

SUPREME COURT OF NIGERIA
FRIDAY 23RD MAY, 2003. SC. 81/1999
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU,
E. O. AYoola, N. TOBI, D. MUSDAPHER, JJSC

CHARLES UDEGBUNAM
AND

..... APPELLANT

1. FEDERAL CAPITAL

DEVELOPMENT AUTHORITY

2. HON. MINISTER, FEDERAL CAPITAL

DEVELOPMENT AUTHORITY

..... RESPONDENTS

3. ATTORNEY-GENERAL OF FEDERATION

ACTIONS - Employment - Evidence - Proof - It was not enough for plaintiff to plead civil service rules - Specific reference should have been made to relevant section of the rules (H1)

MASTER & SERVANT - Termination - Validity - Since appellant absented from duty without leave - His appointment was validly terminated - And lower courts rightly upheld same (H2)

JUDGMENTS - Slip - Effect on appeal - It is not every mistake that results in an appeal being allowed - It is only when mistake is substantial - In that it occasioned miscarriage of justice - That appeal is affected (H3)

FACTS

Plaintiff/appellant was employed by 1st defendant/respondent. Sometime in 1986 appellant absconded from duty and could not be found for over two weeks. Within this period a series of query was issued to appellant to which he only responded after two weeks though he was required to have done so within 48 hours. Based on appellant's representations in his answer to the queries, 1st respondent caused inquiries to be made at National Orthopedic Hospital, Lagos where appellant claimed he was being treated during the period. It was discovered that appellant was only treated as an outpatient by the hospital. Further investigations revealed that appellant was full time Master's Degree student at the University of Lagos. It

was as a result of this discovery that appellant's appointment was eventually terminated.

Consequently, appellant commenced this action against respondents at the High Court of F.C.T. Abuja, claiming inter alia, for reinstatement or in the alternative damages for loss of employment. Respondents contended that appellant's employment was rightly terminated under the Federal Civil Rules. After hearing, the learned trial judge dismissed appellant's claim in its entirety. Aggrieved, appellant appealed to the Court of Appeal, Abuja. The court dismissed the appeal. The court had in its judgment faulted the trial judge's procedure of referring to sections of the Civil Service Rules in his judgment when appellant had merely pleaded the rules without reference to any sections thereof. It was also held by Court of Appeal that it was wrong for appellant to have included claim for salaries and leave allowances as heads of damages. Dissatisfied, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the court below was right when it held as per Kalgo, JCA., 'Therefore it is in my view, wrong for the learned trial Judge to dig out the Federal Civil Service Rules from anywhere and start referring to them as he has done in his judgment.

2. Whether the Court of Appeal was right in confirming the decision of the court of first instance which held that the appellant's appointment was terminated in compliance with CSR 0417 subrule (viii).

3. Whether it is wrong in law to include claims for salaries, leave allowances etc. in an action for wrongful dismissal.

4. Whether the court below (sic) to refer to in its judgment a document not tendered (sic) court of first instance and rely on same to confirm the judgment."

HELD (Unanimously dismissing the appeal per

KATSINA-ALU, JSC)

ACTIONS - Employment - Evidence - Proof

1. For the defendants, it was pointed out that the plaintiff did not make any specific reference to any section of the Civil

Service Rules. It was argued that it is not enough to tender a law without reference to any specific section as an authority. The law in this regard is now settled. It was not enough for the plaintiff to plead the Federal Civil Service Rules which governed his case in evidence at the trial. It was not part of the duty of the learned trial Judge to go on voluntary voyage of his own aimed at producing evidence for the plaintiff. It was clearly a matter that should have been brought out in court at the trial of the case. The observation of the court below was a valid one. (p. 1365 H / 1366 B)

MASTER & SERVANT - Termination - Validity

2. It must be recalled that the plaintiff absented himself from duty without leave or reasonable cause. To cover up the period of his absence, he lied that he was receiving treatment at the National Orthopaedic Hospital Ogbobi - Lagos. His presentation was falsified by Exhibit D5 from the Hospital. Inquiries revealed that he was a full time student of the University of Lagos. For this misconduct, and I dare say gross misconduct, the plaintiff was liable to instant dismissal. Rather than dismiss him, the defendants took a more lenient posture. His appointment was terminated. The two courts below, based on the misconduct of the plaintiff held that the termination of his appointment was proper.

The Court of Appeal gave reasons why it affirmed the decision of the trial court.

This complaint also is without substance. (p. 1367 A)

JUDGMENTS - Slip - Effect on appeal

3. It was said that the court below was in grave error when it held in the course of its judgment:

“Furthermore, in an action for wrongful dismissal such as this, claims for damages should not include claims for salaries, leave allowances etc. earned by the employee. See Abdullahi v. Achou (1969) 1 All NLR 442.”

This contention has merit. With due respect to the court below, this case is one of termination of appointment and not a case of wrongful dismissal. The law is however settled that it

is not every error, mistake or slip in a judgment that must result in an appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere.

In view of the evidence before the court, it seems clear to me that the error of the court below did not occasion any miscarriage of justice having regard, particularly to its finding that the plaintiff did not strictly prove his claim for special damages which finding was not appealed from. (p. 1368 A/ 1369 C)

C NOTABLE POINTS OF INTEREST

TOBI JSC

1. A termination of appointment within the service Rules cannot be wrongful

D Where an appointment of a civil servant is terminated in accordance with the Civil Service Rules, the civil servant has no valid cause of action against the terminating authority or body. A civil servant can only sue for wrongful dismissal or termination of appointment where a dismissal or termination is not within the Civil Service Rules.
E (p. 1370 B)

2. Employer has discretion to give lesser punishment

Although the appellant was by paragraph 4202 of the Federal Civil Service Rules due for outright dismissal from the service, the respondent's magnanimity resulted in the termination of his appointment. This is in order. An employer has a discretion to give lesser punishment to an employee, but it has no discretion to give a higher punishment. Since termination of appointment is a lesser punishment, the appellant has no right to complain. (p. 1370 G)

REPRESENTATION

Chief Karina Tunyan, for the Appellant

H P. Y. Okala, (Director, Legal Services, Ministry of Federal Capital Territory), for the Respondents

CASES REFERRED TO

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

Abdullahi v. Achou (1969) 1 All NLR 442

Akpan v. Otong (1996) 10 NWLR (Pt. 476) 108

Olaniyan v. University of Lagos (1985) NWLR (Pt.9) 599

Ore Falomo v. Lagos Civil Service Commission (1977) 5 S.C. 51

Shitta-Bey v. Federal Public Service Commission (1981) Vol. 12 NSCC 19 B

A.G. Oyo State v. Fair Lakes Hotel (1989) 12 S.C. 1

STATUTE & RULES REFERRED TO

Evidence Act, S. 74

Federal Civil Service Rules, rule 0417 C

LEAD JUDGMENT BY KATSINA-ALU JSC

The Appellant was the Plaintiff in this action. It was an action for wrongful termination of his appointment against the Respondents D as Defendants. In the suit, the Plaintiff claimed in his amended Statement of Claim in the High Court of the Federal Capital Territory, Abuja, the following reliefs:-

“(i) A declaration that as at 15th September, 1987, when his appointment was purportedly terminated by 1st defendant, he was an employee of 2nd defendant. E

(ii) A declaration that letter dated 15th September, 1987, in which the 1st defendant purportedly terminated his appointment with retrospective effect is null and void in that he was not an employee of 1st defendant and his appointment cannot be determined with retrospective effect. F

(iii) A declaration that the purported termination of his appointment by the 1st defendant vide a letter dated 15th September, 1987, is null and void, being in breach of the Federal Civil Service Rules of 1974 and/or rules of natural justice. G

(iv) A declaration that, as a civil servant, holding a permanent and pensionable appointment, the 1st defendant cannot terminate his appointment with an offer to pay him one month's salary in lieu of notice and that he is entitled to remain in service until he attains the statutory retirement age of 60 years or until his appointment is properly determined in accordance with the Federal Civil Service Rules. H

(v) A declaration that he is still an employee of the 2nd defen-

dant and he is still entitled to all his salaries and allowances attached to his office.

(vi) An order on 2nd defendant to reinstate him forthwith without prejudice to salary increment he would have been entitled to and promotions that might have been due to him.

B *(vii) An order that the 1st defendant withdraw the purported letter of termination of his appointment dated 15th September, 1987, and tender a written apology for the suffering and embarrassment he and his family had suffered for their illegal act.”*

C In the alternative, the plaintiff claimed a lump sum N180,860.00 against the 1st defendant as damages suffered by him for the loss of employment with the Ministry of the Federal Capital Territory due to their wrongful act of terminating his appointment.

D At the trial court, pleadings were ordered, filed and exchanged between the parties. The plaintiff gave evidence on his own behalf but called no other witness. The defendants also called only one witness in their defence. At the close of evidence, both counsel, with the leave of the trial court, filed written addresses. In a considered judgment given on 2nd December, 1993, the learned trial Judge Gumi, E J., dismissed the plaintiff's claims. His appeal to the Court of Appeal, Abuja, was also dismissed.

The plaintiff now appeals to this court upon a number of grounds.

F The facts leading to the termination of the plaintiff's appointment with the 1st defendant are short and undisputed. The plaintiff was employed by the 1st defendant, Federal Capital Development Authority (FCDA) on 4th September, 1980, as a Planning Officer. His appointment was confirmed on 22nd January, 1982.

G In November, 1986, plaintiff absconded from duty. His immediate boss, the Assistant Director, Corporate Affairs, issued him a query. He was nowhere to be found. His whereabouts were unknown. The plaintiff's immediate boss then sent a report to the Department of Personnel which in turn issued another query to the plaintiff and H requested him to answer within 48 hours. Plaintiff responded after two weeks.

Based on the plaintiff's representations, the 1st defendant caused inquiries to be made at the National Orthopedic Hospital, Ogbobi - Lagos, where he claimed he was being treated. The hospi-

tal wrote to the effect that the plaintiff was treated only as an out-patient. Further inquiries revealed that the plaintiff was a full time Master's Degree Student at the University of Lagos, (Exhibit D6). As a result of this discovery, the plaintiff was issued a query. The defendants were not satisfied with his defence and consequently terminated his appointment. He then went to court. B

Both parties filed their respective briefs of argument. Based on the grounds of appeal filed, the plaintiff formulated four issues for determination in this appeal. They are:

"1. Whether the court below was right when it held as per Kalgo, JCA., 'Therefore it is in my view, wrong for the learned trial Judge to dig out the Federal Civil Service Rules from anywhere and start referring to them as he has done in his judgment. C

2. Whether the Court of Appeal was right in confirming the decision of the court of first instance which held that the appellant's appointment was terminated in compliance with CSR 0417 sub-rule (viii). D

3. Whether it is wrong in law to include claims for salaries, leave allowances etc. in an action for wrongful dismissal.

4. Whether the court below (sic) to refer to in its judgment a document not tendered (sic) court of first instance and rely on same to confirm the judgment." E

The defendants, for their part, have adopted the issues formulated by the plaintiff.

ISSUE NO. 1 F

Under this issue, it was submitted that there was no need for any of the parties to tender the Civil Service Rules in evidence. All that was required of the plaintiff was to plead same, which was done. It was further submitted that all courts in Nigeria are enjoined to take judicial notice of the Federal Civil Service Rules by virtue of Section 74 of the Evidence Act. Learned counsel for the plaintiff relied for this submission on the cases of Shitta-Bey v. Federal Public Service Commission (1981) Vol. 12 NSCC 19 at 30 and Olaniyan v. University of Lagos (1985) NWLR (Pt.9) 599 at 624. We were urged to answer Issue No.1 in the negative. G H

For the defendants, it was pointed out that the plaintiff did not make any specific reference to any section of the Civil Service Rules. It was argued that it is not enough to tender a

law without reference to any specific section as an authority.

It was further submitted that even if reliance was not placed on the Civil Service Rules, the facts before the two lower courts were enough to dismiss plaintiff's case since he was given a fair hearing in accordance with Section 33 of the 1979 Constitution before the termination of his appointment. It was argued that, on the facts of the case the plaintiff should have been dismissed instantly. Reliance was placed on the case of *Ore Falomo v. Lagos Civil Service Commission* (1977) 5 S.C. 51 at 59.

The law in this regard is now settled. It was not enough for the plaintiff to plead the Federal Civil Service Rules which governed his case in evidence at the trial. It was not part of the duty of the learned trial Judge to go on voluntary voyage of his own aimed at producing evidence for the plaintiff. It was clearly a matter that should have been brought out in court at the trial of the case. The observation of the court below was a valid one. See *Onibudo v. Akibu* (1982) 7 S.C. 60. The plaintiff's complaint therefore has no substance.

ISSUE No. 2

This issue is a complaint against the confirmation of the trial Judge's judgment to the effect that the plaintiff's appointment was terminated in compliance with CSR 0417 sub-rule (viii). It was said that in justifying the termination, the Court of Appeal did not refer to any rule and/or regulation or part of the common law it relied upon to justify the termination of the plaintiff's appointment.

The plaintiff further contended that if the Court of Appeal confirmed the learned Judge's decision by relying on the same provisions of the Civil Service Rules relied upon by the trial Judge, it would have arrived at a different conclusion.

For the defendants, it was contended that it is not the duty of the courts to embark on a journey to discover which sections and/or part of an enactment referred to were applicable to a party's case.

It was further submitted that upon the facts of this case, the plaintiff was liable to instant dismissal without any formality in line with Civil Service Rules under para. 4202. It was also said that even if the Civil Service Rules were not made reference to, there was no miscarriage of justice as the relevant documents and evidence before the court were carefully considered before arriving at the conclusion

that the plaintiff's appointment was properly terminated.

It must be recalled that the plaintiff absented himself from duty without leave or reasonable cause. To cover up the period of his absence, he lied that he was receiving treatment at the National Orthopaedic Hospital Ogbobi - Lagos. His presentation was falsified by Exhibit D5 from the Hospital. Inquiries revealed that he was a full time student of the University of Lagos. For this misconduct, and I dare say gross misconduct, the plaintiff was liable to instant dismissal. Rather than dismiss him, the defendants took a more lenient posture. His appointment was terminated. The two courts below, based on the misconduct of the plaintiff held that the termination of his appointment was proper.

The Court of Appeal gave reasons why it affirmed the decision of the trial court. In the course of its judgment, it said as follows:

"However, the learned trial Judge very carefully examined the evidence before him including the effect of all the relevant documents admitted in evidence by the parties before arriving at the conclusion that the appellant's appointment was properly terminated. The scrupulous evaluation of the evidence of the appellant and the contents of his reply to the query (Exhibit D3) in Exhibit P5, together with the assessment of the contents of the letter from the National Orthopaedic Hospital Ogbobi, Lagos (Exhibit D5) and the letter from the University of Lagos Exhibit D, are in my view in full support of the learned Judge's conclusion on the appellant's termination. In short, they together revealed that the appellant from December, 1986, stayed in Lagos away from his job and in the process, got himself registered as a full-time student of the University of Lagos, and all these without any lawful excuse or approval of his employers. This no doubt is tantamount to gross misconduct on the part of the appellant and is stated in both queries. Exhibits D1 and D3, can lead to dismissal. In addition, D.W.1 confirmed that the representation of the appellant. Exhibit P5, together with all relevant information concerning the appellant's case were examined by the establishment Committee of the 1st respondent before recommending the termination of the appellant's appointment. With all these in mind, I am also of the firm view, that the conduct of the appellant on the whole, justifi-

fied the termination of his appointment. See *Sinclair v. Neighbour* (1967) 2 QB 279. This complaint also is without substance.

ISSUE No. 3

This issue relates to the non-payment of the Plaintiff's salaries and allowances. ***It was said that the court below was in grave***

error when it held in the course of its judgment:

“Furthermore, in an action for wrongful dismissal such as this, claims for damages should not include claims for salaries, leave allowances etc. earned by the employee. See Abdullahi v. Achou (1969) 1 All NLR 442.”

This contention has merit. With due respect to the court below, this case is one of termination of appointment and not a case of wrongful dismissal. The law is however settled that it is not every error, mistake or slip in a judgment that must result in an appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere. See *Akpan v. Otong* (1996) 10 NWLR (Pt. 476) 108.

It is to be pointed out that the Court of Appeal had found as a fact that the plaintiff did not establish his claim for salaries and allowances as required by law. It said:

“On the claim for earned salary from March to September, 1987, this is in the nature of special damages which must be pleaded and proved strictly. See A.G. Oyo State v. Fair Lakes Hotel (1989) 12 S.C. 1, (1989) 5 NWLR (Pt.121) 255. It appears to me that the appellant pleaded this in the particulars to paragraph 18 of his amended Statement of Claim under damages on p.11 of the record. But the evidence on it which he gave on p.33 of the record, does not clearly support the claim as required for special damages.”

The plaintiff did not appeal against this finding. It must be taken as correct and settled. I must however add this. The plaintiff did not earn the money he claimed. He did not work for the defendants for that period. He was pursuing his Master's Degree Programme without leave or reasonable cause at the University of Lagos. Exhibit D6 from the University of Lagos speaks for itself. It states in part thus:

“RE UDEGBUNAM CHARLES

With reference to your letter No. FC. 400/T2 dated 12th March, 1987, I hereby write to confirm that the above named person is a

registered full-time M.Sc. (Econs) Student in the Department of Economics, Faculty of Social Sciences, University of Lagos, during the 1986/1987 academic year.

(SIGNED)

Professor F.A. Olaloku

Head, Department of Economics.” B

There is evidence that the plaintiff completed his Master’s Degree Programme in December, 1987. This evidence was supplied by the Plaintiff himself. When he was cross-examined he testified thus:

“I completed my master’s Degree Programme in December, 1987.” C

In view of the evidence before the court, it seems clear to me that the error of the court below did not occasion any miscarriage of justice having regard, particularly to its finding that the plaintiff did not strictly prove his claim for special damages which finding was not appealed from. This issue also is without merit.

ISSUE NO. 4

The case against the plaintiff was that he absented himself from duty without leave or reasonable cause. I have earlier on this judgment made reference to Exhibits D5 and D6. The letters speak for themselves. The plaintiff was given a fair hearing before his appointment was terminated. No miscarriage of justice was occasioned thereby. He richly deserved what he got. This issue also fails.

All the plaintiff/appellant’s issues having failed, this appeal fails and I dismiss it. I affirm the judgment of the Court of Appeal which confirmed the judgment of the court of trial. There shall be costs of N10,000.00 to the defendants against the plaintiff.

G

KUTIGI JSC

I have had a preview of the judgment just read by my learned brother, Katsina-Alu, JSC. I agree with him that the appeal has no merit. The rule is that every pleading must state facts and not law. So that a Plaintiff who wishes to prove at the trial that a particular law applies to his case must state the facts which make the law applicable and will not be allowed to plead conclusions of law as was the case here. The appeal is dismissed with costs as assessed.

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AYOOLA JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Katsina-Alu, JSC. For the reasons he gives, I too would dismiss the appeal. I also award N10,000 costs in
 B favour of the respondents.

TOBI JSC

C Where an appointment of a civil servant is terminated in accordance with the Civil Service Rules, the civil servant has no valid cause of action against the terminating authority or body. A civil servant can only sue for wrongful dismissal or termination of appointment where a dismissal or termination is not within the Civil Service
 D Rules.

Paragraph 4202 of the Federal Civil Service Rules provides as follows:

E *“Any officer or employee who absents himself from duty... without leave renders himself liable to be dismissed from service without formality and the onus shall rest on him to show that the circumstances do not justify the imposition of the full penalty.”*

F There is evidence that the appellant, while in the employment of the 1st respondent did the Masters Degree in Economics at the University of Lagos. Although appellant lied to his employers that he was receiving treatment at the National Orthopaedic Hospital, Ogbobi, Lagos during the period, the truth is that he was a postgraduate student at the University of Lagos at the material time. Exhibit D5 from the authorities of the National Orthopaedic Hospital, Ogbobi, indicated that the appellant was an out-patient.

H Although the appellant was by paragraph 4202 of the Federal Civil Service Rules due for outright dismissal from the service, the respondent’s magnanimity resulted in the termination of his appointment. This is in order. An employer has a discretion to give lesser punishment to an employee, but it has no discretion to give a higher punishment. Since termination of appointment is a lesser punishment, the appellant has no right to complain.

It would appear that the respondents invoked CSR 04107, which provides that:

“If upon considering the representations of the officer, the Commission is of the opinion that the officer does not deserve to be dismissed but that the facts of the case disclose grounds for requiring him to retire in accordance with Rule 04114, it shall direct accordingly.”

The above rule, which is further vindicated by Rule 04114, in my humble view, was properly invoked by the respondents. B

It is for the above reasons and the more detailed reasons given by my learned brother, Katsina-Alu, JSC., that I too dismiss the appeal. I also award N10,000.00 costs in favour of the respondents. C

MUSDAPHER JSC

I have had a preview of the judgment of my Lord Katsina-Alu, JSC., just delivered. I entirely agree with the reasoning and the conclusion arrived at. D

For the same reasons which I hereby adopt as mine, I too, dismiss the appeal and affirm the decision of the court below which confirmed the judgment of the trial court. I abide by the order for costs contained in the aforesaid leading judgment. E

F

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H