

SUPREME COURT OF NIGERIA
26TH JANUARY, 2001. SC. 181/1993
CORAM:- A. B. WALL, I. L. KUTIGI, S. U. ONU,
A. I. IGUH, A. I. KATSINA-ALU, JJSC.

DR. G. S. OBO PLAINTIFF/APPELLANT
AND
1. COMMISSIONER OF EDUCATION
BENDEL STATE
2. BENDEL STATE CIVIL DEFENDANTS/RESPONDENTS
SERVICE COMMISSION

MASTER & SERVANT - Conditions of employment - Termination of appointment - Must comply with terms or conditions of employment.

MASTER & SERVANT - Fair hearing - Termination of appointment - Without query - No breach of fair hearing - Where plaintiff had repudiated the contract of employment by abandonment.

MASTER & SERVANT - Fraudulent enrichment - Where servant knowingly received and spent salary to which he was not entitled - It is fraudulent and is recoverable.

MASTER & SERVANT - Termination of appointment - Where wrongful - Will attract only stipulated damages - Defendants cannot be compelled to accept services.

FACTS

The plaintiff was employed by the second defendant for the 1st defendant in 1971 and was granted 2 years study leave without pay to enable him undertake a course of study in the United States of America. The leave was to commence from January 1976 and in August 1976 he applied to the first defendant for extension of the study leave by three or four years. The plaintiff was given direction on how to reapply for the

study leave with a confidential academic report from the Head of Department of his College attached therein. He failed to comply with the directives, only replying much later than the stipulated date that the College could not send his academic report because of his indebtedness to the College. Thus without authorization the plaintiff overstayed the study leave granted him by over eight years until 1986 when he returned and wrote a letter to the 1st defendant informing him that he returned and wished to resume duty immediately. The Defendants reacted by terminating his appointment as from January, 1978.

The plaintiff brought this action against the defendants for the termination of his appointment and on receipt of the statement of claim the defendants counterclaimed the sum of N22, 739.49 against the plaintiff being salary paid to the plaintiff while on study leave to which he was not entitled. The trial court dismissed the plaintiff's claim and upheld the defendants counterclaim. The plaintiff appealed to the Court of Appeal which unanimously dismissed the appeal subject to the requirement that he should deduct his one month's salary in lieu of notice from the excess salaries already paid to him. Still dissatisfied with the judgment of the Court of Appeal, the plaintiff has further appealed to the Supreme Court formulating the following issues for determination.

ISSUES FOR DETERMINATION

"(a) Whether the Court of Appeal was right in failing to make a definite finding on the issue of fair hearing.

(b) Whether the Court of Appeal was right in holding that the Plaintiff's appointment was justifiably terminated. Etc. see p. 111

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC.**

Master & servant - Fair hearing

1. *The Plaintiff's eight (8) years absence from duty is a fundamental breach of his contract of service which evinced an intention no longer to be bound by the contract Since it was the Plaintiff who wrongfully repudiated the contract of service by his wilful failure to carry out his duties under the contract, the termination of his appointment with*

retrospective effect is quite in order."

I agree with what the two lower courts respectively said above. The undisputed facts show that the Plaintiff had by himself repudiated the contract of employment by abandoning his work for eight (8) long years! He needed no hearing. The issue accordingly fails. (p. 112 C/F)

Conditions of employment

2. *I am of the view that the procedure for terminating Plaintiffs's appointment as spelt out in his letter of appointment, Exhibit 1, should be followed. That letter required that Plaintiff should be given one month's notice or salary in lieu of notice. No notice was given. He should therefore have been given one month's salary in lieu of notice which was not given So issue No. 1 (i.e. whether the learned trial judge was right in holding that the plaintiff's appointment was justifiably terminated) must be answered in the affirmative with the proviso that the plaintiff should deduct his one month's salary in lieu of notice from the excess salaries paid to him."* I agree. I cannot find anything wrong in the passage above. (p. 113 A)

Termination of appointment - Where wrongful

3. By his letter of Appointment the plaintiff was only entitled to damages for wrongful termination of appointment to one months notice or one month's salary in lieu of notice. The Court of Appeal did the right thing by directing the plaintiff to deduct one month's salary from excess salaries already paid to him (see NIGERIAN PRODUCE MARKETING BOARD VS. ADEWUNMI (1972) 11 SC 111. The Plaintiff ought to realise that as willing as he might be to work for the defendants, the Defendants cannot be compelled to accept him. The Defendants can only be made to comply with terms or conditions of employment as contained in Exhibit 1 herein. This issue also fails. (p. 113 D)

Master & servant - Fraudulent enrichment

4. While the Plaintiff might be said not to have influenced or organised continued payment of his salaries into his account, when he began to

spend salaries which did not belong to him, the spending certainly became fraudulent as explained by the Court of Appeal above. I find no merit in this issue. It accordingly fails. (p. 114 D)

B REPRESENTATION

M. Emiaso for the Plaintiff.

M. O. Kalu (Mrs.) (Director of Civil Litigation,
Ministry of Justice, Benin City, Edo State] for the Defendants.

C CASES REFERRED TO

Nigerian Produce Marketing Board v Adewunmi (1972) 11 S.C. III
Olatunbosun v Niser (1988) 3 NWLR (Pt. 80) 25

D STATUTE REFERRED TO

Civil Service Rules 1978 of Bendel State

LEAD JUDGMENT BY KUTIGI JSC

E In the High Court holden at Benin City, the plaintiff's claims against the Defendants jointly and severally read as follows-

F *"1. A declaration that the purported termination by the defendants of the plaintiff's appointment as a Civil Servant in the Civil Service of the Bendel State of Nigeria is unlawful, unconstitutional, null and void.*

G *2. A declaration that the plaintiff is still an officer in the Bendel State Civil Service and entitled to resume his duties and functions therein and to receive and/or enjoy the rights, remuneration, benefits and privileges attached to his post and/or office.*

3. A mandatory injunction restoring the plaintiff to his post and/or office and to all his rights, remuneration, benefits and privileges aforesaid.

H *4. And any other relief or order which the court may deem fit to grant or make in the circumstance"*

Pleadings were filed and exchanged. In their joint Statement of Defence, the Defendants counterclaimed against the Plaintiff thus-

"The 1st defendant counterclaims from the plaintiff the sum of N22,739.49k being the amount fraudulently earned and drawn as salaries from 20th January 1976 to April 1982 as reflected in the Statement of Account of the N.N.B. (New Nigeria Bank Ltd.), Ring Road Branch, Benin City and the plaintiff's personal emolument cards, (for the same period) both to be founded upon at trial.

PARTICULARS OF FRAUD

(a) *The plaintiff was in the USA.*

(b) *The plaintiff knew that he was granted study leave without pay and withdrew by cheques, to be founded upon.*

(c) *He did not resume duty at the expiration of the two (2) years granted him.*

(d) *He did not seek and obtain any letter from the 1st defendant restoring him to his position.*

(e) *After expiration of two (2) years he did not resume duty and as such was not entitled to any salary from 20th January 1978, when his study leave without pay expired.*

(f) *He bluntly refused to comply with the directives as to extension of his study leave.*

(g) *He received at regular interval from the N.N.B Statement of Account relating to his current account".*

At the hearing the Plaintiff who had filed a Statement of Claim and a Reply to counter-claim offered no oral evidence, but rested his case on the documentary exhibits tendered by him. The Defendants on the other hand called a total of five witnesses and tendered a number of documentary evidence as well.

The undisputed facts of the case are that the Plaintiff was employed as an Assistant Education Officer by the 2nd Defendant for the 1st Defendant on 6th April 1971. He was granted two (2) years study leave without pay to enable him undertake a course of study in the United States of America with effect from 19 January 1976. In August 1976, he applied to the 1st defendant for extension of the study leave by three or four years. This was forwarded by the 1st Defendant to the 2nd Defendant for approval who then directed that the Plaintiff should reapply in

November 1977 with a fresh confidential academic report from the Head of Department of his College. A reminder was sent to the Plaintiff on 9th September 1977 by the 1st Defendant. The Plaintiff failed to comply with the directives until 28th June 1978 when he wrote to the 1st Defendant renewing his old application and informing the 1st Defendant of the inability of his College to issue academic progress report because he was indebted to the College. There was no exchange of communication between the parties after this. The Plaintiff without authority or permission then overstayed the study leave granted him by over eight (8) years until January 1986 when he suddenly returned from the USA and wrote a letter dated 10th January 1986 to the 1st Defendant informing him that he has returned and wished to resume duty immediately. The Defendants then reacted by terminating Plaintiff's appointment with effect from 20th January 1978.

It was against the termination of his appointment that the Plaintiff brought this action against the Defendants.

The Defendants on receipt of the Statement of Claim as mentioned above counterclaimed N22,739.49 against the Plaintiff being salary paid to the Plaintiff while on study leave and to which he was not entitled.

After the trial, the learned trial judge meticulously reviewed the evidence on both sides, dismissed the Plaintiffs claims in their entirety and upheld the Defendants' counterclaim in whose favour judgment was entered in the following terms:-

" I am satisfied that the defendants have proved beyond reasonable doubt that the plaintiff fraudulently received N22,739.49 being salaries to which he was not entitled. I therefore give the defendants judgment for N22,739.49k as claimed. The plaintiff shall in addition pay to the defendants costs assessed at N250.00".

Aggrieved by the decision of the trial Court, the Plaintiff appealed to the Court of Appeal. In a reserved judgment, the Court of Appeal unanimously dismissed Plaintiff's appeal against his claims subject to the requirement that he should deduct his one month's salary in lieu of notice from the excess salaries already paid to him. This appeal against the

counterclaim was dismissed with N500.00 costs in favour of the Defendants.

Still dissatisfied with the judgment of the Court of Appeal, the Plaintiff has further appealed to this court.

The parties filed and exchanged their briefs of argument which were adopted at the hearing of the appeal. Mr. Emiaso learned counsel for the plaintiff has identified three issues as arising for determination in the appeal as follows:

"(a) Whether the Court of Appeal was right in failing to make a definite finding on the issue of fair hearing.

(b) Whether the Court of Appeal was right in holding that the Plaintiff's appointment was justifiably terminated in the light of the Court of Appeal's finding that the procedure for termination of the plaintiff's appointment was not followed.

(c) Whether the counterclaim of the Defendants was rightly allowed in the light of the Court of Appeals finding that there was no evidence on record that the Plaintiff influenced or organised the continued payment of salaries into Plaintiff's personal bank account, and further whether the Court of Appeal was right in holding that the withdrawal of money, by the Plaintiff from Plaintiff's own bank account was fraudulent".

I will now proceed to take the issues one by one.

Issue (a) - Fair Hearing:

This issue was raised both in the High Court and in the Court of Appeal and I must say at once that it received adequate treatment in those courts. The gist of the complaint is that the Plaintiff ought to have been given a query first to explain the reason for his absence from duty. And that it was only after his explanation to the query that he could lawfully and properly be terminated as provided for in the Civil Service Rules 1978, of Bendel State. That the plaintiff was therefore wrongly terminated because he was not given any opportunity to defend himself or to be heard.

The learned trial judge in his judgment after citing relevant provisions of the Civil Service Rules and the Public Service Commission Regu-

lations 1978, said:-

"It is clear from Exhibit 28 (supra) that the plaintiff did not meet the conditions under which his application for the extension of the period of his study leave could be entertained or considered

B *The Plaintiff knew or ought to know that his 8 years absence from duty was a gross misconduct for which he was liable to summary dismissal. The 2nd Defendant terminated the Plaintiff's appointment instead of dismissing him The question of fair hearing does not arise. The Plaintiff knew that the study leave granted him ended in January 1978 and that his further stay in America was unauthorised The Plaintiff would equally have been liable to Summary dismissal under the contract of employment*

C *The Plaintiff's eight (8) years absence from duty is a fundamental D breach of his contract of service which evinced an intention no longer to be bound by the contract Since it was the Plaintiff who wrongfully repudiated the contract of service by his wilful failure to carry out his duties under the contract, the termination of his ap- E pointment with retrospective effect is quite in order."*

The Court of Appeal in the lead judgment of Akpabio J. C. A. said:

"On the totality of all the foregoing, I must say that there was no dispute that the Plaintiff had grossly over stayed his study leave without F pay. He himself had admitted that fact in his letter Exhibit 43. What is admitted need not be proved (S.131 of the Evidence Act). So failure by the 2nd Defendant to have given the plaintiff a query cannot be fatal in his case".

I agree with what the two lower courts respectively said above.
G **The undisputed facts show that the plaintiff had by himself repudiated the contract of employment by abandoning his work for eight (8) long years !He needed no hearing. The issue accordingly fails.**

Issue (b)

H Let us first of all set out in full what the Court of Appeal said on the issue raised. We can then look at it and see whether it was right or wrong. The court said in the lead judgment on page 182 of the record:-

"From all the regulation pointed out to us by the learned counsel

for the Defendants we are in no doubt that the Plaintiff had rendered himself liable to summary dismissal, but was only merely terminated on humanitarian grounds. That being the case, I am of the view that the procedure for terminating plaintiffs's appointment as spelt out in his letter of appointment, Exhibit 1, should be followed. That letter required that plaintiff should be given one month's notice or salary in lieu of notice. No notice was given. He should therefore have been given one month's salary in lieu of notice which was not given So issue No. 1 (i. e whether the learned trial judge was right in holding that the plaintiff's appointment was justifiably terminated) must be answered in the affirmative with the proviso that the plaintiff should deduct his one month's salary in lieu of notice from the excess salaries paid to him."

I agree. I cannot find anything wrong in the passage above. By his letter of Appointment the Plaintiff was only entitled to damages for wrongful termination of appointment to one months notice or one month's salary in lieu of notice. The Court of Appeal did the right thing by directing the plaintiff to deduct one month's salary from excess salaries already paid to him (see NIGERIAN PRODUCE MARKETING BOARD VS. ADEWUNMI (1972) 11 S.C 111 OLATUNBOSUN VS NISER (1988) 3 NWLR (PT. 80) 25. The Plaintiff ought to realise that as willing as he might be to work for the defendants, the Defendants cannot be compelled to accept him. The Defendants can only be made to comply with terms or conditions of employment as contained in Exhibit 1 herein. This issue also fails.

Issue (c)

As with issue (b), I will also reproduce here what the Court of Appeal actually said and then examine it to find out where it went wrong if at all it did. On page 189 the judgment reads:-

"As regards the question of fraud one must say that there were two elements involved As regards the first element, one must say outright that there was no evidence on the records from which it could be inferred that the Plaintiff influenced or organised the continued payment of his salaries into his account, long after he left the country.

One can say that the payment was made as a result of inadvertence or mistake of fact not law and therefore recoverable As regards the second element, about knowledge that excess salaries have been paid into his account, the available evidence, notably, the statement of Account, exhibit 42, as well as the cheques Exhibits 34-41 issued by Plaintiff coupled with his refusal to give oral evidence, clearly show that Plaintiff knew of such overpayment, but failed to inform his employers. Rather he decided to spend them. When he began to do so, the taking became fraudulent. Under these circumstances, I must hold that the counterclaim of the Defendants was rightly granted by the learned trial judge. The appeal against the counterclaim of the Defendants therefore fails and must be dismissed".

I agree. The plaintiff's counsel has not been able to fault the reasoning and conclusions in the passage above. **While the plaintiff might be said not to have influenced or organised continued payment of his salaries into his account, when he began to spend salaries which did not belong to him, the spending certainly became fraudulent as explained by the Court of Appeal above. I find no merit in this issue. It accordingly fails.**

All the three issues having been resolved against the Plaintiff, the appeal must fail. It is accordingly dismissed with N10,000 costs against the Plaintiff.

WALI JSC

I have had the privilege of reading in draft, the lead judgment of my learned brother Kutigi, JSC, and I agree with his conclusion that the appeal has no merit .

Both the trial court and the Court of Appeal have meticulously considered the facts in this case and the conclusions reached upon them could not have been otherwise.

In my view the Respondents were very lenient and generous to the appellant in terminating her appointment instead of an outright dismissal.

I also dismiss this appeal and affirm the judgment of the Court of

Appeal with N10,000.00 costs to the Respondents.

ONU JSC

I had the privilege to read before now the judgment of my learned brother Kutigi, JSC. I share his views that this appeal lacks merit and must perforce fail. B

I wish only to comment by way of expatiation as follows:

The Appellant in this case got "off the hook" with the lesser disciplinary action of termination of his appointment rather than a summary dismissal which was more appropriate to the occasion. And asking for a query to be given to him in the face of 8 years of disobedient absenteeism is, to say the least, most uncalled for, most unhelpful and preposterous. C

Furthermore, asking for the constitutional relief of fair hearing in the circumstances of the case, cannot in my view, be countenanced since by his act of gross misconduct, the Appellant deserved more than a mere termination of his appointment as required by the Civil Service Rules of his employers whose acts of benevolence affording him a study leave was being abused at every turn e.g by his overstay of 8 years without lawful excuse. D E

Indeed , to ask that the Appellant be still declared as an officer of the then Bendel State Civil Service, is to foist an employee upon an unwilling employer unless such an employee is qualified by appointment to a permanent and pensionable position. (See the case of Olatunbosun v NISER Council (1988) NWLR (part 80) 25). F

For these and the further reason contained in the leading judgment of my learned brother Kutigi, JSC I too dismiss this appeal and make similar orders as to costs contained therein. G

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kutigi, J.S.C. and I am in full agreement that this appeal is without substance and should be dismissed. H

There is evidence on record which was accepted by both courts below that the appellant was in contravention of the rules and regulations

governing his contract of service with the respondents by exceeding the period of his study leave by several years. He therefore absented himself from duty without permission for those years. This is a gross act of misconduct and a fundamental breach by the appellant of his contract of service for which he was ordinarily liable to summary dismissal. This is by virtue of the provisions of paragraphs 04201 (v) and 04202 (a) of the Civil Service Rules, 1978.

There is also evidence which was accepted by both courts below that a total of excess salary payments amounting to N22,739.49 was wrongly credited to the appellant's account with the New Nigerian Bank Ltd., by the respondents. This amount, on the accepted evidence, was withdrawn by the appellant and appropriated by him. It is the finding of both courts below that the appellant was not entitled to these excess payments. The Court of Appeal was therefore right to have ordered the appellant to refund the same to the respondents subject to the deduction of his one month's salary in lieu of notice of the termination of his appointment.

I think the appellant, on the whole, is lucky that his appointment was merely terminated and that he was not dismissed from service in accordance with the prevailing Civil Service Rules and Regulations.

This appeal accordingly fails and the same is hereby dismissed with costs as assessed in the leading judgment.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother kutigi, JSC. I agree with it. The appeal has no merit whatsoever. For the reasons which he has given, I, too, would dismiss the appeal with N10,000.00 costs in favour of the respondent.

H