

SUPREME COURT OF NIGERIA

7TH APRIL, 2006. SC. 276/2001

**CORAM:- S. U. ONU, U. A. KALGO, G. A. OGUNTADE,
M. MOHAMMED, W. S. N. ONNOGHEN, JJSC**

JOSEPH IFETA APPELLANT

AND

SHELL PETROLEUM DEVELOPMENT RESPONDENT
COMPANY OF NIGERIA LIMITED

CONTRACTS - Sanctity of - Contract of service - Termination terms - Is as stated in clause 11 of Exhibit G - Which said terms were breached by the respondent (H1)

MASTER & SERVANT - Termination - That is in breach of contract - Will not usually attract specific performance - Or reinstatement - Save in special circumstances (H2)

MASTER & SERVANT - Wrongful termination - Though established in this case - No special circumstance such as statutory flavour exists - To warrant order of specific performance or reinstatement (H3)

MASTER & SERVANT - Wrongful termination - Damages - Principles of assessment - Is to award salary in lieu of notice - Not servant's entitlement till year of retirement (H4)

APPEALS - Interference - Findings of trial court - Are to be disturbed - Where not supported by evidence - And will lead to a miscarriage of justice (H5)

FACTS

Before the High Court of Delta State Warri, plaintiff/appellant instituted this action against the defendant/respondent for wrongful termination of employment. He claimed inter alia, a declaration that his purported termination was wrongful, N16.2 million which represents plaintiff's salary till he retires or an order reinstating the plaintiff. Appellant

testified and called no other witness. Respondent call no evidence. The facts of the case appear not to be dispute. Contrary to the terms of the parties' contract of service as contained in clause 11 of Exhibit G, respondent orally terminated appellant's employment on 17-5-1991 without giving him the agreed 3 months notice or paying him 3 months salary in lieu of notice. The point of disagreement between the parties is in respect of what is the proper principle for ascertaining the damages due to appellant for wrongful termination of his appointment.

Trial court found in favour of the appellant, awarding the sum of N16.2 million and all other reliefs claimed. Respondent's appeal to the Court of Appeal was successful as it awarded N7,500.00 as damages, being 3 months salary in lieu of 3 months notice. Aggrieved, appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the learned justices of the Court of Appeal Benin Division were right in holding that the appellant’s appointment was effectively brought to an end on 17-5-1991 notwithstanding failure of the respondent to give notice or payment of salaries in lieu of notice,

(2) Whether in all the circumstance of this case, the proper measure of damages the appellant is entitled to, is three months salaries in lieu of three months’ notice.

(3) Whether failure of the justices of the Court of Appeal Benin Division, to adequately consider the legal consequence of oral termination in the circumstances of this case occasioned a miscarriage of justice.”

HELD (Unanimously dismissing the appeal per **MOHAMMED JSC**)

CONTRACTS - Sanctity of

1. There is no doubt that the parties’ freedom of contract carries with it the inevitable implication of sanctity of their contracts. This means that if any question should arise with respect to the contract, the terms in any documents which constitute the contract are, invariably, the guide to its interpretation. On this premise, the material question is; what did the parties in the instant case agree with respect to the termination of the contract of service? The answer to this question of course points to the provisions of

Exhibit ‘G’ which provides in clause 11 as follows:-

“11. You, or we, shall have the right at any time to terminate your employment under this letter by giving to the other not less than one month’s notice in writing, or by paying one month’s salary in lieu of notice. On the confirmation of your appointment, the period of notice shall be two months, or two months’ salary in lieu of notice and on the completion of five years of service, the period of notice shall be three months or three months’ salary in lieu of notice”

Clause 11 of Exhibit ‘G’ therefore gave both the appellant and the respondent equal rights to terminate the employment of the appellant at anytime by giving the prescribed notice or paying appropriate salary in lieu of notice. From the evidence adduced by the appellant who had served the respondent for a period of more than five years, the respondent ought to have given the appellant three months’ notice or three months’ salary in lieu of notice upon the termination of the appellant’s employment. It is not in dispute between the parties that the appellant was neither given three months notice nor three months’ salary in lieu of notice on the termination of employment by the respondent on 17-5-1991. This means the termination of the appellant’s employment was in breach of the contract between the parties in Exhibit “G’. (p. 1055 D)

Termination - That is in breach of contract

2. The traditional common law rule which has been adopted and applied in many decisions of our courts in this country is that the courts will not grant specific performance in respect of breach of contract of service.

The position of the law therefore is that where there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will rarely be made. See Bankole v. N.B.C. (1968) 2 All NLR 371 and Olaniyan v. University of Lagos (1985) 2 NWLR (pt.9) 599 at 612 where Oputa JSC had this to say on the subject of termination of master and servant relationship under a contract of service.

“The law regarding master and servant is not in doubt. There is also no doubt that the contract of master and servant is subject of both

statutory and common law rules. By and large, the master can terminate the contract with his servant at anytime and for any reason or for no reason at all. But if he does so in a manner not warranted by the particular contract under review, he must pay damages for breach."

B As a general rule, reinstatement as sought by the appellant as one of his reliefs in the present case, is not ordinarily the remedy for breach of contract of service. Specific performance or reinstatement is generally not the remedy in respect of personal service. Special circumstances will be required before such a declaration is made and its making will usually
C be in the discretion of the court. (p. 1056 E)

D 3. Such special circumstances have been held to arise where the contract of employment has a legal or statutory flavour thus putting it over and above the ordinary master and servant relationship. Equally so where a special legal status such as a tenure of public office is attached to the contract of employment. While it cannot be said that what may amount to special circumstances is exhaustive, in the present case having regard to
E the evidence on record, I fail to see any special circumstance to warrant such declaration of specific performance of the contract of service being made in favour of the appellant as was done by the trial court. I therefore entirely agree with the court below in setting aside the judgment of the trial
F court. In other words the court below was quite right in holding that the appellant's appointment was effectively brought to an end on 17-5-1991 notwithstanding failure of the respondent to give three months notice or payment of three months salary in lieu of notice. Therefore from the case presented before the trial court by the appellant the issue of the termination of his employment on 17-5-1991 and the fact that the termination
G was not done in accordance with the agreed procedure under clause 11 of the contract of service Exhibit 'G' by giving him three months notice or three months' salary in lieu of notice had been fully established by him. To say it differently, the termination of the appellant's employment was done in breach of the contract of service between him and the respondent
H resulting in the respondent being liable for damages for the breach. (pp. 1057 F / 1058 D)

4. In the present case, the damages as itemized in the appellant's amended statement of claim in paragraph 36 earlier quoted in this judgment shows quite plainly that the items being claimed are based on the fact that the
B appellant would have remained in the service of the respondent for about 14 years from 1991, the date of the termination of his employment, to 2005, the year he would have retired from the service. This position cannot be correct because that is not in accordance with the principle on which damages for wrongful termination of employment are assessed. In the
C case of *The Nigerian Produce Marketing Board v. Adewunmi* (1972) 11 SC 111 at 117; (1972) NSCC 662 at 665, this court (per Fatayi Williams JSC (as he then was) held-

"In a claim for wrongful dismissal the measure of damages is D prima facie the amount that the plaintiff would have earned had the employment., continued according to contract [see Beckham v. Drake (1849) 2 HLC 579 at pp. 607-608]. Where, however, the defendant, on giving the prescribed notice, has a right to terminate the contract before the end of E the term, the damages awarded, apart from other entitlements, should be limited to the amount which would have been earned by the plaintiff over the period of notice bearing in mind that it is the duty of the plaintiff to minimize the damage which he sustains by the wrongful dismissal."
F

See also *Western Nigeria Development Corporation v. Jimoh Abimbola* (1966) 1 All NLR 159;

Applying the law as laid down in these decisions on assessment of damages for wrongful dismissal or wrongful termination of employment as happened in the instant case, the appellant was only entitled
G to the amount of salaries and allowances he would have earned within the period of notice of three months he would have been entitled to under clause 11 of Exhibit 'G' containing the contract of service binding on the parties. As the appellant only pleaded his monthly salary of N2,500.00
H without pleading other monthly allowances he was entitled to, the court below was quite in order in awarding him three months salary in lieu of notice which came to the sum of N7,500.00 based on the evidence adduced

by the appellant himself. (p. 1060 B)

5. Although I am quite aware that it is not the practice of an appellate court to interfere with or disturb a finding of fact by a trial court, the appellate court is quite justified and in fact is enjoined by law to interfere with such findings where they are not supported by the evidence on record or where they are perverse or in violation of some essential principles of law or procedure so substantial enough to lead to a miscarriage of justice if left uncorrected. In the instant case, the judgment of the trial court is indeed very far from the evidence adduced before that court and as such the court below in exercise of its powers on appeal against that judgment, was duty bound to interfere by allowing the appeal and setting aside the judgment. That duty performed by the court below was perfectly sanctioned by the decisions of this court in *Adimora v. Ajuffo* (1988) 3 NWLR (pt.80) 1 and *Nkado v. Obiano* (1997) 5 NWLR (pt.503) 41 at 55-56.

In the final result this appeal fails and the same is hereby dismissed. (p. 1061 C)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Legal practitioners - Need to advice clients properly on damages for wrongful termination

That apart, it is settled law that in an action for termination of appointment where the court finds that the termination is wrongful, the proper measure of damages is what the employee would have earned within the period of notice required to properly bring the employment to an end together with other benefits by way of overtime, rent subsidy etc. in accordance with the terms of the contract of employment

If legal practitioners can come to terms with this true position of the law on the subject, clients' money and the courts' time would be saved by their honestly advising their clients accordingly and probably settling the matter out of court by demanding only what is legally due to their client from the employer in breach. In practice however, we see

these simple cases of ordinary master and servant relationship being turned into imaginary monsters in which compensation amounting to millions of Naira are claimed and sometimes, reinstatement in addition as in the instant case. So you have the client saddled with enormous bills in instituting and presenting such cases of wrongful termination of employment from the High court right up to this court only at the end to be told the bitter truth which his counsel could have told him much earlier and would have saved costs. (p. 1071 C)

2. Appeals - Proper issues to challenge

Looking generally at the appeal, it is important to note that learned counsel for the appellant has not really challenged the judgment of the Court of Appeal in this appeal. He is rather very busy justifying the judgment of the trial court without telling this court why the decision of the Court of Appeal on the issues raised is not sound in law and/or facts

For instance when one looks at the issue of award of damages, there is no specific ground of appeal challenging the award as made by the Court of Appeal neither have the issues shown any valid basis on which one could fault the assessment of damages by the Court of Appeal. It is not a waste of time to remind ourselves that while appeals before the court of Appeal challenge the decision of the trial court, a further appeal to the Supreme Court challenges the decision of the court of Appeal. When these are kept constantly in view we will definitely move the legal practice particularly as it pertains to appellate jurisdiction, forward and make same less stressful to the clients and the court.

(p. 1073 G)

3. Oral notice issue of oral notice - Was not pleaded by appellant

Learned counsel for the appellant has argued that this case is different from other cases of wrongful termination of appointment; that in the present case this court ought to determine the legal effect of oral notice of termination of appointment which learned counsel for the appellant contends is invalid. I however wish to remind counsel that the law simply states that both parties and the court are bound by the pleadings of

the parties and can never be allowed to go outside same in determining the issues in controversy between the parties, in the present case going through the pleadings, oral notice of termination was not made an issue in the proceeding so the trial court never decided it and any decision thereon therefore grounds to no issue.

Further still I hold the view that notice is notice whether in writing or oral provided both parties are not mislead as to what is going on. In the instant case, appellant knew and in fact accepted the fact that his appointment with the respondent was terminated on 17/5/1991 whether orally or in writing. (p. 1074 C)

REPRESENTATION

Counsel to the appellant was absent but served.

C.A. Ajuyah Esq. with him Emakpor Esq. for the respondent.

CASES REFERRED TO

Adimora v. Ajuffo (1988) 3 NWLR (pt.80) 1

Nkado v. Obiano (1997) 5 NWLR (pt.503) 41 at 55-56

Bankole v. N.B.C. (1968) 2 All NLR 371

Olaniyan v. University of Lagos (1985) 2 NWLR (pt.9) 599 at 612

Olaniyan v. University of Lagos (1985) 2 NWLR (pt.9) 559

Shitta-Bay v. Federal Public Service Commission (1981) 1 SC 40

Ewerami v. African Continental Bank Ltd (1978) 4 SC 99

Western Nigeria Development Corporation v. Jimoh Abimbola (1966) 1 All NLR 159

G.B. Ollivant (Nigeria) Limited v. Agbabiaka (1972) 2 SC 137

Nyong Emmanuel Obot v. Central Bank of Nigeria (1993) 8 NWLR (pt.310) 140 at 162

Onongwu V. M. N. P. (1989) 4 NWLR (pt 115) 296 at 309

Nigeria Producer Marketing Board v. Adewunmi (1972) NSCC 662 at 665

LEAD JUDGMENT BY MOHAMMED JSC

By a writ of summons dated 17-9-1996, the plaintiff instituted this action against the defendant for wrongful termination of employment.

Pleadings were duly filed and later amended by the parties before the plaintiffs claims came for hearing before the High Court of Justice of Delta State at Warn. In his amended statement of claim the plaintiff claimed in paragraph 36, the following reliefs -

“36. *WHEREFORE the plaintiffs claim as follows:-*

(a) *A declaration that the purported termination is wrongful, malicious null and void and of no legal effect whatsoever,*

(b) *The sum of N9,000,000.00 (nine million naira) which represents the plaintiffs salary from 1991-1996.*

(c) *The sum of N2,800,000.00 (two million eight hundred thousand naira) which represents Long Service Award entitlements.*

(d) *The sum of N200,000.00 (two hundred thousand naira) which represents Long Service Award entitlement.*

(e) *The sum of N16,200,000.00 (sixteen million two hundred thousand naira) which represents plaintiffs salary till he retires. Or in the alternative to relief (e) above.*

(f) *An order for this Honourable Court reinstating the plaintiff to his, rightful status which he would have presently occupied within the defendant company.”*

At the hearing of the case, only the appellant as plaintiff testified in support of his claims and no other witness was called by him. On the part of the defendant, its learned counsel saw no need in calling evidence in the matter thereby leaving the statement of defence bare and unsupported. After receiving addresses from the learned counsel of the parties, the learned trial judge, Narebor J. in his judgment delivered on 15-12-1998, found for the plaintiff, granting him all the reliefs claimed including the alternative relief of reinstating the plaintiff to his employment in the defendant company.

The defendant being dissatisfied with the judgment of the trial court, appealed against it to the Court of Appeal Benin Division. The appeal was heard on the respective briefs of argument filed by the parties and in a unanimous decision of that court delivered on 2-4-2001, the defendant's appeal was allowed. The judgment of the trial court in favour of the plaintiff was set aside and replaced with the award of N7,500.00 only,

as damages to the plaintiff for the wrongful termination of his employment by the defendant. The plaintiff being unhappy with the judgment of the Court of Appeal depriving him of the benefits of the judgment of the trial High Court in his favour, has now appealed to this court. The plaintiff who was the respondent before the Court of Appeal is now the appellant in this court while the defendant is now the respondent. The appellant's Notice of Appeal filed with the leave of the Court of Appeal granted on 11-6-2001, contains four grounds of appeal from which the following three issues for the determination of the appeal were formulated in the appellant's brief of argument.

"(1) Whether the learned justices of the Court of Appeal Benin Division were right in holding that the appellant's appointment was effectively brought to an end on 17-5-1991 notwithstanding failure of the respondent to give notice or payment of salaries in lieu of notice,

(2) Whether in all the circumstance of this case, the proper measure of damages the appellant is entitled to, is three months salaries in lieu of three months' notice.

(3) Whether failure of the justices of the Court of Appeal Benin Division, to adequately consider the legal consequence of oral termination in the circumstances of this case occasioned a miscarriage of justice."

In the respondent's brief of argument, its learned counsel submitted only two issues for determination. They are:

"i. Was the Court of Appeal wrong in holding that the plaintiffs employment was terminated on 17-5-1991?

ii. Was the Award of N7,500.00 to the plaintiff as damages for wrongful termination of the contract of employment wrong?"

The facts of the case which gave rise to the appeal in this court do not appear to be in dispute at all taking into consideration the position taken by the respondent as the defendant before the trial court not to call evidence to support its statement of defence thereby relying on the case made out by the appellant as plaintiff on his statement of claim and evidence. It is noted that pleadings can not constitute evidence and a defendant as in the instant case, who does not give evidence in support of his pleading or in challenge of the evidence of the plaintiff, is deemed to have accepted and rested his case on the facts adduced by the plaintiff not

withstanding his general traverse. In other words, averments in pleadings on which no evidence is adduced, are deemed to have been abandoned as mere averment without proof of facts pleaded and does not constitute proof of such facts unless such facts are admitted. See *Woluchem v. Gudi* (1981) 5 SC 291; *Basheer v. Samuel* (1992) 4 NWLR (pt.236) 491; *Uwegba v. Attorney General Bendel State* (1986) 1 NWLR (pt.16) 303; *Adegbite v. Ogunfaolu* (1990) 4 NWLR (pt.146) 578 at 590 and *FCDA v. Naibi* (1990) 3 NWLR (pt.138) 270 at 281. The case of the appellant as can be seen from the relevant paragraphs of his amended statement of claim at pages 26-34 of the record is as follows:

"4. The plaintiff avers that he was employed by the defendant company on the 8th day of October, 1979 as an Operation Supervisor in Water Transport Department, Ogunu. Plaintiff shall rely on this document at the trial. The plaintiff avers that the original of the said letter got lost along with other documents including the letter of suspension. Plaintiff shall found on the photocopies of the documents which were made before these documents got lost. Notice is also hereby given to the defendant to produce file copies of the aforementioned documents, xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx

9. The plaintiff avers that inspite of the fact he had performed very well and served the defendant company diligently with transparent honesty, he was served with a letter of suspension dated 11th day of March, 1991 based on allegation of theft of pipes valued at N300,000.00 (Three hundred thousand naira) the plaintiff shall rely on the said letter of suspension at the trial of this suit.

10. The plaintiff further avers that he -was never recalled to his job until the 17th day of May, 1991 when his appointment was terminated, although no letter of termination was given to him. The plaintiff shall rely on the letter of termination at the trial of this suit. xx

12. The plaintiff avers that his purported termination by the defendant company is predicated upon the alleged theft charge preferred against him.

13. The plaintiff shall lead evidence to establish and contend at the trial of this suit that his termination was wrongful, loaded with malice,

null and void and of no legal effect whatsoever.

14. The plaintiff further avers that the laid down procedure for terminating a senior staff in the defendant company was not adhered to in his case.

[illegible]

17. The plaintiff further avers that he was earning a basic monthly salary of N2,500.00 (two thousand five hundred naira) when his appointment was wickedly terminated.

xx

C 19. The plaintiff further avers that he was a senior staff of the
defendant company when his appointment was terminated. And all senior
staff of the defendant company are bound by the 'CONDITIONS OF SER-
VICE FOR SENIOR STAFF IN SHELL PETROLEUM DEVELOPMENT
COMPANY OF NIGERIA LIMITED.' The plaintiff hereby pleads and shall
D rely on the said conditions of service at the trial of this suit

xx

24. The plaintiff further avers that his children no longer attend the defendant company's clinic as a result of the malicious termination of his appointment.

xx

26. The plaintiff further avers that since his appointment was terminated summarily by the defendant company some times in 1991 F he has not gained any other employment since all the companies he has visited always asked for recommendation letter from former employer which the defendant company consistently refused to write. One of such letter from such company shall be relied upon at the trial.

27. The plaintiff avers that since his job was terminated by the defendant company he has been living at the mercy of relations and friends.

28. *The plaintiff further avers that as a result of the wrongful, callous and malicious termination of his appointment, his wife deserted him and none of his 7 (seven) children is presently attending school. This is a result of the plaintiffs inability to pay their school fees.*"

H In the defendant's amended statement of defence in paragraph 1, paragraph 10 of the plaintiffs statement of claim is one of the paragraphs

admitted by the defendant. In that paragraph of the statement of claim, the plaintiff now appellant had pleaded unequivocally, the termination of his appointment by the defendant on 17th day of May, 1991.

The case of the appellant as predicated on the pleadings and the evidence adduced by him is that he was employed by the respondent on 8-10-1979 as operations supervisor in the Transport Department where he rose to the post of a planning supervisor. He was given a long service award in 1989. However, on 11-3-1991, he was suspended from duty based on an allegation of theft of pipes. While he was on suspension, the appellant was summoned before the Head of Administration on 17-5-1991 where he was informed that his appointment had been terminated. He was not given any letter by the defendant to the effect that his appointment had been terminated. His appointment was terminated because of the allegation of stealing of pipes. The appellant's contract of service with the respondent is contained in a document Exhibit 'G' which the appellant alleged the respondent did not comply with in terminating his appointment. The appellant was on a monthly salary of N2,500.00 at the time his appointment was terminated. By the contract agreement, the appellant was entitled to three months notice or the payment of three months' salary in lieu of such notice on the termination of his employment. On these undisputed facts, the first issue for determination as submitted by the appellant is whether the learned justices of the Court of Appeal Benin Division were right in holding that the appellant's appointment was effectively brought to an end on 17-5-1991 notwithstanding failure of the respondent to give notice or payment of salaries in lieu of notice.

On the first issue for determination, the learned counsel for the appellant submitted that the respondent not having led any piece of evidence in support of its statement of defence, the facts contained therein on the authority of the cases of *Okafor v. Dumez (Nig) Limited* (1998) 13 NWLR (pt.580) 88 at 95 and *Gamboruma v. Borno* (1997) 3 NWLR (pt.495) 530 at 543, are deemed abandoned thereby leaving the evidence adduced by the appellant unchallenged. Learned counsel pointed out that in the termination of the appellant's employment, the respondent failed to comply with the conditions of employment binding on the parties as to the manner of the termination of the contract of employment. Citing

the case of Olaniyan v. University of Lagos (1985) 2 NWLR (pt.9) 599 at 605, learned counsel emphasized that the contract of service between the parties in this case being in writing, the termination of the appellant's appointment also ought to have been in writing and that in the absence of the letter of termination, the result ought to have been that there was no termination at all as found by the trial court. On the position of the law that a declaration to the effect that a contract of service still subsists will rarely be made, learned counsel for the appellant insists that the present case comes within the exceptions in special circumstances mentioned in the case of Chukwumah v. Shell Petroleum (1993) 4 NWLR (pt.289) 512 at 537.

Learned counsel to the respondent however referred to paragraphs 10, 13, 26, 27 and 28 of the appellant's Amended Statement of Claim, paragraphs 1, 5 and 6 of the respondents amended statement of defence and the evidence adduced by the appellant in support of the averments in the amended statement of claim and submitted that the fact that the appointment of the appellant was terminated on 17-5-1991, had been established by the appellant himself and admitted by the respondent. Some of the cases relied upon in support of this argument are Lewis & Peat (NRI) Limited v. Akhimien (1976) All NLR 365; Okagbue v. Romaine (1982) All NLR 111 and Solana v. Olusanya (1975) 6 SC 55 at 62. Learned counsel then observed that the appellant in his arguments in support of this issue, has not faulted any of the findings or pronouncements of the Court of Appeal of its reasons for allowing the appeal before it and setting aside the judgment of the trial High Court. He pointed out that although it is not the practice for any appellate court to interfere or disturb a finding of fact by a trial court, where the finding is not supported by evidence on record or where the finding is perverse, the appellate court has a duty to interfere if the decisions in Adimora v. Ajuffo (1988) 3 NWLR (pt.80) 1 and Nkado v. Obiano (1997) 5 NWLR (pt.503) 41 at 56, are taken into consideration. On the failure of the respondent to comply with the terms of Exhibit 'G' to terminate the employment of the appellant in writing by giving appropriate notice, learned counsel submitted that the failure to comply with Exhibit 'G' by the respondent amounted only to a breach of the contract of employment and no more because the termination of the

appellant's employment had brought to an end the relationship of master and servant between the appellant and the respondent.

In the determination of this issue, I need to emphasize the bindingness of the terms of the contract of service between the parties. **There is no doubt that the parties' freedom of contract carries with it the inevitable implication of sanctity of their contracts. This means that if any question should arise with respect to the contract, the terms in any documents which constitute the contract are, invariably, the guide to its interpretation. On this premise, the material question is; what did the parties in the instant case agree with respect to the termination of the contract of service? The answer to this question of course points to the provisions of Exhibit 'G' which provides in clause 11 as follows:-**

"11. You, or we, shall have the right at any time to terminate your employment under this letter by giving to the other not less than one month's notice in writing, or by paying one month's salary in lieu of notice. On the confirmation of your appointment, the period of notice shall be two months, or two months' salary in lieu of notice and on the completion of five years of service, the period of notice shall be three months or three months' salary in lieu of notice"

Clause 11 of Exhibit 'G' therefore gave both the appellant and the respondent equal rights to terminate the employment of the appellant at anytime by giving the prescribed notice or paying appropriate salary in lieu of notice. From the evidence adduced by the appellant who had served the respondent for a period of more than five years, the respondent ought to have given the appellant three months' notice or three months' salary in lieu of notice upon the termination of the appellant's employment. It is not in dispute between the parties that the appellant was neither given three months notice nor three months' salary in lieu of notice on the termination of employment by the respondent on 17-5-1991. This means the termination of the appellant's employment was in breach of the contract between the parties in Exhibit "G". What then is the appropriate remedy available to the appellant in law. While the trial High Court saw the existence of special circumstances in this case to justify granting the appellants relief of specific

performance of his contract of service by ordering his reinstatement to the service of the respondent, the court below on appeal before it against the decision of the trial High Court, saw otherwise.

This issue has been dealt with exhaustively in the judgment of the court below. **The traditional common law rule which has been adopted and applied in many decisions of our courts in this country is that the courts will not grant specific performance in respect of breach of contract of service.** In *Rigby v. Connon* (1884) 14 Ch. D.482, Jessel MR said:

“The courts have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreement of hiring and service, being the common relation of master and servant, or whether they are agreement for the purpose of pleasure, or for the purpose of specific pursuits, or the purpose of charity or philanthropy.”

In *Vince v. National Dock Labour Board* (1956) 1 All E.R.J, Viscount Kilmuir expressed the common law view that in the ordinary case of master and servant,

“... if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract.”

The position of the law therefore is that where there has been a purported termination of a contract of service, a declaration to the effect that the contract of service still subsists will rarely be made. See *Bankole v. N.B.C.* (1968) 2 All NLR 371 and *Olaniyan v. University of Lagos* (1985) 2 NWLR (pt.9) 599 at 612 where Oputa JSC had this to say on the subject of termination of master and servant relationship under a contract of service.

“The law regarding master and servant is not in doubt. There is also no doubt that the contract of master and servant is subject of both statutory and common law rules. By and large, the master can terminate the contract with his servant at anytime and for any reason or for no reason at all. But if he does so in a manner not warranted by the particular contract under review, he must pay damages for breach.”

As a general rule, reinstatement as sought by the appellant as one of his reliefs in the present case, is not ordinarily the remedy for

breach of contract of service. Specific performance or reinstatement is generally not the remedy in respect of personal service. Special circumstances will be required before such a declaration is made and its making will usually be in the discretion of the court. Several decisions of this court in which this state of the law was dealt with include *Olaniyan v. University of Lagos* (1985) 2 NWLR (pt.9) 559; *Shitta-Bay v. Federal Public Service Commission* (1981) 1 SC 40 and *Ewerami v. African Continental Bank Ltd* (1978) 4 SC 99. **Such special circumstances have been held to arise where the contract of employment has a legal or statutory flavour thus putting it over and above the ordinary master and servant relationship. Equally so where a special legal status such as a tenure of public office is attached to the contract of employment. While it cannot be said that what may amount to special circumstances is exhaustive, in the present case having regard to the evidence on record, I fail to see any special circumstance to warrant such declaration of specific performance of the contract of service being made in favour of the appellant as was done by the trial court. I therefore entirely agree with the court below in setting aside the judgment of the trial court, In other words the court below was quite right in holding that the appellant’s appointment was effectively brought to an end on 17-5-1991 notwithstanding failure of the respondent to give three months notice or payment of three months salary in lieu of notice.**

Although by not leading any evidence to support its amended statement of defence the respondent as defendant at the trial High Court was deemed to have rested its case on the case as proved by the appellant as plaintiff on his pleadings and evidence, it is quite clear from several paragraphs of the Amended Statement of Claim of the appellant earlier quoted in this judgment, particularly paragraph 10 thereof which unambiguously pleaded the termination of the appellant’s employment on 17-5-1991, the appellant himself had accepted the fact that he was no longer in the service of the respondent. This fact which was admitted by the respondent in paragraph one of its Amended Statement of Defence was further confirmed in the appellant’s evidence-in-chief and under cross examination. **Therefore from the case presented before the trial court**

by the appellant the issue of the termination of his employment on 17-5-1991 and the fact that the termination was not done in accordance with the agreed procedure under clause 11 of the contract of service Exhibit 'G' by giving him three months notice or three months' salary in lieu of notice had been fully established by him. To say it differently, the termination of the appellant's employment was done in breach of the contract of service between him and the respondent resulting in the respondent being liable for damages for the breach.

This brings me to the second and third issues for determination in this appeal which are whether in all the circumstance of this case, the proper measure of damages the appellant is entitled to, is three months salaries in lieu of three months notice and whether failure of the court below to adequately consider the legal consequence of oral termination in the circumstances of this case occasioned a miscarriage of justice. According to the appellant the proper measure of damages he was entitled to is as contained in the alternative judgment of the trial court being the sum of N16,200,000.00 representing appellant's salaries from 1991 until retirement consistent with the subsisting applicable conditions of service. By this stand, the appellant seemed to have put aside the fact of the termination of his employment relying on the case of Latchford Premier Cinemas Ltd. v. Ennion & Paterson (1931) 2 CH 409. Learned counsel to the appellant submitted that the court below was wrong in setting aside the damages awarded to the appellant by the trial court because this case is distinguishable from the cases of Western Nigerian Development Corporation v. Abimbola (1966) 1 All NLR 159 and G.B. Ollivant (Nigeria) Ltd v. I.B. Agbabiaka (1972) 2 SC 137 at 144, relied upon by the court below. Concluding his argument without visiting the appellant's complain of the alleged miscarriage of justice in the decision of the court below against the appellant, learned counsel pointed out that this case stands on its own and same is bravely different from the recognizable facts of all decided cases of master and servant relationship ever decided by our courts and urge the court to allow the appeal.

For the respondent, it was contended that the argument of the appellant predicated on the view that after the appellant's employment

was on his own showing terminated on 17-5-1991, he continued to remain in the employment of the respondent, entitled to salaries and allowances until his retirement, is not the correct position in law. Referring to the judgment of the court below on the question of damages, learned counsel agreed with that court that having found the trial court did not award damages on any correct legal basis, the court below was under a duty to interfere with the award of damages and make its own assessment on the evidence on record as was done in Ekpe v. Fagbemi (1978) All NLR 107; Obere v. Eku Baptist Hospital (Board of Management) (1978) All NLR 155. In supporting the decision of the court below to award the appellant N7,500.00 being his three months salary in lieu of notice as provided in the contract of service Exhibit *G', learned counsel said that the court in doing so was guided by the principles laid down in the decisions of this court on assessment of damages in cases of wrongful termination of employment. The cases are Western Nigeria Development Corporation v. Jimoh Abimbola (1966) 1 All NLR 159; G.B. Ollivant (Nigeria) Limited v. Agbabiaka (1972) 2 SC 137 and Nigerian Produce Marketing Board v. Adewunmi (1972) 1 All NLR (pt.2) 433, which are not only applicable to the ordinary common law case of master and servant relationship as disclosed in the present case but also binding on the court below.

In the present case, the damages as itemized in the appellant's amended statement of claim in paragraph 36 earlier quoted in this judgment shows quite plainly that the items being claimed are based on the fact that the appellant would have remained in the service of the respondent for about 14 years from 1991, the date of the termination of his employment, to 2005, the year he would have retired from the service. This position cannot be correct because that is not in accordance with the principle on which damages for wrongful termination of employment are assessed. In the case of The Nigerian Produce Marketing Board v. Adewunmi (1972) 11 SC 111 at 117; (1972) NSCC 662 at 665, this court (per Fatayi Williams JSC (as he then was) held-

"In a claim for wrongful dismissal the measure of damages is prima facie the amount that the plaintiff would have earned had the employment., continued according to contract [see Beckham v. Drake (1849) 2 HLC 579 at pp. 607-608]. Where, however, the defendant, on

giving the prescribed notice, has a right to terminate the contract before the end of the term, the damages awarded, apart from other entitlements, should be limited to the amount which would have been earned by the plaintiff over the period of notice bearing in mind that it is the duty of the plaintiff to minimize the damage which he sustains by the wrongful dismissal.”

See also **Western Nigeria Development Corporation v. Jimoh Abimbola (1966) 1 All NLR 159**; **G.B. Ollivant (Nigeria) Limited v. Agbabiaka (1972) 2 SC 137** and **Nyong Emmanuel Obot v. Central Bank of Nigeria (1993) 8 NWLR (pt.310) 140 at 162**. **Applying the law as laid down in these decisions on assessment of damages for wrongful dismissal or wrongful termination of employment as happened in the instant case, the appellant was only entitled to the amount of salaries and allowances he would have earned within the period of notice of three months he would have been entitled to under clause 11 of Exhibit ‘G’ containing the contract of service binding on the parties. As the appellant only pleaded his monthly salary of N2,500.00 without pleading other monthly allowances he was entitled to, the court below was quite in order in awarding him three months salary in lieu of notice which came to the sum of N7,500.00 based on the evidence adduced by the appellant himself.**

Although I am quite aware that it is not the practice of an appellate court to interfere with or disturb a finding of fact by a trial court, the appellate court is quite justified and in fact is enjoined by law to interfere with such findings where they are not supported by the evidence on record or where they are perverse or in violation of some essential principles of law or procedure so substantial enough to lead to a miscarriage of justice if left uncorrected. In the instant case, the judgment of the trial court is indeed very far from the evidence adduced before that court and as such the court below in exercise of its powers on appeal against that judgment, was duty bound to interfere by allowing the appeal and setting aside the judgment. That duty performed by the court below was perfectly sanctioned by the decisions of this court in **Adimora v. Ajuffo (1988) 3 NWLR (pt.80) 1**

and Nkado v. Obiano (1997) 5 NWLR (pt.503) 41 at 55-56.

In the final result this appeal fails and the same is hereby dismissed.

The respondent shall have N10,000.00 costs against the appellant.

ONU JSC

Having been privileged to read before now the judgment of my learned brother Mahmud Mohammed, JSC just read, I entirely agree with him that the appeal fails and it is dismissed by me.

In an Amended Statement of Claim, the Appellant then as Plaintiff claimed against the Respondent then Defendant, the following reliefs:

(a) A declaration that the purported termination is wrongful, malicious, null and void and of no legal effect whatsoever.

(b) The sum of N9,000,000.00 (Nine million Naira) which represents the Plaintiff salary from 1991 to 1996.

(c) The sum of N2,800,000.00 (Two Million eight hundred thousand Naira) which represents long service award entitlements.

(d) The sum of N200,000.00 (Two hundred thousand Naira) which represents long service award entitlement.

(e) The sum of N16,200,000.00 (Sixteen million, two hundred thousand Naira) which represents Plaintiffs salary till he retires, or in the alternative to relief (e) above.

(f) An order of this Honourable Court reinstating the Plaintiff to his rightful status which he would have presently occupied within the defendant company.”

Be it noted that relief (f) is not claimed in the alternative which means in effect that Appellant is to be reinstated after being awarded relief (e) i.e N16,200,000.00 by way of salary till he retires - fatuous as it appears.

In adding a few words of mine in expatiation, I wish to comment on the case through the three issues formulated at the Appellant’s instance vis - a - vis the three submitted as arising by the Respondent in its brief, are as follows: -

“(1) *Whether the learned Justices of the Court of Appeal Benin*

Division were right in holding that the Appellant's appointment was effectively brought to an end on 17/5/1991 notwithstanding failure of the respondent to give notice or payment of salaries in lieu of notice.

(2) Whether in all the circumstances of this ease, the proper measure of damages the appellant is entitled to, is three months salaries in lieu of three months' notice.

(3) Whether failure of the Justices of the Court of Appeal Benin Division, to adequately consider the legal consequence of oral termination in the circumstances of this case occasioned a miscarriage of justice.”

The only two issues proffered at Respondent's instance for determination on the other hand, are:

“i. Was the Court of Appeal wrong in holding that the Plaintiffs employment was terminated on 17/5/1991?

D ii. Was the Award of N7,500 to the Plaintiff as damages for wrongful termination of the contract of employment wrong?

The facts of the case have admirably been set out in the judgment of my learned brother I need any repetition herein except to say that I agree with him entirely.

E In sum, the case of the Appellant as Plaintiff as can be gathered from the relevant paragraphs of his Amended Statement of Claim at pages 26-34 of the record may be stated as follows:

“4. The plaintiff avers that he was employed by the defendant company on the 8th day of October, 1979 as an operation Supervisor in Water Transport Department Ogunu. The Plaintiff shall rely on this document at the trial. The Plaintiff avers that the original of the said letter got lost along with other documents including the letter of suspension. Plaintiff shall found on the photocopies of the documents which were made before these documents got lost. Notice is also hereby given to the defendant to produce file copies of the aforementioned documents

9. The plaintiff avers that inspite of the fact he had performed very well and served the defendant company diligently with transparent honesty, he was served with a letter of suspension dated 11th March, 1991 based on allegation of theft of pipes valued at N300,000.00 (Three hundred thousand naira) the plaintiff shall rely on the said letter of suspension at

the trial of this suit.

10. The plaintiff further avers that he was never recalled to his job until the 17th day of May, 1991 when his appointment was terminated, although no letter of termination was given to him. The plaintiff shall rely on the letter of termination at the trial of this suit.

xx

12. The plaintiff avers that his purported termination by the defendant company is predicated upon the alleged theft charge preferred against him. (Underlining is mine for emphasis).

13. The plaintiff shall lead evidence to establish and contend at the trial of this suit that his termination was wrongful, loaded with malice, null and void and of no legal effect whatsoever.

xx

14. The plaintiff further avers that the laid down procedure for terminating a senior staff in the defendant company was not adhered to in his case,

xx

17. The plaintiff further avers that lie was earning a basic monthly E salary of N2,500.00 (two thousand five hundred naira) when his appointment was wickedly terminated.

XX

19. The plaintiff further avers that he was a senior staff of the defendant company when his appointment was terminated. And all senior staff of the defendant company are bound by the 'CONDITIONS OF SERVICE FOR SENIOR STAFF IN SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED.' The plaintiff hereby pleads and shall rely on the said conditions of service at the trial of this suit.

24. The plaintiff further avers that his children no longer attend the defendant company's clinic as a result of the malicious termination of his appointment,

xx

26. The plaintiff further avers that since his appointment was terminated summarily by the defendant company sometimes in 1991 he has not gained any other employment since all the companies he has visited always asked for recommendation letter from former employer

which the defendant company consistently refused to write one of such letter (sic) from such company shall be relied upon at the trial.

27. *The plaintiff avers that since his job was terminated by the defendant company he has been living at the mercy of relations and friends.*

B 28. *The plaintiff further avers that as a result of the wrongful, callous and malicious termination of his appointment, his wife deserted him and none of his 7 (seven) children is presently attending school. This is a result of the plaintiffs inability to pay their school fees."*

C In what I consider as an exhaustive and unimpeachable consideration of the issues vis - a - vis the pleadings the parties herein fought in this case in the courts below, I entirely share my learned brother - Mohammed JSC's views that his (Appellant's) case lacks any iota of merit. For instance, in paragraphs 9 and 10 of the Statement of Claim where Appellant stated he was suspended on 11th March, 1991 on an allegation D of stealing pipes valued N300,000.00, he was never recalled to his post until on 17th May, 1991 when it was finally terminated orally. Although no letter by the Respondent manifesting its intention to terminate Appellant's appointment as employed, an oral termination as employed, the Appellant E conceded his appointment could no longer persist.

Exhibit G. which clearly governed the parties contractual relationship of master and employee/servant whether it stipulated orally or written notice, rightly brought same in respect of salary in lieu thereof to F an end devoid of controversy. See *Nigerian Produce Marketing Board v. Adewunmi* (1972) 11 SC 111 at 117. Hence, the sum of N7,500 the Court of Appeal awarded the Appellant on the basis of N2, 500 per month for three months in lieu of notice was justified and ought not to be disturbed. In other words, the decision ought not, in my view, to be impeached or G impugned.

For these reasons and the overwhelming ones set out in the judgment of my learned brother Mohammed, JSC I too dismiss this appeal and make the same orders as to costs.

I have read before now, the judgment of my learned brother Mohammed JSC just delivered. I agree with him that there is no merit in the appeal and it ought be dismissed.

The relationship between the appellant and the respondent is that of master and servant. The contract of service which binds the parties is B contained in Exhibit 'G'. By clauses 11 and 12 of Exhibit 'G', either party could terminate the employment by giving three months notice in writing or payment of three months salary in lieu of notice. The appellant, by himself, testified in the trial court that he appointment with the respondent was terminated on 17th May 1991; his ID card was taken away from him and he C stopped going to work. This evidence was not challenged or contradicted by the respondent. It is therefore not in any doubt that the appellant was aware that as from the 17th of May 1991, his employment was at an end.

It is not in dispute that from the wording of clauses 11 and 12 D of the contract of service Exhibit 'G' the termination of employment by either party must be in writing. The appellant testified that his employment was terminated by the respondent orally and not in writing. This was not denied or disputed by the respondent. Clauses 11 and 12 of Exhibit 'G' E did not say that any reasons must be given in the notice of termination, and the appellant knew that his appointment was terminated orally on 17th May 1991 and he stopped going to work after that date. Therefore the only thing the respondent did wrong was failure to give the appellant notice of F termination in writing. This makes the termination wrongful and no more. And since their relationship is only that of master and servant without any statutory flavour, (See *Olaniyan V. University of Lagos* (1985) 2 NWLR (pt. 9) '599) the appellant can only be entitled to salary in lieu of notice which the respondent failed to give him in compliance with Exhibit 'G' G. The principle of assessment of damages for breach of contract generally is restitutio in integrum - that is the plaintiff shall be restored as far as money can do it, into the correct position he would have been if the breach had not occurred. It is not intended to give the plaintiff a windmill on all claims H for damages. See *Onongwu V. M. N. P.* (1989) 4 NWLR (pt 115) 296 at 309; *Nigeria Producer Marketing Board v. Adewunmi* (1972) NSCC 662 at 665. The appellant was on salary of N2,500.00 per month at the time of his termination. He was therefore entitled to three months salary in lieu

of notice according to Exhibit 'G' which amounted to N7,500.00 This was what the Court of Appeal granted him and I find that the court was right.

For the above and the more detailed reasons given in the leading judgment of my learned brother Mohammed, I also find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal. I abide by the order of costs made in the leading judgment.

OGUNTADE JSC

The appellant was the plaintiff at the Warri High Court of Delta State where he claimed against the respondent for the following reliefs:

"36. WHEREFORE the plaintiffs claim as follows:

(a) A declaration that the purported termination is wrongful, malicious, null and void and (of) no legal effect whatsoever.

(b) The sum of N9,000,000.00 (Nine million Naira) which represents the plaintiffs salary from 1991-1996.

(c) The sum of N2,800,000.00 (Two million, eight hundred thousand Naira) which represents Long Service Award entitlements.

(d) The sum of N200,000.00 (Two hundred Thousand Naira) which represents Long Service Award entitlement.

(e) The sum of N16,200,000.00 (sixteen million, two hundred thousand Naira) which represents plaintiffs salary till he retires.

Or in the alternative to relief (e) above,

(f) An order for this Honourable Court reinstating the plaintiff to his rightful status which he would have presently occupied within the defendant company."

The parties filed and exchanged pleadings after which the suit was heard by Narebor J. On 15-12-98, the trial judge granted all the reliefs claimed. Dissatisfied, the respondent appealed to the Court of Appeal, Benin Division (hereinafter called the 'court below'). On 2-4-2001, the court below in its judgment allowed the appeal. The judgment of the trial court was set aside and plaintiff was granted only N7,500.00 damages being three months salary due to him in lieu of three months notice to bring the employment to an end. The plaintiff has brought a final appeal before this Court. In his appellant's brief, the issues for determination in

the appeal were stated to be these:

"(1) Whether the learned Justices of the Court of Appeal Benin Division were right in holding that the appellant's appointment was effectively brought to an end on 17-5-1991 notwithstanding failure of the respondent to give notice or payment of salaries in lieu of notice.

(2) Whether in all the circumstance of this case, the proper measure of damages the appellant is entitled to, is three months salaries in lieu of three months' notice.

(3) Whether failure of the Justices of the Court of Appeal Benin Division, to adequately consider the legal consequence of oral termination in the circumstances of this case occasioned a miscarriage of justice."

My learned brother, Mohammed JSC, has in the lead judgment exhaustively considered each of the above three issues identified for determination. I entirely agree with him. This appeal is in an area where the law may be regarded as well settled. The plaintiff had pleaded in paragraph 10 of his Statement of Claim that his employment was terminated on 17-05-91. The defendant in its Statement of defence admitted this averment. That being the position, the date of termination of plaintiff's employment was not an issue before the trial court. This situation makes the appellant's issue three completely otiose and irrelevant. Whether plaintiff's termination was by oral notice or in writing or the gates of the defendant's office were just shut against the appellant, it ceased to be material on the state of pleadings. The defendant as the employer manifested its intention not to keep plaintiff in its employment from 17-05-91 and the plaintiff recognized and accepted that fact.

The measure of damages where a master brings the contract of employment to an end without giving the requisite notice as stipulated in the parties' contract is the salary the employee would have earned had the employment been determined as stipulated in the contract of employment - see *Nigerian Produce Marketing Board v. Adewunmi* (1972) 11 SC.111 at 117.

Under exhibit 'G' the contract between the parties, either of them could bring the relationship to an end by three months notice. The plaintiff was not given the due notice. At the time the employment was brought to an end, plaintiffs monthly salary was £42,500.00. The damages the

plaintiff could be awarded was his salary for three months which came to N7,500.00 as awarded by the court below.

On the state of the law, the plaintiff/appellant was not entitled to more than N7,500.00 as was granted him.

B This appeal has no merit. I would also dismiss it with N10,000.00 costs in favour of the respondent as in the lead judgment of my learned brother Mohammed JSC.

ONNOGHEN JSC

C By an amended Statement of claim, appellant claimed against the respondent, the following reliefs:

(a) A declaration that the purported termination is wrongful, malicious, null and void and of no legal effect whatsoever.

D (b) The sum of N9,000,000.00 (Nine million Naira) which represents the plaintiff salary from 1991 to 1996.

(c) The sum of N2,800,000.00 (Two million, eight thousand naira) which represents long service award entitlements.

E (d) The sum of N200,000.00 (Two hundred thousand naria) which represents long service award entitlement.

(e) The sum of N16,200,000.00 (Sixteen million, two hundred thousand Naira) which represents plaintiff's salary till he retires, or in the alternative to relief (c) above.

F (f) An order of this Honourable Court reinstating the plaintiff to his rightful status which he would have Presently occupied within the defendant company

G It should be noted that relief (f) is not claimed in the alternative, which means in effect that appellant is to be reinstated after being awarded relief (e) which is the sum of N6,200,000.00 by way of salary till he retires. The question is after being awarded relief (e) (salary till retirement) will it not be double compensation reinstating the appellant in the employment of the respondent. This is one of the funny aspects of this worthless appeal.

H Appellant testified and called no witness while the respondent rested its case on that of the appellant.

The facts of the case are very simple and straightforward.

Appellant was an employee of the respondent until 17/5/91 when his appointment was terminated by the respondent without written notice of termination nor payment of three months salaries in lieu of notice.

B Both parties agree that exhibit c contains the terms of the contract of employment. Both parties also agree from the pleadings that appellants appointment was terminated on 17/5/91 without notice neither was appellant paid salary in lieu thereof. Appellant subsequently sued the respondent claiming the reliefs earlier reproduced in this judgment. C The trial court entered judgment for the appellant by holding that the employment of the appellant still subsists and that he be reinstated or in the alternative paid the sum of N16,200,000.00 (Sixteen million two hundred thousand Naira) only. The respondent was not happy with that judgment so it appealed to the Court of Appeal, Benin division which D court set aside the judgment of the trial court and awarded the sum of N7,500.00 damages being three months salaries in lieu of notice to the appellant for wrongful termination of appointment. Appellant is dissatisfied with that judgment and has consequently appealed to this court. E

Learned counsel for the appellant has submitted three issues for determination which, if properly looked at amount to only two issues particularly as issue No.3 can be taken along with issue No.1 because they are virtually the same. The issues are as follows:-

F “(1) *Whether the learned Justices of the Court of Appeal, Benin - Division were right in holding that the appellant's appointment was effectively brought to an end on 17/5/1991 notwithstanding failure of the respondent to give notice or payment of salaries in lieu of notice.*

G (2) *Whether in all the circumstance of this Case, the proper measure of damages the Appellant is entitled to, is three months Salaries in lieu of three months notice.*

H (3) *Whether failure of the Justices of the Court of Appeal Benin Division, to adequately consider the legal consequence of oral termination in the circumstances of this case occasioned a miscarriage of justice.”*

In an action for termination of appointment, two basic issues

call for determination. These are:

(a) Whether the appointment was terminated or, in any event, brought to an end by either of the parties involved in the relationship, in accordance with the terms of the contract of employment. If the answer to that issue is in the positive, then that is the end of the case, but if negative, the second then comes to be determined, that is:

(b) What is the measure of damages for the wrongful termination of appointment.

It is however not uncommon to find three or five issues being formulated in an appeal on an action for wrongful termination of appointment.

That apart, it is settled law that in an action for termination of appointment where the court finds that the termination is wrongful, the proper measure of damages is what the employee would have earned within the period of notice required to properly bring the employment to an end together with other benefits by way of overtime, rent subsidy etc in accordance with the terms of the contract of employment

If legal practitioners can come to terms with this true position of the law on the subject, clients' money and the courts' time would be saved by their honestly advising their clients accordingly and probably settling the matter out of court by demanding only what is legally due to their client from the employer in breach. In practice however, we see these simple cases of ordinary master and servant relationship being turned into imaginary monsters in which compensation amounting to millions of Naira are claimed and sometimes, reinstatement in addition as in the instant case. So you have the client saddled with enormous bills in instituting and presenting such cases of wrongful termination of employment from the High court right up to this court only at the end to be told the bitter truth which his counsel could have told him much earlier and would have saved costs.

In the present case both parties agree in the pleadings and there is evidence on record that appellant's appointment was terminated by the respondent on 17/5/91. In paragraphs 10,13,26,27 and 28 of the amended statement of claim, appellant pleaded as follows:-

"10 The Plaintiff further avers that he was never recalled to his job until the 17th day of May, 1991 when his appointment, was terminated, although no letter of termination was given to him. The Plaintiff shall rely on the letter of termination at the trial of this suit".

13. The Plaintiff shall lead evidence to establish and contend at the trial of this suit that his termination was wrongful, loaded with malice, null and void and of no legal effect whatsoever.

26. The Plaintiff further that since his appointment was terminated summary the Defendant company sometimes in 1991 he has not gained any other employment since all the companies he visited always asked for recommendation letter from former employer which the Defendant company consistently to write. One of such Setters from such company shall be relied upon at the trial.

27. The Plaintiff avers that since his Job was has been living at the mercy of relations

28. The Plaintiff further avers that as a result of the wrongful, callous and malicious termination of his appointment, his wife deserted him and none of his 7 (seven) children is presently attending school".
Emphasis supplied.

From the case as put up in the Amended statement of claim and reproduced, inter alia, supra, there is no doubt appellant knew that his appointment with the respondent was terminated either rightly or wrongfully and that appellant accepted the fact of his termination hence his going about searching for new employment. It does not matter, at this stage, whether in terminating his appointment appellant was given notice or not the fact being that the relationship of master and servant had been brought to an end by the action of the respondent. The issue of giving of notice or absence of same comes into play when considering whether the termination is in accordance with the terms of the contract of employment, in this case exhibits G. In the instant case, both parties agree that either party could end their relationship by giving to the other three months notice of termination or pay three months salaries in lieu thereof. In the present case, no written notice of termination was given by the respondent neither was appellant paid three months

salaries in lieu of notice. In law, that is why appellant is complaining of wrongful termination of appointment because his appointment with the respondent was not brought to an end in accordance with the terms and conditions stipulated in exhibit G. It is clear that the termination of the appointment of the appellant in all circumstances of his case is wrongful as found by the court of Appeal and I agree with that finding.

To me it does not matter whether appellant was given notice in writing or oral (notice is notice) what is important is whether the respondent had demonstrated clearly by action that the services of the appellant are no longer required by the respondent. This fact is very clear from the evidence in that respondent retrieved the identity card of the appellant without which appellant can neither enter the premises of the respondent nor work for it; his salaries and other entitlements were stopped after being told that his appointment had been terminated, etc and appellant started looking for an alternative job.

On the issue of damages, the trial court proceeded erroneously to deal “with the issue as if the termination of the appointment of the appellant was not effective. The Court of Appeal was therefore right in holding that *“suffices for me to say that from the pleadings, the evidence adduced and the established facts, the findings of the lower court on the issue of damages in this case have no legal bases.”* That being the case, I hold the view that the court of Appeal was very correct in interfering with the award made by the trial court and thereby made a correct and proper assessment of damages according to law - see vs.

Fagbemi (1970) All NLR 107;

It is clear on the basis of exhibit G and the authorities of Western Nig. Devp. Corp. vs. Abimbola (1966) 1 ANLR 159; G.B. Ollivant (Nig). Ltd vs. Agbabiaka (1972) 2 S.C. 137, that appellant is entitled to three months salaries in lieu of notice as contained in the said exhibit G -contract of employment.

Looking generally at the appeal, it is important to note that learned counsel for the appellant has not really challenged the judgment of the Court of Appeal in this appeal. He is rather very busy justifying the judgment of the trial court without telling this court why the deci-

sion of the Court of Appeal on the issues raised is not sound in law and/or facts

For instance when one looks at the issue of award of damages, there is no specific ground of appeal challenging the award as made by the Court of Appeal neither have the issues shown any valid basis on which one could fault the assessment of damages by the Court of Appeal. It is not a waste of time to remind ourselves that while appeals before the court of Appeal challenge the decision of the trial court, a further appeal to the Supreme Court challenges the decision of the court of Appeal. When these are kept constantly in view we will definitely move the legal practice particularly as it pertains to appellate jurisdiction, forward and make same less stressful to the clients and the court.

Learned counsel for the appellant has argued that this case is different from other cases of wrongful termination of appointment; that in the present case this court ought to determine the legal effect of oral notice of termination of appointment which learned counsel for the appellant contends is invalid. I however wish to remind counsel that the law simply states that both parties and the court are bound by the pleadings of the parties and can never be allowed to go outside same in determining the issues in controversy between the parties, in the present case going through the pleadings, oral notice of termination was not made an issue in the proceeding so the trial court never decided it and any decision thereon therefore grounds to no issue.

Further still I hold the view that notice is notice whether in writing or oral provided both parties are not mislead as to what is going on. In the instant case, appellant knew and in fact accepted the fact that his appointment with the respondent was terminated on 17/5/1991 whether orally or in writing.

In conclusion I too find no merit in this appeal which is accordingly dismissed with costs as assessed and fixed in the lead judgment of my learned brother MOHAMMED JSC.

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