel. But curiously enough pages 151 & 152 recorded both Adio and Okezie JJCA as delivering concurring judgments to the lead judgment of Ndoma-Egba JCA. Apart from the simple concurring judgment of Adio JCA reproduced on 151, no where in the record of B proceedings did his name appear as taking or playing any part in the appeal.

S. 258 (1), (2) and (3) of the 1979 Constitution provides as follows:-

C *"(1) Every court established under this Constitution shall deliver its decision in writing not later than three months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivering thereof.*

D *(2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion*

E *Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.*

F *(3) A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members."*

**Sub-section (3) supra clearly provides a solution to a situation like the one at hand in this case as it stated that where the decision of the court consists of more than one judge, the concurring opinion expressed by the majority justices shall be the binding judgment. The sudden appearance of the name of Adio JCA as delivering a concurring judgment must be without doubt a genuine mistake made in the course of compiling the record. Generally a G court possesses the inherent power to amend its clerical slip in order to avert any misapprehension that may arise therefrom. This court has equally the inherent as well as statutory power under s. H 22 of the Supreme Court Act, 1960 to correct such a slip made by**

the courts below. See Asiyanbi v. Adeniji (1967) 1 ALL NLR 82 and A.G. of Oyo State & Ors. v. Fairlakes Hotel Ltd. & Anor. (1988) 12 SCNJ (Pt. 1) 1 at 12. What was recorded as concurring judgment of Adio JCA if excluded, would not affect the validity of the majority judgment of Ndoma-Egba and Okezie JJCA even if it were to be taken that Mukhtar JCA delivered a dissenting decision. See s. 258 (3) of the 1979 Constitution (supra) and s. 9 of the Court of Appeal Act, 1976. The prime duty of any court in taking any decision is to do substantial justice. The wheel of justice could no longer be allowed to be clogged with technicalities. See Joseph Afolabi and 2 Ors v. John Adekunle & Ors. (1983) 2 SCNLR 150 particularly at p. 149 where Aniagolu JSC delivering the lead judgment of the Court with what Irikefe and Bello JJSC (as they then were) and Idigbe and Obaseki, JJSC all agreed, opined thus:-

*"..... it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in whirligig of technicalities, to the detriment of the determination of substantial issues between them."*

See also Gwonto v. The State (1983) 1 SCNLR 142. In the light of the reasons above, I am unable to accept the argument of learned counsel for the appellant that because of the mix-up or accidental slip the judgment of the Court of Appeal is rendered incompetent, null and void.

Issue 1 has not therefore been established in favour of the appellant and it fails.

Issue 2. In the brief filed by learned counsel for the appellant he presented his argument as follows:-

*"On the issue of costs, it is our submission that it was neither a Ground of Appeal before the Court of Appeal nor was it canvassed as an issue in the brief. The Court of Appeal was therefore clearly wrong to have suo motu raised and dealt with it. See page 132 of the record."* Learned counsel cited and relied on the case of Okoye & Ors. v. Nigerian Constitution & Furniture Co. Ltd & Ors. (1991) 7 SCNJ 365.

In reply Mr. Okulaja of respondent's counsel referred to page

132 from line 18 to 28 of the record and contended that what was contained therein was a mere comment or an observation by the learned Justice of the Court of Appeal which did not decide any issue against the appellant and could not therefore qualify even as a ground of appeal. He submitted that it was wrong, for the learned counsel for the appellant to seize on every comment to raise a ground of appeal and urged the issue to be dismissed.

The penultimate paragraph that came under criticism by learned counsel for the appellant reads:

*"I observe here and now that it seems to me irregular for the learned trial judge to have re-opened the case after signing judgment and without any application for costs by counsel. Indeed, the question of costs is at the discretion of the court. It appears to me however, that there was no basis for the exercise of the trial court's discretion on costs. Furthermore, there is no indication that the decision on costs was considered and signed before the court rose for the day. This action may be vitiate the proceedings. It should not however, be encouraged."*

**Reading the excerpt above, I am in agreement with the Learned counsel for the respondent that what was stated therein was a mere passing remark by Ndoma-Egba, JCA. It did not amount to a decision within S. 277 (1) of the 1979 Constitution. It was emphasized in Wilson v. Osin (1988) 4 NWLR (Pt. 88) 324 that it is not every pronouncement made by a judge that can be made the subject of appeal, but only such that qualifies as a decision under s. 277(1) of the 1979 Constitution. The point is totally misconceived and is lacking in substance. See also A. G. Oyo State v. Fairlakes Hotels Ltd. (1988) 5 NWLR (Pt 92); Oredoyin v. Arowolo (1989) 4 NWLR (Pt 114) 172 and Eliochin (Nig.) Ltd. v. Mbadiwe (1986) NWLR (Pt. 14) 47.**

**The remark complained of did not affect the decision of the Court of Appeal and no miscarriage of justice resulted.** Both the ground of appeal and the issue culled therefrom fail.

Issue 3. In relation to this issue learned counsel for the appellant referred to statement on pages 130 - 131 of the record of proceedings

where Ndoma-Egba JCA in the lead judgment said "Facilities can only be granted on sufficient funds. The company [Cotos Nigeria Limited] was only N1,000.00 on credit." and submitted that the conclusion was not based on any evidence. In support of this he referred to the evidence of P.W. 1 where he said -

*"I now say that the Manager can disburse funds but cannot grant overdraft facilities where the customer's Account has insufficient funds. I saw a credit of N1,000,000.00 in favour of Cotos Nig. Ltd."*

and then further submitted that the Court of Appeal did not appreciate this vital fact and therefore treated the transaction as that of granting an over-draft of N200,000.000 to a Company that was only N1000.00 in credit; and that it would have arrived at a different conclusion if it had appreciated that the N200,000.00 was withdrawn from the amount of N1000,000 already paid into the account of Cotos Nigeria Ltd. He submitted there was no evidence on which the Court of Appeal based its finding that the documents presented to the appellant by the Area Manager were fictitious as no such statement was contained in the evidence of D.W. 1.

In reply learned counsel for the Respondent submitted, that the argument presented by appellant's counsel on the Issue was nothing but a total misconception. He said what happened on pages 130 - 131 was a review of the evidence of P.W. 1 while the conclusion of the Court of Appeal was on p. 138. On the payment of the N200,000 by the appellant as regards the fictitious document, learned counsel described the point as minor which did not advance the case of the appellant in any significant manner as it did not detract from the point made by the Court of Appeal that the appellant should have obtained clearance from the Head Office before paying out the said sum of N200,000 when his power, as an Area Manager, was limited to the authorisation of payment of N50,000 only.

**I agree with the learned counsel for the respondent that the arguments by learned counsel for the appellant misconceived the judgment of the Court of Appeal. The question of banking practice of the Respondent was pleaded by both the appellant and the respondent in paragraph 10 of the Amended Statement of Claim**

and paragraph 8 of the Statement of Defence respectively. The

evidence of the appellant on the issue was to the effect that on 25/11/87 late Alhaji Abdulkadir, the Area Manager (North) of the Respondent (Nigeria-Arab Bank Ltd.) in company of the General Manager of Cotos Nigeria Ltd. brought in a cheque of one million Naira and paid the same into the current account of Cotos Nig. Ltd. with Respondent's branch in Bauchi. Both late Abdulkadir and the General Manager Cotos Nig. Ltd. were signatories to the said account at the material time. The evidence of the appellant/plaintiff continued as follows:

C "The Area Manager (North) then showed me a resolution by the  
Cotos Nig. Ltd. approving the withdrawal of N200,000 by the Area Man-  
ager (North) & The General Manager for the use of Cotos Nig. Ltd. He  
showed me a form co appointing him a Chairman/Director of Cotos Nig.  
D Ltd. He left a certified true copy of that form Co with the Bank and  
confirmed that all the infighting within Cotos Nig. Ltd. had been settled  
with his own appointment as Chairman of Cotos Nig. Ltd. and expulsion  
of the former Chairman Chief Obomanu. He instructed me to effect  
E payment of the N200,000. He signed for the Cotos Nig. Ltd. as its Chair-  
man with the General Manager and as a sign of his authorising me to  
pay the money he also signed as Area Manager (North). The General  
Manager of Cotos Nig. Ltd. is Mr. A. Yange. They signed the Internal  
F withdrawal Voucher. I signed also as the Manager. The Area Manager is  
the Head of all the Branches in the Northern States. I can identify the  
Internal withdrawal voucher we all signed if seen by my signature and  
that of the Area Manger.

*This is the said Voucher. Tendered No Objection. Admitted and marked*  
 G *Exhibit D."*

[illegible]

*To the best of my knowledge and such instruction was given to me and vide the Area Manager (N) was there and personally instructed me to H payout the N200,000 from Cotos Nig. Ltd. I had known the late Area Manager for his financial integrity and is a much more Senior official of the Bank than the alleged signatory to the said letter which I have not seen still now."*

And cross examined, the witness further said:-

*The use of Internal withdrawal Voucher is a proper mode of withdrawal in the Nig. Arab Bank Nig. Ltd. Cotos Nig. Ltd. deserved such attention especially when it is backed by an Area Manager North of the Defendant Bank."*

W. 1 Dali Lawal, the Branch Manager of the Respondent said in his evidence as follows:-

*"The practice of the Arab Bank in approving facilities is that all applications are forwarded to our Area Office. The Area Manager can approve up to N50,000 anything above that must be forwarded to the Head Office in Lagos. A Manager has no power to disburse any funds in our Bank. A cheque must be used in withdrawing from a Current Account, if it is a saving account a withdrawal Voucher must be used. If it is an internal transaction then a contra voucher is used if the amount is below N1000, one officer can authorise payment, from N1000 - N5000 must be 2 officers, officer on "A" and "B" signatories. From N5000 - N10000 must be signed by either A. or "B" signatory and the Accountant or Assistant Manger, N10,000 and above the Manager must countersign. Internal withdrawal vouchers are never used for withdrawal from current Accounts, only cheques are allowed."*

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*"On 25/11/87 I received a letter from our Managing Director. I see Exhibit "D", it is an Internal withdrawal voucher raised Internally to operate a current Account. If it is to be used internally the name and Account No. of the Account holder must appear but none appears here. The late Area Manager who signed it acted as both the Drawee and also the Authorising Officer. The Late Area Manager acted wrongly."*

**The learned Justice of the Court of Appeal after thoroughly considering the evidence came to the following unimpeachable conclusion in his judgment:-**

*"It is not disputed that an Area Manager could only approve credit facilities to the limit of N50,000.00 while the respondent in his status, is confined to N1,500.00 ceiling.*

*The use of an internal voucher instead of a cheque for the withdrawal*

*of the sum of money complained of, was, undeniably, contrary to the prevailing Banking practice in the appellant's establishment. The irregularity of the transaction was therefore total, and on the part of the respondent, grossly negligent and disquieting.*

**B** *The only defence raised by the respondent was a plea, in Military Par-  
lance, of "superior order" of the Area Manager. Respondent could not  
resist the latter's representation, even if it was apparently irregular and  
indefensible.*

**C** *The representations made, according to the respondent, by the Area  
Manager, (Abdulkadir) that he was the incumbent Chairman of the  
Company (Cottos) by virtue of his position in the appellant's Bank and  
a Director of it (Cottos) were not true and the documents presented to  
the respondent in support of the claim were, according to D.W.I, ficti-  
D tious, a situation that could have been easily and quickly verified from  
the Head Office of the Bank in Lagos.*

*From the evidence on record, it seems to me that there was some  
scheeming. The respondent appears to have withheld the whole truth  
E about the transaction in question."*

**The issue is answered in the affirmative and ground 5 of  
the Grounds of Appeal to which it is hinged fails.**

**F** The next and last issue in this appeal is Issue No. 6 derived from  
ground 5 of the Grounds of Appeal. The complaint was that the appel-  
lant before his summary dismissal was not given fair hearing. It was  
claimed that the appellant was not given a written query as stipulated in  
Exhibit G but was invited to the Respondent's head office in Lagos and  
on arrival he reported to the Respondent's Executive Director who there  
**G** and then requested the appellant to brief him on the Cotos Nig. Ltd.  
account and the withdrawal of N200,000:00 therefrom. The appellant  
did so and he was asked to reduce the discussion in writing which he  
also did. It was submitted that there was no contemplation of any disci-  
**H** plinary action against the appellant at the time and therefore the only  
reasonable inference that could be drawn is that the Appellant only dis-  
cussed with the Respondent's Executive Director. It was submitted that  
the dismissal of the Appellant was wrongful and reliance was put on



Exhibit G, the provision of fair hearing in the 1979 Constitution as well as the decisions in Baba v. Nigerian Civil Aviation Training Centre & Anor. (1991) 7 SCNJ 1; Oyeyemi v. Commissioner for Local Government Kwara State (1992) 2 SCN 266 and The State v. Olu Onagoruwa (1992) SCNJ 1.

In response it was submitted on behalf of the Respondent that the appellant was orally queried as a result of which he made written submission. It was contended that the oral query to the appellant followed by his written reply satisfied the requirement of the law, the important thing being that he was given opportunity to explain himself. It was further contended that the case was simply of master and servant with no statutory flavour and that as the appellant was guilty of serious misconduct, the summary termination of his employment by the Respondent was in order.

In paragraph 16 of the Amended Statement of Claim, the appellant pleaded as follows:-

*"16. The Plaintiff avers and will contend that his dismissal is unconstitutional contrary to natural justice and contrary to rules governing his conditions of service as contained in the collective agreement between Nigeria Employers Association of Banks, Insurance and Allied Institutions and Association of Employees of Banks, Insurance and Financial Institutions. The Plaintiff will rely on the agreement at the trial."* The Respondent on his part pleaded thus in paragraph 16 of his Statement of Defence -

*"16. The defendant will at the hearing put the plaintiff to the strictest proof thereof as to the unconstitutionality of his dismissal, we shall also contend that the summary dismissal of the plaintiff was in order as it touches on the essential ingredients of summary dismissal."*

**The Learned Justice of the Court of Appeal in his lead judgment came to the following conclusions and rightly too in my opinion -**

*"There is yet another phase to Issue C in the appellant's brief of argument. This is equally important in the determination of this appeal. It poses the question was the dismissal of the respondent wrongful?"*

*Exhibit C, the collective agreement of Association of Banks, Insurance and Allied Institutions, etcetera is, at best, a "gentlemen's agreement"; an extra-legal document totally devoid of sanctions. It is a product of trade Unionist's pressure.*

**B** *The respondent claimed both in his pleadings and in his evidence adduced in support of them, that the tenure and security of his employment with the appellant rest on Article (c) of Exhibit G. It reads:*

*"Before either summary dismissal or warning letter is effected, the employee shall be given a query and afforded the opportunity of defending himself in writing except where the employee has absconded.*

**C** *There is no evidence that the appellant as an employee of labour subscribed to the foregoing. Even if Exhibit G had the quality and force of law as they say "properly so called", that is, it was brought about by*

**D** *known process of lawmaking, then the provision of Article 4 (II) that an employee may be summarily dismissed" for wilful disobedience of lawful order or serious negligence" is noticeable. The respondent ought to have taken this into account in his pleadings and evidence. He*

**E** *appears to have conveniently avoided that."*

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*"Respondent's entire defence that he acted on the instructions of his Area Manager, Abdulkadir lacks credibility.*

**F** *With the duration of the experience in banking the respondent claimed for which he was amply compensated by rapid promotions, he ought to know the limitations of the authority of an Area Manager vis a vis that of the Management at the apex. The authority of the former is clearly penultimate."*

**G** xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

*In summary, any act outside the scope of an employee's duties in his employer's establishment which is prejudicial to the latter's interest is wilful misconduct, considering the nature of the business and service*

**H** *in which his master is bound to provide to the customers.*

*Applying the principles stated to the situation of the present appeal, the respondent did not prove his mettle to the end. If he did earlier, he subsequently soiled it.*

*I now return to the point made by learned counsel for the appellant at the trial of this case that the terms and conditions of service of the respondent are neither statutory nor based on the constitution. These are controlled by Common Law and on Exhibit "A". Under both, the misconduct exhibited by the respondent in this case justified instant dismissal.* B  
*In Professor Dupe Olatunbosun v. Niser, (1988) 3 NWLR, Part 80, 24 at page 31, the Supreme Court defined misconduct as follows:*

*"Under Common Law and statute law disobedience of lawful 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 one of the worst forms warrant (sic) summary dismissal it is enough that the conduct of the servant is of such a grave and weighty character as to undermine the relationship of confidence which should exist between master and servant". See also Ajayi v. Texaco Nigeria Ltd. 1987 3 NLWR pt. 62 page 577 at 579 where the Supreme Court held thus:* C D

*"There is no fixed rule of law defining the degree of misconduct which would justify a dismissal. It is enough that the conduct of the servant is of a grave and weighty character as to underline the confidence which should exist between him and the master. Working against the deep interest of the employer clearly amounts to gross misconduct entitling the employer to premeptorily (sic) dismiss the employee irrespective of the condition of service".* E F

*The lead authorities I have cited are consistent with the definition of Maclyne in his impressive Book on "Unfair Dismissal" 2nd Edition at page 229. The Author stated:*

*"There is no fixed Rule of Law defining the degree of misconduct which will justify summary dismissal. The conduct complained of has to be looked at in the context of (a) the nature of the business (b) the normal circumstances which prevail at the particular establishment and (c) the employees position. If the conduct, judged in the light of the above H circumstance is seen as a deliberate flouting of the contractual conditions, then summary dismissal is justified."*

**These are findings well supported and justified by the evi-**

**dence with which I find no reason to interfere. See Joshua Ogunlaye v. Babatayo Oni (1990) ALL NLR 341 and Tanbani Majamma v. The State (1964) NNLR 205.**

For the reasons stated above I find no merit in this appeal. I affirm the judgment of the Court of Appeal. The appeal is dismissed with N10,000.00 costs to the Respondent.

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C

### OGUNDARE JSC

I have a preview of the judgment of my learned brother Wali JSC just delivered. I agree with him that this appeal is totally lacking in merit and ought to be dismissed. I need however, to comment on Issue D (1). As I am in total agreement with my learned brother on the views expressed by him in respect of all the other issues and the preliminary objection, I shall not say more on those issues.

On issue (1) , it is clear from the record that the appeal in the E Court of Appeal, that is, the court below was heard on 20th February 1991 by three Justices of that court namely- Hon. Justice E.T. Ndoma-Egba, Hon. Justice A.M. Mukhtar and Hon. Justice O. A. Okezie. At the conclusion of oral arguments the learned Justices reserved judgment till F 10th April 1991. On the latter date the three Justices again sat and the judgments of the court were read. The appeal was unanimously allowed. The judgments that were read however, were those of Hon. Justice E.T. Ndoma-Egba JCA, Hon. Justice Yekini Olayiwola Adio JCA (as he then was ) in which he wrote:

G *"I have had the privilege of reading, in draft, the judgment just delivered by my learned brother, Ndoma-Egba, JCA , with which I agree. I also abide by the consequential order including the order for costs."* and signed same and the judgment of O.A. Okezie JCA in which he too H wrote:

*" After reading the judgment of my learned brother, Ndoma-Egba, JCA in this appeal, I have considered it unnecessary to state my own reasons which agree in all respects with his own, I, therefore, adopt*

*them as mine."*

and signed. The Hon. Justice A.M. Mukhtar JCA who sat at the oral hearing appeared not to have written a judgment in the matter even though she sat on the day the judgments were read. To my mind, it would appear that the Hon. Justice Adio JCA who was not present at the oral hearing of the appeal participated in judgment. The questions then arises: would his participation amount to the proceedings in the Court of Appeal being null and void, as contended by the Appellant in the appeal before us? Or would the proceedings just be merely irregular, as contended by the Respondent? If the Appellant's contention is correct, then this Court would have to nullify the proceedings of the Court below and order a rehearing of the appeal in that court, If however , the Respondent's contention is correct, unless the irregularity occasioned a miscarriage of justice, the irregularity would not vitiate the proceedings since both at the oral hearing and the delivering of the judgment stage the court below was duly constituted as provided in section 226 of the Constitution of the Federal Republic of Nigeria 1979 which provides:

"226, *For the purpose of exercising any jurisdiction conferred upon it by this constitution or any other law, the court of Appeal shall be duly constituted if it consists of not less than 3 Justices of the Court of Appeal .....*"

The West African Court of Appeal had taken the view that where membership of a court - the Native Court varied during hearing, the proceedings were a nullity.- See, Nana Tawiah 111 v Kwasi Ewudzi 3 W.A.C.A. 52; Akosuah Otwiwaa & Anor. v. Adjoa Kwaseko 3 W.A.C.A. 230; Chief Yaw Damoah v. Chief Kofi Taibili & Anor 12 W.A.C.A. 167 and Kwaku Kanning v. Kwabena Pong & Ors. 14 W.A.C.A. 244. This Court however, held to the contrary in Adeigbe & Anor. v. Kusimo & Ors. (1965) NMLR 285; (1965) 4 NSCC 188. where it was held-

*"In a complaint of nullity the test is whether the complaint is extrinsic to the adjudication; but the plaintiffs' complaint, which was based on the variation in the trial bench, was at bottom a complaint that the judgment could not be satisfactory on the ground that those who*

*gave it had all the witnesses, and did not pertain to any matter of jurisdiction, therefore the judgment was not a nullity."*

Sir Ademola CJN delivering the judgment of this Court observed at page 191 of the latter Report

B "We are in no doubt about the correctness of what the learned appeal judge said in his judgment that there are abundant decisions in the High Court and in the West African Court of Appeal on the point that where a court is differently constituted during the hearing of a case, or on various occasions when it met, or where one member did not hear the whole evidence, the effect on the proceedings is to render them null and void. The learned judge obviously had in mind, among others the following cases-

D *Egba N. A.V. Adeyanju (1936) 13 N.L.R.77;*

*Tawiah III v. Ewudzi 3 W.A.C. 52:*

*Otwiwa v. Kwaseko 3 W.A.C.A. 230:*

*Damoah v. Taibil 12 W.A.C.A. 167:*

*Runka v. Katsina N.A. 13 W.A.C.A. 98:*

E *In the first of these cases, in which the defendant's witnesses were not heard by two members of the court, the principle was enunciated that a judgment could not be allowed to stand which was given by judges who had not heard all the evidence; in the other four cases, the appeal court held expressly that the proceedings were a nullity on that account. There seems to be a confusion of thought between jurisdiction and regularity: between the competence of the court to hear the case and the propriety of a bench who had not heard all the evidence adjudicating on the case.*

G *This matter was aptly put in a judgment of this court in the appeal Gabiel Madukolu v. Johnson Nkemdilim FSC, 344/1960 (unreported) decided on the 12th day of November, 1962, where Bairamian, F.J., put it thus:-*

H *'a court is competent when-*

*(1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and*

(2) *the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and*

(3) *the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of B jurisdiction.'*

He continues:-

*'Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to C the adjudication.*

*If the court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity; in the conduct of the trial;.....*

*The complaint against a hearing that was not always before the D same bench does not pertain to any matter that goes to the jurisdiction of the court. It is at bottom a complaint that the judgment cannot be satisfactory on the ground that as the persons who gave it had not seen and heard all the witnesses, they could not appraise the evidence as a E whole and decide the facts properly. Thus it is a complaint on the soundness of the judgment itself, and not a complaint that is extrinsic of the adjudication, which is the test to apply when considering a submission on F jurisdiction. We are therefore of the opinion that variations in the bench do not make the judgment a nullity; they may make it unsatisfactory, and it may have to be set aside for this reason, but whether they do or not depends on the particular circumstances of the case"*

Note: Madukolu v. Nkemdilim is reported in (1962) ANLR 581.

The correct position, therefore, is that the complaint of the Appellant G before us that Adio JCA participated in the judgment when he did not join in the oral hearing is, at best, a complaint of irregularity which, unless it occasions a miscarriage of justice, will not vitiate the proceedings H of the Court below.

Now Section 258(3) of the constitution provides:

*"A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members."*

Of the three Justices that heard the appeal on February 20, 1991, two, that is, Ndoma-Egba and Okezie JJCA ruled in favour of allowing the appeal before them. They constituted a majority of the three Justices that heard the appeal. What it means is that even if Mukhtar JCA had  
 B dissented, her dissent would have had no effect on the judgment that the appeal was allowed. Therefore, in my respectful view and having regard to the circumstances, the participation of Adio JCA in the judgment of the court below regrettable as it is, did not vitiate the proceedings of the court below. The position would have been other wise had  
 C Okezie JCA or Ndoma-Egba JCA had dissented and Adio JCA had joined either of them to form a majority.

It is for the above reasons that I resolve issue (1) against the Appellant. As I agree with my learned brother Wali JSC on all the other  
 D issues which I equally resolve against him (Appellant) I dismiss this appeal with costs as assessed by my learned brother Wali JSC.

E **OGWUEGBU JSC**

I had the advantage of reading in draft the judgment just delivered by my learned brother Wali, J.S.C. and I agree with him that the appeal should be dismissed.

F The panel of the Court of Appeal which heard the appeal on 20-2-91 comprises Ndoma-Egba, Mukhtar and Okezie, JJ.C.A. and judgment was reserved till 10-4-91. On the said day the same panel that heard the appeal was recorded as having unanimously allowed the appeal at page 122 of the record. At pages 151 of the record, Adio, J.C.A. (as  
 G he then was) and Okezie, J.C.A. were shown to have concurred with the lead judgment of Ndoma-Egba, J.C.A. No explanation was given as to how the judgment of Adio, J.C.A. strayed into the record of proceedings.

H This fact did not occasion any miscarriage of justice bearing in mind that at least two members of the panel who heard the appeal (Ndoma-Egba and Okezie, JJ.C.A.) expressed the opinion that the appeal had merit and allowed it. Section 258(3) of the Constitution of the Federal



Republic of Nigeria, 1979 provides that a decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members. There was a mistake somewhere and as I had said earlier, it did not lead to any miscarriage of justice.

I hereby dismiss the appeal and affirm the decision of the court below delivered on 10-4-91. I also abide by the consequential orders including the order as to costs made in the lead judgment of my learned brother Wali, J.S.C.

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### MOHAMMED JSC

I, too, do not see any merit in this appeal and for the reasons given in the lead judgment, just read by my learned brother, Wali JSC, this appeal is dismissed. I agree that the concurring judgment of Adio, JCA, (as he then was) was mistakenly made part of the judgments delivered by the Court of Appeal. The record of proceedings in the lower court is quite clear that Justices Ndoma-Egba, Mukhtar and Okezie all of the Court of Appeal, Jos Division, sat and heard the appeal filed by the Nigeria-Arab Bank Ltd, from the decision of Bauchi High Court. After the submission of Counsel the learned justices reserved the delivery of the judgment to 10th April, 1991.

On the 10th of April, 1991 the learned justices read their respective judgments and unanimously allowed the appeal. Hon Justices Y.O. Adio did not take part in the hearing of the appeal and he was not in court when the judgments were read. However, in compiling the record of proceedings the judgment of Y.O. Adio was mistakenly made part of the record. It is my view that the error does not affect the merit of the decision of the Court of Appeal and as has been explained in the lead judgment of my learned brother Wali, this appeal has failed. It is accordingly dismissed. The judgment of the lower Court is hereby affirmed. I also award N10,000.00 in favour of the respondent.

**ONU JSC**

In this case which is an appeal against the decision of the Court of Appeal (hereinafter referred to as the court below) of 10th April, 1991, the Appellant as plaintiff had brought an action against the Respondent B (then Defendant) claiming inter alia the following reliefs, to wit:

"(20) Whereof by reason of his dismissal, the plaintiff has suffered loss and damages and thereby claim as follows:

(i) A declaration that his dismissal is wrongful, unlawful, unconstitutional, contrary to the rules of Natural Justice, and the conditions of service as per the collective Agreement and therefore Null and Void and of no effect whatsoever.

(ii) A declaration that his dismissal being wrongful, unlawful and of no effect whatsoever he is entitled to be reinstated to his job and D to be paid the arrears of his salary and allowances from 31/8/88 till the date of judgment as per paragraph 18 above.

(21). Alternatively, special Damages for wrongful dismissal as follows:-

E (a) Annual salary from 31/8/88 for 25 years which is the retirement age amounting to #525,200.00.

(b) December bonus of # 1, 745,33 for 25 years amounting to #43,633.25.

F (c) Leave Allowance of #1047.20 for 25 years amounting to #26,180.00.

(d) Housing Allowance of #6,000.00 for 25 years amounting to #150,000.00.

G (e) Transport Allowance of #300.00 per month for 25 years amounting to #90,000.00.

(f) Entertainment Allowance of #600.00 for 25 years amounting to #15,000.00.

Total for special Damages is #838,415,25

H General Damages of #161,586.75

Grand Total = # 1, 000,000.00".

At the end of the trial, the High Court Bauchi (Coram: Ike Okoye, J) on 23rd February, 1990 awarded in Appellant's favour #155,000.00

special and #18,500 general damages. It was sequel to that judgment that the Respondent's appeal to the court below (Coram: Ndoma-Egba, Mukhtar and Okezie, JJ.CA) on appeal set same aside on 10th April, 1991 as hereinbefore stated. For some inexplicable reasons, the judgment of Adio, JCA (of the blessed memory), as he then was, who did not sit on the panel but found its way into the panel of the court below is being challenged. The most fundamental of the issues distilled for this Court's resolution founded on jurisdiction and which is enough to dispose of the appeal, in my opinion, namely, Issue Number 1, complains whether the court below was properly constituted when judgment was delivered on 10th April, 1991.

Now, Section 258(2) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 17- Constitution (Suspension and Modification) Decree, 1984 provides as follows:-

*"(2) Each Justice of the Supreme Court or the court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion:*

*Provided that it shall not be necessary for the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing .*

*(3) A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members."*

It is the contention of the learned counsel for the Appellant that non-compliance with Section 258(3) of the Constitution (ibid) rendered the judgment delivered on 10th April, 1991 at pages 121 and 122 of the record a nullity whilst learned counsel for the Respondent has argued to the contrary. Further, learned counsel for the Appellants after adverting our attention to pages 151 and 152 of the Record urged us to remit the case back to the court below for rehearing.

I am satisfied after a careful perusal of the Record at pages 121 and 122 as well as pages 151 and 152 thereof that the appearance of the opinion of Adio, JCA (as he then was ) on the Record will at most

amount to an irregularity and not constitute a nullity. It has been held by this court in Ahmadu v. Salawu (1974)11 SC. 43; (1974) NSCC (Vol.9) 538 at page 542, that where the subject matter of the action is substantial enough to dispose the court not to allow mere procedural irregularity to preclude an opportunity to scrutinize the case and determine it on the merits it should not decline to do so. It has also been decided by this court by a long line of cases that irregularity will not vitiate proceedings or the judgment of a court unless it occasions a miscarriage of justice, See Olubode v. Salami (1985)4 SC. (Part 1 ) 41; Surakatu v. Nigerian Housing Developing Society (1981) 4 SC. 20; Enwere v. The State (1981)9 SC, 4; Pakapakaye Oruwari v. The State (1985)3 NWLR (Part 13) 486 and Rex v Zenvinula 12 WACA 68.

In the case of Okumagba Eboh v. o. Akpotu (1968) 1 All NLR D 220 at 224 this court held that:

*"It is not every irregularity that can nullify entire proceedings and it may well be open to a party claiming by virtue of an irregularity to contend that such irregularity does not materially affect the merits of the case or engender a miscarriage of justice ....."*

At page 225, the court further observed as follows:-

*"The parties were represented before the learned Chief Magistrate by counsel and counsel for the defendants raised no objection at any time to the procedure at the hearing."*

See also the provisions of Section 9, 10 and 11 of the Court of Appeal Act relating to *minimum number* of Justices to constitute the Court of Appeal, the powers of a single Justice and number of Justices to deliver judgments. See also G.A. Akhiwu v. The Principal Lotteries Officer, Mid-Western State &Anor. (1972) 1All NLR 299; C.F.A.O. Onitsha Industries Ltd (1932) 11 NLR 102 and Colony Development Bord v. Kamson (1955) 21 NLR 75. The instant case is not one in which it can be argued that the respondent acquiesced in the irregularity and cannot therefore be heard to complain. See Ashiru Noibi v. R.J. Fikolati (1987)2 (Part 52)619 at 625- 626; Joab Ezomo v. G.B. Oyakhire (1985)2 SC 260 at 283-285 and Ogbomor v. The State (1985) 1 NWLR (Part 2)225 at 240. There is therefore, in my judgment, no miscarriage of

justice in upholding the decision of the court below. See Ojomu v. Ajao (1983)9 SC. 22 at 53 and Eme v The State (1964)1 All NLR 416. The complaint of the Appellant before us that Adio, JCA participated in the judgment when he did not join in the oral hearing is therefore, in my firm view, a complaint of irregularity which will not vitiate the proceedings of B the court below.

The distinction between nullity and irregularity was laid down in the case of Adeigbe &Anor. V. Salami (1965)1 All NLR 248 in which Madukolu V. Nkemdilim (1962)1 All NLR 587 was followed. Thus, C although the plea of nullity of a judgment as raised in the case in hand will be entertained at any stage of the proceedings of an appeal (see Hakido Kpema V. The State (1986)1 NWLR 396 and Okoro v. I.G. of Police 14 WACA

370), the majority opinions of Ndoma-Egba and Okezie, JJ.CA having D overwhelmed that of Adio, JCA (as he then was), that majority decision prevails. The constitution of the court below cannot therefore, in my opinion, be successfully impeached or be declared a nullity.

A word needs to be said in conclusion on the merit of the case. E As the Appellant was rightly dismissed for his disregard or disobedience of his employer's official instructions contained in Exhibit 'J' and he failed to prove his case on the balance of probability, his summary dismissal for gross misconduct founded on Exhibit "A" and under the F common law of master and servant but not under Exhibit "G", discharged the respondent from all liability. See Olatunbosun v. NISER (1988)5 NWLR (Part 80)25 and University of Calabar v. Dr. Okon J. Essien (1996)10 NWLR 225 at 262.

For these and the fuller reasons contained in the leading judgment of my learned brother Wali, JSC, a preview of which I had before G now, I too, dismiss this appeal with the same consequential orders inclusive of costs as contained therein.

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