

SUPREME COURT OF NIGERIA
7TH MAY 1999, SC. 168/96.
CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,
U. MOHAMMED, A. I. KATSINA-ALU,
A. O. EJIWUNMI, JJSC.

RUFUS FEMI AMOKEODO APPELLANT
AND

1. INSPECTOR GENERAL OF POLICE
 2. NIGERIA POLICE COUNCIL
 3. ATTORNEY GENERAL OF THE FEDERATION RESPONDENTS
-

FAIR HEARING - Denial - Of fair hearing - Where the courts carefully considered all the questions raised by the appellant - He was not denied fair hearing.

INTERPRETATION OF STATUTES - Pensions Act - The Provisions of S.21(1) - Are mandatory - An officer wishing to retire from the Public Service - Must either give three months notice or Pay three months salary in lieu.

INTERPRETATION OF STATUTES - Public Officers (Special Provisions) Act - Public Officer - Under S. 4 of the Act - The appellant was a public officer at the time of his dismissal.

MASTER AND SERVANT - Retirement notice - Dismissal - Of the appellant - Within the period of his retirement notice - Is the exercise of the right of the respondents over one of its serving officers.

MASTER AND SERVANT - Retirement - Salary in lieu of notice - Where the appellant had purported to give his employers three months notice of retirement - Contention that his unpaid salaries should have been used as payment of three months salary in lieu of notice - Is not tenable.

MASTER AND SERVANT - *Voluntary retirement - Notice - Given under S.21(1) of the Pensions Act - The section requires retirement officer to give a notice of three months - That immediately Precedes the date of his retirement.*

FACTS

In the Lagos High Court, the appellant by an originating motion Sought a determination as to whether having retired from the Nigerian Police Force, he could still be dismissed under the Provisions of Public Officers (Special Provisions) Act Cap.381 Laws of the Federation of Nigeria Otherwise known as Decree No. 17 of 1984. The appellant a superintendent of Police who had put in 21and 1/2 years of service in the Nigeria Police Force by a letter dated the 3rd of November, 1989 gave the Police force notice of his Voluntary retirement from the force. By the said letter the appellant wished it to be noted that his retirement was with immediate effect. He purported to utilize his three months accumulated leave for the years 1987, 1988 and 1989 as period of Notice required under the appropriate enactment . On the 8th of November, 1989, five days after the letter of retirement, he was dismissed from the force under the provisions of Decree 17 of 1984.

Upon a consideration of the affidavit evidence of the parties, and the addresses of their learned counsel the High court struck out the claims of the appellant on the ground that the jurisdiction of the court has been ousted by S. 3(3) of Decree 17. The learned trial judge also held that the appellant had not validly retired from the Nigerian Police Force at the time he was dismissed. Being dissatisfied the appellant appealed unsuccessfully to the Court of Appeal (Lagos Division). He has now further appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

(1) Whether the Court of Appeal on its own part and in affirming the decision of the learned trial Judge on the point, misconstrued the provisions of section 21(1) of the Pensions Act Cap 346 Laws of the Federation of Nigeria 1990 and thereby came to a wrong conclusion (Grounds (i), (ii) and (iii).

(2) Whether the Court of Appeal misconstrued the appellant's Notice of Retirement - Exhibit RFA 3 and thereby made wrong inference that the appellant had not retired with immediate effect (grounds (iv) and (v). Etc. see p.

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

Pensions Act - The Provisions of S.21(1)

1. A careful reading of the above quoted provisions of section 21(1) of the Pensions Act (supra) clearly reveals that the section was enacted for the purpose of enabling officers wishing to retire from the Public Service of the Federation, having been in the service for a minimum of fifteen years prior to the date of his retirement notice. It also prescribes the formalities which are essential to the validity of the retirement of the officer. The formalities that such an officer have to fulfil are optional. He shall either give three months notice of his intention to the Minister, or pays three months salary in lieu of notice. The use of the word "shall" as a prefix to either of the choices open to a retiring officer cannot be ignored in construing the provisions of section 21(1) of the Pensions Act (supra). I refer on this point to Longman Dictionary of the English Language where it is stated that "shall" is used to express a command or exhortation, or what is legally mandatory. It must therefore follow from all I have said above that I must conclude that the provisions of section 21(1) of the Pensions Act (supra) are mandatory. An officer wishing to retire from the Public Service is under a mandatory duty to either give three months notice of his intention or pay three months salary in lieu to validly retire from the service. (p. 1119 G)

Master and Servant - Voluntary retirement

2. It is manifest from the above letter of retirement that it was the intention of the appellant to retire voluntarily from the Nigeria Police Force from the 3rd of November, 1989, i.e. the date of his letter. It is however clear that the appellant wanted to give three months notice under section 21(1) of the Pensions Act. In that regard he asked in that letter that his

months accumulated leave for the years 1987, 88 - 89 be utilized for the three months notice stipulated in S. 21(1) of the Pensions Act. It seems to me clear that a notice of this kind cannot come within the meaning of the requisite three months prior to retirement envisaged in section 21(1) of the Pensions Act. What I think the section requires of a retirement officer is to give a notice of three months that immediately precedes the date of his retirement. To do otherwise, as was done in the instant case cannot be regarded as compliance with the provisions of section 21 (1) of the Pensions Act. (p. 1121 C)

Retirement - Salary in lieu of notice

3. The argument that the unpaid salaries owed to the appellant at the date of his letter of retirement should have been as payment of three months salary in lieu of notice is simply not tenable. In the first place his letter of retirement is clearly to the effect that he had given his employers three months notice of his intention to retire. He cannot now seek to alter that by hiding under some alleged money owed to him by the respondents. (p. 1121 F)

Retirement notice - Dismissal

4. As I have emphasized above, the provisions of section 21(1) of the Pensions Act allow a retiring officer a choice. A three months notice or payment of three months salary in lieu of that notice. It is either one or the other. The appellant made a choice by giving a notice of three months to retire. He will have to abide with the legal consequences that flow from that choice. This being that he remained in the service until the expiration of his three months notice. Within that period, he also remained subject to all the benefits and, advantages that an officer of his rank is entitled to. He is also subject to any disciplinary measures that his employers deem necessary to maintain generally on a serving officer. The dismissal of the appellant within the period of his retirement notice is the exercise of the right of the respondents over one of the serving officers in the Nigeria Police Force. I must therefore resolve issues 1 & 2 against the appellant for all the reasons given above. (p. 1121 H)

Interpretation of Statutes - Public Officers (Special Provisions) Act

5. On the 3rd issue, the contention of the appellant is that the Court below misconstrued the provisions of the Public Officers (Special Provisions) Act Cap 381. Laws of the Federation of Nigeria 1990 and thereby came to a wrong conclusion that the jurisdiction of the Court had been ousted. The kernel of the submission of learned counsel to the appellant is that by the provision of section 4 of Decree 17 under which the appellant was dismissed, he cannot be described as a public officer. Learned counsel to the respondents has however argued in his brief that there is no substance in the contention of the learned counsel to the appellants. I agree with that view of learned counsel to the respondent on this issue. I have before now examined the questions raised as to whether the appellant was a public servant when he was dismissed on the 8th day of November, 1989. And my firm view is that he was, when dismissed by the respondents. I therefore resolve this issue against the appellant. (p. 1122 D)

Fair hearing - Denial

6. If, as it is argued for the appellant, that the appellant was denied fair hearing, the duty of the appellant is to show that nowhere in the judgment of the Court below was this question considered. It is evident that the central issue in this appeal and indeed what has dominated the proceedings in this case is whether the appellant was a public officer when he was dismissed by the respondents. It cannot be denied that the Court below and that trial Court considered very carefully all the questions raised by the appellant concerning his status as a public officer when he was dismissed. I have also considered this question, and have resolved that the appellant was a public officer when he was dismissed. The appellant has not in my respectful opinion show how he was denied fair hearing by the Court below. (p. 1123 D)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

The effect of utilizing accumulated leave as the required period of notice

1. Section 21(1) of the Pensions Act permitted the plaintiff to take his
B pick. He opted for three months' notice. In Exhibit "RFA3" (the pur-
ported letter of voluntary retirement), the plaintiff stated that he was
utilizing his three months' accumulated leave for three years (1987, 1988
and 1989) as the period of notice. What this meant was that he was
proceeding on leave for three months with effect from 3rd November,
C 1989 which was the date of Exhibit "RFA3". In law, the notice of
retirement would not take effect until the expiration of the three months'
leave. If he had paid the three months' salary in lieu of notice on 3-11-
89, his notice of retirement would have been with immediate effect. The
D type of notice given by the plaintiff assuming he was entitled to the accu-
mulated leave of three months, entitled him to proceed on such leave
immediately and if nothing happened during the said period of leave, he
would, at its expiration, have complied with the first limb of section
E 21(1) of the Pensions Act. On the other hand, he would have earned his
immediate retirement if he had paid the three months' salary in lieu of
notice on 3-11-89 when he purported to give three months' notice.
(p. 1126 C)

F
2. *The principle governing "shall" in a legislation*

The principle governing the use of "shall " in a legislative sentence is that
it is generally imperative or mandatory and in its ordinary meaning, "shall"
is a word of command which is normally given a compulsory meaning
G because it is intended to denote obligation, "Shall", however, is some-
times intended to be directory only and in that case, it is equivalent to
"may" and will be construed as being merely permissive e.g. Where an
Act of the legislature confers a right of appeal and provides that notice of
H appeal shall be filed within 30 days. The "shall" here is not used in the
mandatory sense. It is used as a procedural direction, stating the time
within which the right of appeal may be exercised See R. v. Secretary of
State for Social Services Exp. Association of Metropolitan Authorities

(1986) 1 All E.R.164. In the context of the Pensions Act, the plaintiff is commanded to give three months' notice of his intention to retire or pay three months' salary in lieu of notice. He had no discretion in the matter. (p. 1126 H)

B

REPRESENTATION

I. Ajomo Esq. For The Appellant

C. I. Okpoko Esq. Legal Officer, Federal Ministry Of Justice, The Respondents.

C

CASES REFERRED TO

Howard v. Bodinton 1871 2 P-D 203 at 210;

London Clydeside Estates Limited V. Aberdeen District Council 1979 3 AER 876 at 883

D

Niger Progress Ltd v. North Eastline Corporation (1989) 3 NWLR (pt. 109) 68 at 85

Ifezue v. Mbadugha (1984) 1 SCNLR 427 at 450

Caldow v. Pixell (1877) C PD. 562 at 566

E

London Clydeside Estates Ltd. v. Aberdeen District counsel (1979)3 All E.R. 876 at 883

Wilson v. Attorney-General, Bendel State (1985) 1 N.W.L.R. (Pt. 4) 572

Nokes v. Dancaster Amalgamated Collieries Ltd. (1940) A.C. 1014

F

Niger Progress Ltd. v. North East Line Corporation (1989) 3 NWLR (Part 109) 68

STATUTES REFERRED TO

Pensions Act Cap 346 Laws of the Federation of Nigeria, 1990; S.21(1)

G

Public Officers (Special Provisions) Act Cap. 381.

Laws of the Federation of Nigeria, 1990; SS 1(i)(d); and 4.

BOOKS REFERRED TO

H

Halsbury's Laws of England 3rd ed. P.435 Longman Dictionary of English Language.

LEAD JUDGMENT BY EJIWUNMI JSC

By an originating summons issued in the Lagos High Court at the instance of the appellant seeking a determination as to whether having retired from the Nigeria Police Force, he could still be dismissed under the provisions of Decree 17 of 1984. The matter came up before the Lagos High Court presided over by Ilori J. (as he then was) who upon the affidavit evidence of the parties, and the addresses of their learned counsel struck out the claims of the appellant. The claims were struck out on the ground that the jurisdiction of the Court has been ousted by section 3(3) of Decree 17, Public Officers (Special Provisions) Act of 1984.

However, before reaching that conclusion, the learned trial Judge had also held that the appellant has not validly retired from the Nigeria Police Force at the time he was dismissed.

It must be noted that during the hearing in that court several exhibits were tendered. Reference would therefore be made to some or all of them as deemed pertinent to the issues raised for determination in this appeal.

Being dissatisfied with the Judgment and orders of that Court, the appellant appealed to the Court of Appeal (Lagos Division) by filing a Notice of Appeal wherein he challenged the judgment of the Court upon seven grounds of appeal.

At the hearing of the appeal before the Court below, briefs were filed and exchanged. The appellant in that Court raised three issues for determination and which read thus:-

(1) Whether the trial Court mis-applied the relevant principles and come to a wrong conclusion on the effect of non-compliance with section 21(1) of the Pensions Act.

(2) Whether the appellant was still in the Public Service at the time of his dismissal under Decree No. 17 of 1984.

(3) Whether the trial Court lacked jurisdiction to entertain the appellant's action on the grounds:-

(a) That Decree No. 17 of 1984 applied to Public Officers like the appellant (who) was no longer in service.

(b) That Decree No. 17 of 1984 as involved (sic) applied to the appellant.

In a well considered judgment, the court below resolved all the issues raised before it against the appellant. Consequently that Court dismissed the appeal, and affirmed the judgment of the trial court. B

Still not satisfied, the appellant has appealed to this Court upon seven grounds of appeal. In accordance with the rules of this Court, briefs were filed and exchanged. The appellant upon the receipt of the respondents' brief also filed a reply brief. At the hearing before us, learned Counsel for the respondents sought the leave of court to withdraw the preliminary objection he had raised in the respondents' brief. Leave was duly granted and the preliminary objection was accordingly struck out. Learned Counsel appearing for the appellant I. Ajomo Esq. adopted and placed reliance on the two briefs filed by the appellant. He also made further submissions to explain further some of the arguments that had been urged in the briefs. At the end of this submission, he urged that the appeal be allowed. The learned Counsel to the respondents also adopted the brief filed for the respondents. He also addressed the court further in respect of some aspects of the arguments that he had set out in the respondents' brief. Learned counsel concluded his submission by asking that the appeal be dismissed. C D E

In the appellant's brief the following are the issues identified for the determination of this appeal from the seven grounds of appeal filed against the judgment of the court below. F

(1) Whether the Court of Appeal on its own part and in affirming the decision of the learned trial Judge on the point, misconstrued the provisions of section 21(1) of the Pensions Act Cap 346 Laws of the Federation of Nigeria 1990 and thereby came to a wrong conclusion (Grounds (i), (ii) and (iii)). G

(2) Whether the Court of Appeal misconstrued the appellant's Notice of Retirement - Exhibit RFA 3 and thereby made wrong inference that the appellant had not retired with immediate effect (grounds (iv) and (v)). H

(3) Whether the Court of Appeal misconstrued the provisions of

the Public Officers (Special Provisions) Act Cap. 381 Laws of the Federation of Nigeria 1990 and thereby came to a wrong conclusion that the jurisdiction of the court had been ousted (Ground (vi)).

B (4) Whether the Court of Appeal erred and denied the appellant a fair hearing as regards the case put forward on section 1 (1) (d) of the Public Officers (Special Provisions) Act Cap 381 Laws of the Federation of Nigeria 1990 ([Ground (vii)]).

C Similarly, the respondents identified four issues for the determination of the appeal. But after a careful perusal of those issues, it is my view that as they are all in the same terms as those recorded above from the appellant's brief, I will not set the issues identified in the respondent's brief. The appeal would therefore be determined upon the issues set down in the appellant's brief.

D However, before examining these issues the facts leading to these proceedings would be related, howbeit, briefly. The appellant before the events leading to this action was a Superintendent of Police, but on the 1st of February, 1989, he was dismissed from the Nigeria Police Force with effect from the 10th of December, 1987. The appellant then challenged that dismissal in suit No. ID/140m/89. The court upheld his claims as that court had in the decision delivered on the 15th of September, 1989 declared that the dismissal was unconstitutional, null, void and of no effect whatsoever. Following the receipt of a consequential order that F the appellant be reinstated in the force, the Inspector General of Police caused a letter dated 30th October, 1989 to be written to the appellant. He was, upon the basis of the letter, ordered to be reinstated in his position in the Police Force from the 10th of December, 1987.

G Having been so reinstated into his position, the appellant on the 3rd of November, 1989, by a letter of the same date informed the Police Force of his voluntary retirement from the force. By the said letter the appellant wished it to be noted that his retirement was with immediate H effect. That letter would be reproduced later in this judgment. On the 8th of November, 1989, five days after that letter of retirement, he was dismissed from the Nigeria Police Force under the Provisions of Decree 17 of 1984.

Before this Court, having failed to persuade the Court below to hold that his dismissal was illegal and void, he has as I have previously observed challenged that decision of the Court of Appeal (Lagos Division).

The first issue raised by the appellant against the judgment of the Court below touches on whether that court did not misconstrue the provisions of Section 21(1) of the Pensions Act Cap 346 Laws of Nigeria 1990 and thereby came to a wrong conclusion. In the argument of learned counsel to the appellant in the appellant's brief, the view is canvassed that in interpreting section 21(1) of the Pension Act, a distinction must be drawn between non-compliance with what the subsection prescribes and the legal consequences of a breach or contravention of the subsection. He further contends that it is not in every case that non-compliance with the provisions of a statute renders the resulting action void. He therefore submits that it was the failure to observe this distinction that led in part to the error that the Court of Appeal fell into in affirming the judgment of the trial Court. Furthermore, counsel argues, that the other error of construction made by the court below was the assumption that the use of word "shall" as a pre-fix to the "giving of Notice" and "payment in lieu of Notice" under section 21(1) of the Pensions Act meant that the prescriptions were mandatory rendering "ipso facto" void any act of non-compliance.

It would appear therefore from the argument advanced by the learned counsel to the appellant in the appellant's brief that the court below did not consider or examine critically whether the provisions in S. 21(1) of the Pension Act is mandatory or directive. That if the court had adequately examined the provisions in the light of the applicable principles for constructing such statutory provisions the court would have concluded that the provisions concerning "Notice" and "Lieu of Notice" in S. 21(1) of the Pensions Act should be regarded as merely directory. In support of his contention reference was made to the following cases:- HOWARD V. BODINTON 1871 2 P-D 203 at 210; IFEZUE V. MBADUGHA 1984 1 SCNLR 427 at 450; LONDON CLYDESIDE ESTATES LIMITED V. ABERDEEN DISTRICT COUNCIL & ANOR 1979

3 AER 876 at 883.

The learned counsel to the appellant then contends that the provision for three months pre-retirement notice or payment of wages in lieu of notice, are not condition precedents (mandatory) but rather directory. B And submits that this is so because, the only damage to the employer accruing from the breach of this provision is quantifiable in precuniary terms and recoverable by action. Learned counsel therefore submits that if the consequences of the breach become payable, then such a breach C should not render the act void, moreso when the employer has not suffered any prejudice. With that submission he urges that this issue be resolved in his favour.

Responding, the respondents in their brief, have argued that there is no merit in the several contentions made for the appellant. It is the D submission of learned counsel to the respondents that the provision of Section 21(1) of the Pensions Act are plain and unambiguous. Therefore, he argues, that where words in an enactment are plain and unambiguous then the ordinary and/or natural meaning of the words must be E construed from the provisions. In support of this submission, he has referred to the case of Niger Progress Ltd v. North Eastline Corporation (1989) 3 NWLR (pt. 109) 68 at 85. The learned counsel to the respondents then submits that the Court of Appeal per Dahiru Musdapher JCA, F was right to have held in the judgment of that court, the word "shall" as used in Section 21(1) of the Pension Act, is mandatory, and not permissive as the words must be given their ordinary and grammatical meaning. He finally contends that this issue be resolved against the appellant.

As I have stated above the complaint of the appellant in respect G of this issue is that the Court below failed to recognize that the three months pre-retirement notice or payment of wages are not condition precedents. In other words it is his view that the conditions are merely directory and not mandatory.

H It is manifest from the records that this argument was the same as that which was pressed upon the courts below. At the Court of first instance, the learned trial Judge rejected the argument when he said:-

"I pause here to remark that I find no merit in the alternative

submission where a statute prescribes a condition precedent for the doing of an act that act cannot be validly done without first complying with the prescribed condition precedent".

The Court of Appeal also rejected that contention made on his behalf by learned counsel to the appellant as that Court held thus:- B

"In order to terminate the relationship of master and servant under section 21 of the Pensions Act, an officer needs to do one of two things, either he gives three months' notice of intention to retire from service or pays immediately a sum of equal to three months' pay."

In his criticism of the decision of the Court, learned counsel to the appellant clearly recognized that statutes are traditionally classified as either mandatory or directory. And he properly referred to the case of Howard v. Bodington 1871 2 P-D 203 where Lord Penzeance at p. 210 observed that - "the real question in all cases is this. A thing has been D ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the courts have decided that if it is not done, the whole thing fails, and the proceedings that follow upon it are void. On the other hand when the Court E holds a provision to be directory they say that although such a provision may not have been complied with the subsequent proceedings do not fail".

Learned Counsel to the appellant, concedes it, that this distinction F has been recognized in this court in Ifezue v. Mbadugha (1984) 1 SCNLR 427 where Aniagolu JSC in the course of delivering the lead judgment of the court said -

An absolute or mandatory (sometimes) also referred to as imperative enactment must be obeyed or fulfilled exactly; but in a case of a G directory enactment, it is sufficient if it is obeyed or fulfilled substantially."

However, though learned counsel to the appellant recognized this distinction, yet it is his view that this Court should, for the determination H of this appeal take the view that the consequences that would flow from holding whether the provisions of a statute are imperative or directory must be weighed or considered before classifying such provisions of

statute into either of these categories. For this proposition learned counsel to the appellant sought solace in the following authorities - In Ifezue v. Mbadugha (supra), Bello JSC (as he then was) said:-

"Importantly, the consequences of holding a provision to be mandatory or directory ought to be taken into account. In Caldow v. Pixell (1977) C.P.D 562 at 566 Denman J said "In the absence of an express provision, the intention of the Legislature is to be ascertained by weighing the consequence of holding a statute to be directory or mandatory".

Also, Lord Hailsham in London Clydeside Estates Limited v. Aberdeen District Council & Anor 1979. A.E.R. 876 at 883, observed that:-

"In the reported decisions there is much language presupposing the existence of stark categories such as "mandatory" and "directory", "Void" and "voidable" a "nullity" and "purely regulatory". Such language is useful and indeed, in the course of this opinion, I have used it myself. But I wish to say that I am not at all clear that the language itself may not be misleading insofar as it may be supposed to present a court with the necessity of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartment."

However, a careful reading of the entire Judgment from which the above quoted dictum was extracted would reveal that the learned Lord Hailsham, the Lord Chancellor had before uttering the observation, considered how the provisions of a statute could be classified as "mandatory" or directory". I refer in this regard to the London & Clydeside Estates v. Aberdeen District Council (supra) where, the Lord Chancellor said inter alia that:-

"The first task is to construe the statute, and ask the question is it "mandatory" or "directory" If it be mandatory, the second task is to ask what remedy is available for non-compliance"

And at page 883. the Lord Chancellor continued by saying that:-

"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the right of the subject

viewed in the light of concrete state of facts and a continuing chain of events"

In view of the above extracts from the Judgment of the Lord Chancellor, I do not think that it can be said that his Lordship took the view that the determination of a statute are "Mandatory" or "directory" B would depend upon the consequences of holding whether they are or not.

It is in my view clear that the question whether a statute is mandatory or directory fall to be determined upon a true construction of its provisions. It is after it has been determined that the statute is mandatory C or directory that the Court would then consider if necessary, the legal consequences that would flow from the classification given to the statute.

I will now examine the provisions of s. 21(1) of the Pensions D Act Cap. 346 of the Laws of the Federation of Nigeria 1990 in the instant case bearing in mind the principles stated above and that of the learned authors of Halsbury's Laws of England, 3rd Edition where at p. 435, it was stated:-

"no universal rule can be laid down for determining whether E provisions are mandatory or directory; in each case, the intention of the legislature must be ascertained by looking at the whole scope of the statute and in particular, at the importance of the provision in question in F relation to the general object to be secured".

It is relevant that the provisions of S. 21(1) of the Pensions Act be set out. It reads;-

"21. (1) An officer who wishes to retire from the service after G serving for fifteen years or more shall give the Minister three months' notice of his intention to do so or he shall pay three months' salary in lieu of such notice."

A careful reading of the above quoted provisions of section H 21(1) of the Pensions Act (supra) clearly reveals that the section was enacted for the purpose of enabling officers wishing to retire from the Public Service of the Federation, having been in the service for a minimum of fifteen years prior to the date of his retire-

ment notice. It also prescribes the formalities which are essential to the validity of the retirement of the officer. The formalities that such an officer have to fulfil are optional. He shall either give three months notice of his intention to the Minister, or pays three months salary in lieu of notice. The use of the word "shall" as a prefix to either of the choices open to a retiring officer cannot be ignored in construing the provisions of section 21(1) of the Pensions Act (supra). I refer on this point to Longman Dictionary of the English Language where it is stated that "shall" is used to express a command or exhortation, or what is legally mandatory. It must therefore follow from all I have said above that I must conclude that the provisions of section 21(1) of the Pensions Act (supra) are mandatory. An officer wishing to retire from the Public Service is under a mandatory duty to either give three months notice of his intention or pay three months salary in lieu to validly retire from the service.

What now remains is to consider whether the appellant in the instant case validly retired from the Public Service of the Federation. The appellant, herein, served a notice of his intention to retire from the Public Service with the following letter to Inspector General of Police dated 3rd November, 1989.

Sir,

NOTICE OF VOLUNTARY RETIREMENT FROM THE NIGERIA POLICE FORCE

This is to inform you that I Rufus Amokeodo (SP) presently of Lagos State Police Command, Ikeja hereby voluntarily retire from the Nigeria Police Force with effect from date hereof.

I hereby utilize my three months accumulated leave for the years 1987-88-89 as period of Notice required under the appropriate enactment.

I have put in 21 1/2 years of meritorious service in the Nigeria Police Force i.e. from 1/5/68 - 3/11/89.

I was promoted to my present Rank of Superintendent of Police with effect from 1/22/88 which I am still holding till date.

I will take immediate steps to surrender Police properties in my possession to the CP Lagos State Command.

I think the I.G.P for allowing me to serve the Federal Government of Nigeria for these years of service to the Nation.

Kindly expedite action on my gratuities, pension and other entitlements please.

Yours Obediently

.....

RUFUS AMOKEODO

It is manifest from the above letter of retirement that it was the intention of the appellant to retire voluntarily from the Nigeria Police Force from the 3rd of November, 1989, i.e. the date of his letter. It is however clear that the appellant wanted to give three months notice under section 21(1) of the Pensions Act. In that regard he asked in that letter that his months accumulated leave for the years 1987, 88 - 89 be utilized for the three months notice stipulated in S. 21(1) of the Pensions Act. It seems to me clear that a notice of this kind cannot come within the meaning of the requisite three months prior to retirement envisaged in section 21(1) of the Pensions Act. What I think the section requires of a retirement officer is to give a notice of three months that immediately precedes the date of his retirement. To do otherwise, as was done in the instant case cannot be regarded as compliance with the provisions of section 21 (1) of the Pensions Act. Having not retired from the service immediately, which the appellant could have done by paying three months salary in lieu of notice. Similarly the argument that the unpaid salaries owed to the appellant at the date of his letter of retirement should have been as payment of three months salary in lieu of notice is simply not tenable. In the first place his letter of retirement is clearly to the effect that he had given his employers three months notice of his intention to retire. He cannot now seek to alter that by hiding under some alleged money owed to him by the respondents.

As I have emphasized above, the provisions of section 21(1)

of the Pensions Act allow a retiring officer a choice. A three months notice or payment of three months salary in lieu of that notice. It is either one or the other. The appellant made a choice by giving a notice of three months to retire. He will have to abide with the legal consequences that flow from that choice. This being that he remained in the service until the expiration of his three months notice. Within that period, he also remained subject to all the benefits and, advantages that an officer of his rank is entitled to. He is also subject to any disciplinary measures that his employers deem necessary to maintain generally on a serving officer. The dismissal of the appellant within the period of his retirement notice is the exercise of the right of the respondents over one of the serving officers in the Nigeria Police Force. I must therefore resolve issues 1 & 2 against the appellant for all the reasons given above.

On the 3rd issue, the contention of the appellant is that the Court below misconstrued the provisions of the Public Officers (Special Provisions) Act Cap 381. Laws of the Federation of Nigeria 1990 and thereby came to a wrong conclusion that the jurisdiction of the Court had been ousted.

The thrust of the argument for the appellant in the appellant's brief on this issue is that at the time of his dismissal, the appellant was no longer in the Public Service. **The kernel of the submission of learned counsel to the appellant is that by the provision of section 4 of Decree 17 under which the appellant was dismissed, he cannot be described as a public officer.** The said section 4 of Decree 17 which defines who is a public officer reads:-

"Any person who holds or has held office on or after 31st December 1983 in the Public Service of the Federation or of a State within the meaning assigned thereto by section 277(1) of the Constitution of the Federal Republic of Nigeria 1979."

Learned counsel then proceeded to contend that the appellant was not in the public service within the meaning of the provisions of section 4 of Decree 17. **Learned counsel to the respondents has however argued in his brief that there is no substance in the con-**

tention of the learned counsel to the appellants. I agree with that view of learned counsel to the respondent on this issue. I have before now examined the questions raised as to whether the appellant was a public servant when he was dismissed on the 8th day of November, 1989. And my firm view is that he was, when dismissed by the respondents. I therefore resolve this issue against the appellant.

On issue 4, the appellant's complaint is that he was denied fair hearing by the Court below in accordance with the provisions of section 33(1) of the Constitution of Nigeria 1979. The contention made for the appellant by his learned counsel in the appellant's brief appears to be that the Court below failed to consider that the appellant was not a public officer under which he was dismissed "to wit" Section 1 (1) (d) of Decree 17 of 1990. In response to this contention learned counsel to the respondents in their brief urged that as the contention is frivolous and lacks merit it should be dismissed.

If, as it is argued for the appellant, that the appellant was denied fair hearing, the duty of the appellant is to show that nowhere in the judgment of the Court below was this question considered. It is evident that the central issue in this appeal and indeed what has dominated the proceedings in this case is whether the appellant was a public officer when he was dismissed by the respondents. It cannot be denied that the Court below and that trial Court considered very carefully all the questions raised by the appellant concerning his status as a public officer when he was dismissed. I have also considered this question, and have resolved that the appellant was a public officer when he was dismissed. The appellant has not in my respectful opinion show how he was denied fair hearing by the Court below.

In the result this appeal is dismissed in its entirety. The respondents are awarded the sum of N10,000.00 as costs.

KARIBI-WHYTE JSC

I have had the opportunity of reading the lead judgment in this appeal in its judge. I have also read the final version which is the judgment now being read. I entirely agree with the reasoning and conclusion B that the appeal should be dismissed. I also will dismiss it, and is hereby dismissed.

Appellants shall pay cost of N10,000 (ten thousand naira) to the Respondents.

C

OGWUEGBU JSC

I have had the opportunity of reading the draft of the judgment just read by my learned brother Ejiwunmi, JSC and I agree with his D reasoning and conclusion. However, I wish to add the following few points for the sake of further emphasis.

The first issue for determination is:

"Whether the Court of Appeal misconstrued the Appellant's Notice of Retirement Exhibit RFA3 and thereby made a wrong inference that E the Appellant had not retired with immediate effect (iv and (v))."

It was the contention of the learned counsel for the appellant that the provision of three month's pre-retirement notice or payment of F wages on lieu of notice, is not a condition precedent because the only damage to the employer accruing from the breach of this provision is quantifiable in pecuniary terms and recoverable by action, that the payment in lieu of notice is a genuine pre-estimate of liquidated damages arising from failure to give three months' notice which is prescribed by G statute and its breach renders the damages prescribed by statute payable and should not render the notice void.

He further submitted on that issue that the provisions of section 21(1) of the Pensions Act are directly and that it is open to the employer H to pursue his claim for damages and that the act of retirement cannot be voided on that ground.

On the consequences of breaching a statutory provision, counsel referred the court to the following decided cases; Howard v. Bodington

(1871)2 P.D. 203 at 210, Ifezue v. Mbadugha (1984) 1 SCNLR 427 at 450, Caldow v. Pixell (1877) C PD. 562 at 566 and London Clydeside Estates Ltd., v. Aberdeen District counsel & Or. (1979)3 All E.R. 876 at 883.

In his short reply, the learned counsel for the respondents submitted that the provisions of section 21(1) of the Pensions Act are very plain and unambiguous and that it is a settled principle of law that where words used in a statute are plain and unambiguous, the literal meaning should be given to it and that the giving of Notice and the payment of three months' salary in lieu of notice are predicated upon the word "shall" which is mandatory.

Section 21(1) of the Pensions Act Cap 346 Laws of the Federation, 1990 which is under consideration in this appeal provides as follows:

"21(1) An officer who wishes to retire from the service after serving for fifteen years or more shall give the Minister three months' notice of his intention to do so or he shall pay three months' salary in lieu of such notice"

The officer has two options. He either given three months' notice of his intention to retire or pays three months' salary in lieu thereof. The appellant exercised the first option by his letter Exhibit "RFA3" which was admitted in evidence at the trial and it reads:

"NOTICE OF VOLUNTARY
RETIREMENT FORM THE NIGERIA
POLICE

This is to inform you that I, Rufus Amokeodo (SP) presently of the Lagos State Police Command, Ikeja hereby voluntarily retire from the Nigeria Police force with effect from date hereof.

I hereby utilize my three months accumulated leave for the years 1987, 1988, 1989 as period of Notice required under the appropriate enactments.

I have put in 21 1/2 years of meritorious service in the Nigeria Police Force i.e. from 1st May, 1968 - 3rd November, 1989.

I was promoted to the present rank of Superintendent of Police

with effect from 1st December, 1984 which I am still holding till date.

I shall take immediate steps to surrender Police Paraphernalia in my possession to CP Lagos Command.

I thank the Inspector General of Police for allowing me to serve the Federal Government of Nigeria for these years of Service to the Nation.

Kindly expedite action on my gratuities, pension and other entitlements, please.

Yours obediently

(Sgd.)

RUFUS AMOKEODO."

Section 21(1) of the Pensions Act permitted the plaintiff to take his pick. He opted for three months' notice. In Exhibit "RFA3" (the purported letter of voluntary retirement), the plaintiff stated that he was utilizing his three months' accumulated leave for three years (1987, 1988 and 1989) as the period of notice. What this meant was that he was proceeding on leave for three months with effect from 3rd November, 1989 which was the date of Exhibit "RFA3". In law, the notice of retirement would not take effect until the expiration of the three months' leave. If he had paid the three months' salary in lieu of notice on 3-11-89, his notice of retirement would have been with immediate effect.

The type of notice given by the plaintiff assuming he was entitled to the accumulated leave of three months, entitled him to proceed on such leave immediately and if nothing happened during the said period of leave, he would, at its expiration, have complied with the first limb of section 21(1) of the Pensions Act. On the other hand, he would have earned his immediate retirement if he had paid the three months' salary in lieu of notice on 3-11-89 when he purported to give three months' notice.

Exhibit "RFA3" is ineffective to bring about the immediate retirement of the plaintiff from service and it is therefore void. The words of section 21(1) of the Pensions Act are clear and unambiguous and the intention of the legislature is also clear. The words being plain and unambiguous, must be given their plain and ordinary meaning.

The principle governing the use of "shall " in a legislative sen-

tence is that it is generally imperative or mandatory and in its ordinary meaning, "shall" is a word of command which is normally given a compulsory meaning because it is intended to denote obligation, "Shall", however, is sometimes intended to be directory only and in that case, it is equivalent to "may" and will be construed as being merely permissive e.g. B Where an Act of the legislature confers a right of appeal and provides that notice of appeal shall be filed within 30 days. The "shall" here is not used in the mandatory sense. It is used as a procedural direction, stating the time within which the right of appeal may be exercised See R.v. Secretary of State for Social Services Exp. Association of Metropolitan C Authorities (1986) 1 All E.R.164.

In the context of the Pensions Act, the plaintiff is commanded to give three months' notice of his intention to retire or pay three months' salary in lieu of notice. He had no discretion in the matter. D

While dealing with the notice the learned trial judge held:

"To my mind, the first question to consider is granted that the plaintiff validly and effectively determined his contract of service by submitting a Notice of Retirement when does that retirement take effect? E Where the retiring officer pays three months salary in lieu of Notice no dispute arises as to the effective date of his retirement. It would take effect from the date of payment in lieu of Notice, but where an officer gives three months Notice of his retirement, that Notice shall be prospec- F tive not retrospective, hence retirement will take effect at the end of the Notice period."

The Court below rightly affirmed the above conclusion of the learned trial judge when he said:

"..... therefore, when the Respondent dismissed the Appellant only 8 days after his Notice to retire from service after the expiration of 3 months leave period, he was still under the employment of the Respondent. During leave period, an employee is still within the service and is liable to be recalled during the leave period. In any event, H the appellant did not comply with the requirements of the Pensions Act to lawfully terminate his appointment with immediate effect."

I agree with the courts below that non-compliance with section 21(1) of

the Act vitiated the notice and I do not subscribe to the contention of the learned counsel for the appellant that the provisions are directory and that it was open to the employer to sue for damages for three months' salary in lieu of notice. That is not the law.

B It was also argued in the appellant's brief that if the use of three months' accumulated leave did not realize the immediate retirement of the plaintiff, recourse should be had to the second limb of section 21(1) of the Pensions Act which provides that the intending retiree shall pay three months' salary in lieu of notice since the plaintiff stated in his Notice of Retirement that he was owed the sum of N29,405.50 as arrears of unpaid salary. It was further submitted that in the case of the plaintiff, it was sufficient for him to indicate his intention to retire with immediate effect and his employers with or without his instruction should set off D three months' wages from his final entitlements and in that case, the plaintiff would have fully complied with the second limb of section 21(1), of the Act.

The arguments put forward on behalf of the plaintiff as to the E utilization of his accumulated leave or the set-off of three months' salary in lieu of notice from the sum of N29,405.50 are illogical and incapable of achieving the desired result. It is not open to a public officer to travel out of the statutory procedure of disengaging from the public service by F unilaterally imposing his own method of retirement on his employer. Any departure, if at all, must be with the prior agreement of his employer.

There was a further contention in the plaintiff brief that at the time of his dismissal, he was not a person who could be said to be holding office the public service since he ceased to hold office on 3rd G November, 1989. The Court was referred to section 4 of the Public Officers (Special Provisions) Decree No. 17 of 1984. (Now Public Officers (Special Provisions) Act Cap. 381 Laws of the federation of Nigeria, 1990). Section 4(1) of the Public Officers (Special Provisions) Act H provides:

*"4(1) in this Act, "public officer" means Any person who holds or has held any office on or after 31st December, 1983 in
(a) the public service of the Federation or of a State within the*

meaning assigned thereto by section 277(1) of the Constitution of the federal Republic of Nigeria;

(b)

.....

(c) "

B

(Underlining is for emphasis)

The provisions of the Act cited and relied upon by the learned counsel for the plaintiff defeated his argument. The definition in section 4(1) of act is wide enough.. It comprehends and includes both serving and retired officers, as well as officers who resigned or who were dismissed. See Wilson v. Attorney-General, Bendel State (1985) 1 N.W.L.R. (Pt. 4) 572. As at 8th November, 1989, the plaintiff was still in the public service of the Federation as a Superintendent of Police notwithstanding his purported notice of voluntary retirement (Exhibit RFA3") dated 3rd November, 1989. Even if he had effectively retired from the service, he was still a public officer as defined in section 4(1) of the Act.

For the above reasons, I will dismiss the appeal and affirm the decision of the Court of Appeal dated 11-7-96. I agree with the order as to costs contained in the judgment of my learned brother Ejiwunmi, J.S.C.

MOHAMMED JSC

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I have had a preview of the judgment just delivered by my learned brother, Ejiwunmi, J.S.C., in draft and I respectfully agree with the reasons given by my Lord for dismissing the appeal. It is plain that section 21 (i) of Pensions Act is unambiguous. It provides that any officer wishing to retire from service after serving for 15 years or more shall give the Minister three months notice of his intention to retire or pay three months salary in lieu of notice.

At the time the Inspector-General of Police addressed a letter H dated 8/11/89 to the appellant indicating that he had been dismissed from Nigeria Police Force the appellant was still under the employment of the Nigeria Police. The three months notice he gave to the Police Authority

indicating his intention to retire started from the 3rd of November, 1989.

Appellant cannot ask the police authorities to use the funds for his accumulated leave for three years; 1987, 1988 & 1989 to satisfy the requirement of three months salary which the Pensions Act provided to be paid in lieu of Notice because that amount has not been ascertained.

This appeal has no merit at all and it is dismissed. I affirm the judgment of the court below and abide by all the consequential orders made in the lead judgment.

KATSINA-ALU JSC

I entirely agree with my learned brother, Ejiwunmi, JSC that this appeal should be dismissed. The main issue in this appeal is whether the court below misconstrued the provisions of Section 21(1) of the Pensions Act Cap 346 Laws of the Federation of Nigeria 1990 and thereby came to a wrong conclusion. This section of the Act prescribes what an employee wishing to retire from the Public service of the Federation should do. Sub-section 1 provides as follows:

"An officer who wishes to retire from the service after serving for fifteen years or more shall give the Minister three months notice of his intention to do so or shall pay three months' salary in lieu of such notice"

The principles of construction which apply in interpreting such a section of the Act are well established. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. In other words where the words used in an enactment are plain on the face of it, their literal meaning should, in accordance with cautions of instruction and interpretation, be given to them" see Nokes v. Dancaaster Amalgamated Collieries Ltd. (1940) A.C. 1014; Niger Progress Ltd. v. North East Line Corporation (1989) 3 NWLR (Part 109) 68.

It seems plain to me that under Section 21(1) of the Pensions Act, an officer who desires to retire from service needs to do two things:

(1) to give three (3) months' notice of his intention to retire, or

(2) Immediately pay three (3) months' salary in lieu of such notice.

The consequence of (1) above is that such an officer remains in service for the duration of the notice. In (2) however his retirement takes immediate effect from the date of payment.

In the present case, the question that must be asked is : which option did the Appellant choose? In order to answer this, recourse must be had to his letter of retirement. It is exhibit RFA3 in these proceedings. It is dated 3 November 1989. The relevant part reads as follows:

"This is to inform you that I Rufus Amokeodo (S.P.) presently of Lagos state Police Command, Ikeja hereby voluntarily retire from the Nigeria Police Force with effect from the date hereof.

I hereby utilize my three months accumulated leave for the years 1978 - 88 - 89 as period of notice required under the appropriate enactment "

It was submitted for the Appellant that the literal interpretation of his letter was that he had retired with effect from the date of the letter i.e. 3 November 1989. This it was said was the principal sense to be ascribed to it. Accessory to this however, was his setting off of his leave entitlement to satisfy the notice requirements of section 21(1) of the Pensions Act. The accessory, it was submitted must follow the principal. It was the further submission of the Appellant that it was sufficient for him to indicate his intention to retire with immediate effect and it was left to his employers with or without his instruction to set off his 3 months wages from his final entitlements. To what extent, it was said that the Appellant had fully complied with the second limb of section 21(1) of the Pensions Act.

This argument is at best fanciful. The provisions of section 21(1) of the Pensions Act are very clear. If the Appellant wished to retire with immediate effect, then he should have paid three (3) months salary in lieu of notice. This he failed or neglected to do with the consequence that he was in service for the duration of the three months notice. The court below was therefore right when it held that the Appellant was still in service until the expiration of the three months notice.

I wish to add that it was during this period (three months) that the Appellant was dismissed from service. Clearly therefore the Appellant was still in service on 8 November 1989 when he was dismissed from the Nigeria Police Force.

B Issues 3 and 4 were based on the assumption albeit wrongly, that the Appellant had ceased to hold office on 3 November 1989. Both issues also fail.

C For these reasons and the fuller reasons given by my learned brother ejiwunmi, JSC I too dismiss this appeal and affirm the decision of the court below with N10,000.00 costs in favour of the Respondents.

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