

SUPREME COURT OF NIGERIA

9TH MARCH, 2007 SC. 242\2003

**CORAM:- I. L. KUTIGI CJN, A. I. KATSINA-ALU, N. TOBI,
D. MUSDAPHER, S. A. AKINTAN, JJSC**

AUGUSTINE MAIKYO APPELLANT

AND

1. W. E. ITODO

2. LOCAL GOVT. SERVICE

COMMISSION, BENUE STATE

3. J. S. EWACHE

..... RESPONDENTS

4. AUDITOR-GENERAL, LOCAL GOVT.

AUDIT BENUE STATE

5. HON. ATTORNEY-GENERAL,

BENUE STATE

MASTER & SERVANT - Retirement - Decision to retire appellant - Is based on the Military Administrator's directive - Pursuant to s.1 Public Officers Act (H1)

MASTER & SERVANT - Fair hearing - Misappropriation of funds - Retirement - Allegation that appellant was not given fair hearing - By the Investigation Committee before being retired - Has no foundation (H2)

TRIBUNALS - Employee - Allegation of a criminal nature - Falling within statutory jurisdiction of the appropriate authority - Was properly determined - Without prior recourse to court (H3)

FACTS

The plaintiff/appellant was a Senior Personnel Officer on Grade Level 10 employed by the Local Government Service Commission of Benue State. His appointment was a permanent and pensionable one. Between 1992 and 1993, he was appointed to serve as the Secretary of the Market Reorganisation Construction Committee. There were four

other members in that Committee. Appellant was granted an impress of N92,000 for the assignment. He claimed that he used that amount for the Committee's duty. But in the account presented by him dates on the purchase receipts he presented revealed that those items were bought before the date the impress of N92,000 was given to him. A Committee set up by the State Government to investigate the activities of Local Governments carried out its assignment and submitted its report. A Government White Paper was published in December 1996, which contained the Government's views and decisions. Appellant was directed to refund the N92,000 for failing to rehabilitate the market in issue. He was retired from service vide a letter.

Aggrieved, appellant filed a suit before the Makurdi High Court against the defendants/respondents. He claimed inter alia, that his termination and compulsory retirement is null and void for not being in accordance with the law. He sought an order of reinstatement and that the findings of the investigation panel/the White Paper be set aside. The trial court dismissed appellant's claim in its entirety. His appeal to the Court of Appeal was also dismissed. Appellant has further appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(a) Whether the plaintiff/appellant was given a fair hearing before his appointment was terminated and subsequently converted to retirement, having regard to all the facts and circumstances of this case.

(b) Whether the non-production of the whole of the white paper containing government's views and recommendations in respect of this case was fatal to the appellant's case as held by the lower court having regard to the fact that all facts relevant to this case were admitted in evidence.”

HELD (Unanimously dismissing the appeal **AKINTAN JSC**)

Retirement - Decision to retire appellant

1. It is clear from the contents of the letter, Exhibit A6, that the decision to retire the appellant was based on a directive from the then Military Administrator of Benue State pursuant to the powers conferred on him

by section 1(1) of the *Public Officers (Special Provisions) Act*, Cap. 381, Laws of the Federation 1990. The said section 1 (1) of the Act provides as follows:

“1. (1) *Notwithstanding anything to the contrary in any law, the appropriate authority if satisfied that-*

(a) *It is necessary to do so in order to facilitate improvements in the organization of the department or service to which a public officer belongs; or*

(b) *By reason of age or ill health or due to any other cause a public officer has been inefficient in the performance of his duties; or*

(c) *The public officer has been engaged in corrupt practices or has in any way corruptly enriched himself or any other person; or.*

(p. 1375 A)

Fair hearing - Misappropriation of funds

2. The allegation that the appellant was not given a fair hearing cannot stand in that his defence that he had retired the amount he collected was not supported by the documents he filed in support of his contention that he spent the money for the job for which the money was given to him. This is because there is a presumption to the effect that the money he collected was to be spent on a job he was to carry out and not for a job he had carried out on behalf of his employer. If his case was that he had incurred the expenses before he received the money, he ought to have made that clear as at the time he filed Exhibit C5 and not wait till after the discovery by the Committee. The findings of the Committee, as reflected in the White Paper is therefore justifiable and the allegation by the appellant that he was not given a fair hearing is totally without any foundation. (p. 1378 B)

Employee - Allegation of a criminal nature

3. The contention that the allegation made against the appellant, being criminal in nature, the disciplinary action taken against him should not have been embarked upon until after his trial by a competent court is also untenable. This is because what the appropriate authority needed to as-

certain against an officer before taking necessary action under section 1 (1) of the Act include showing that the action to be taken would facilitate improvement in the organization, or that the general conduct of the public officer in relation to the performance of his duties has been such that his further or continued employment would not be in the public interest.

In the instant case, the appropriate authority's decision on the appellant is covered by and within the provisions of the Act. (p. 1378 F)

C **NOTABLE POINTS OF INTEREST** **AKINTAN JSC**

1. Attitude of court to an ouster clause

Chapter IV of the Constitution dealing with Fundamental Rights is suspended for the purposes of the Act in section 3 (4) of the said Act. There is no doubt that section 3(3) of the Act creates an ouster clause in that the rights of an aggrieved person to challenge actions taken by the appropriate authority under the Act are expressly taken away by the provision.

The attitude of the courts to such provisions was recently extensively considered by me in a recent decision in *Inakoju & Ors. V. Adeleke & Ors.* (unreported, Suit No. SC 272/2006 delivered on 12th January, 2007). I stated the position of the law in the matter, *inter alia*, as follows in the said case:

"The attitude of the courts to such provisions is that they are regarded as an aberration, outrageous provision and one that should be treated with extreme caution since they are regarded as unwarranted affront and unnecessary challenge to the jurisdiction of the courts which the courts guard jealously. Where, therefore, a person's right of access to court is taken away or restricted by either the Constitution or any statute, the language of any such provision is usually construed very cautiously and strictly. (p. 1376 A)

H **TOBI JSC**

2. Breach of fair hearing - Burden of proof

It is clear that the appellant was retired from the service of the Benue Local Government Service Commission on the views of the committee

set up by the Guma Local Government. In the circumstance, I agree entirely with the Court of Appeal that the appellant ought to have produced the minutes of the committee that investigated the matter.

The burden is on the party alleging breach of fair hearing in a case to prove the breach; and he must do so in the light of the facts of the case. This is because the facts of a case and the facts only donate non-compliance with the principle of fair hearing.

I am of the view that the appellant has not proved that he was denied fair hearing. (p. 1381 A)

REPRESENTATION

Mr. A. A. Ijohor for Appellant.

Mr. P. O. Ahemba, DDPP (Benue State) for Respondents.

CASES REFERRED TO

Garba v. University of Maiduguri (1986) 17 NSCC (Pt. 1) 245

Yusuf v. Union Bank (1996) 6 NWLR (Pt. 457) 632

Osakwe v. Nigerian Paper Mills Ltd. (1998) 10 NWLR (Pt. 568) 1 E

Adigun & Ors. v. Attorney-General of Oyo State (1987) SCNJ 118 at 147

The Queen v. Director of Audit (Western Region) (1961) All N.L.R 659 at 660

Hart v. Military Governor of Rivers State (1976) NMLR 102 F

Barclays Bank Nig Ltd v. Central Bank of Nigeria (1976) 1 ALL NLR 409

Agwunna v. Attorney-General of Federation (1995) 5 NWLR (Pt. 396) 418

Osadebey v. Attorney-General of Bendel State (1991) 1 NWLR (Pt. 169) 525 G

Attorney-General of Bendel State. v. Agbofodoh (1999) 2 NWLR (Pt. 592) 476

Attorney-General of Federation v. Sode (1990) 1 NWLR (Pt.128) 500 H

Ekpo v. Calabar Local Government (1993) 3 NWLR (Pt. 281) 324

STATUTES REFERRED TO

Evidence Act s. 149(d)

Public Officers (Special Provisions) Act 1990 Ss. 1(1) & 3(3-4)

LEAD JUDGMENT BY AKINTAN JSC

B The appellant, Augustine Maikyo, instituted this action at Makurdi High Court in Benue State as suit No, MHC/75/97. The said appellant was an employee of the Benue State Local Government Service (2nd respondent) and his grouse with his said employer was that he was compulsorily retired from service. The action was aimed at redressing the wrong. His claim as set out in paragraph 23 of his amended statement of claim is as follows:

D “(a) A DECLARATION that the Plaintiffs termination and retirement is null and void. The said termination and retirement not being in accordance with the law, i.e. The Public Officers (Special Provisions) Act Cap. 381 L.F.N. 1990.

E (b) AN ORDER re-instating the plaintiff to his employment as a senior personnel officer with the 2nd defendant, Local Government Service Commission, Benue State.

F (c) AN ORDER that the plaintiffs emoluments including promotions and leave bonus as a senior personnel officer, lost during the period of the purported termination and retirement be paid to him.

G (d) AN ORDER setting aside the findings of the investigation panel which investigated the activities of the Directors of Personnel and Treasurers of Local Government in Benue State between (18/11/93 -6/4/95) and the Government views in the white paper based on the said panel’s recommendations in respect of the plaintiff.”

H Pleadings were filed and exchanged and the appellant, as plaintiff, gave evidence in support of his claim and tendered a number of documents as exhibits. Three witnesses gave evidence for the defence. At the close of the case for the defence and after taking submissions from learned counsel for the parties, the learned trial Judge, Puusu, CJ, delivered his reserved judgment on 6/4/2000. The plaintiff’s claim was dismissed in its entirety. An appeal filed against the judgment to the Court

of Appeal was also dismissed. The present appeal is from the judgment of the Court of Appeal.

The appellant filed an appellant's brief in this court and a joint brief was filed on behalf of the respondents. The appellant formulated the following two issues in his brief as arising for determination in the appeal: B

“(a) Whether the plaintiff/appellant was given a fair hearing before his appointment was terminated and subsequently converted to retirement, having regard to all the facts and circumstances of this case.

(b) Whether the non-production of the whole of the white paper containing government's views and recommendations in respect of this case was fatal to the appellant's case as held by the lower court having regard to the fact that all facts relevant to this case were admitted in evidence.” C

The respondents also formulated two similar issues in their joint D brief. I therefore consider it unnecessary to reproduce them here. I believe the two issues formulated by the appellant and reproduced above are quite adequate in resolving the dispute raised in the appeal.

The brief facts of the case are that the appellant was a Senior E Personnel Officer on Grade Level 10 employed by the Local Government Service Commission of Benue State. His appointment was a permanent and pensionable one. His last posting was Buruku Local Government. But while he was serving at Guma Local Government Council between F 1992 and 1993, he was appointed to serve as the Secretary of the Market Reorganization Construction Committee. He was granted an imprest of =N=92,000 in his capacity as secretary of the said Committee for the job to be carried out by the Committee, There were four other members of the Committee. One of the four members was Mr. S. I. Ortom, who was G the Chairman of the committee while the other three were members. The appellant contended that the =N=92,000 he received as imprest was used for the purpose of the Committee's assignment. He also claimed that on completion of the assignment, he retired the total sum of =N=92,000 in H accordance with the laid down procedure of the Local Government Service Commission and was issued with Treasury Receipt No.037167 dated 31st December, 1993.

The appellant was later transferred from Guma Local Government to Buruku Local Government. But on 20th August 1996, the appellant was served with a letter from the 1st respondent by which his appointment was terminated. That letter was, however, later retrieved and replaced with another one by which he was retired from the service of the 2nd respondent.

The State Government had earlier in 1996 set up a Committee to look into the activities of the Local Governments in the State. The Committee carried out its assignment and submitted its report. A Government White Paper was published in December 1996, which contained the Government decisions and views on the Committee's Report. The report dealt with financial mismanagement of Directors of personnel and treasurers between 18th November 1993 to 6th April, 1994. On page 17 of the white paper, the appellant was directed to refund the ₦92,000 to Guma Local Government for failing to rehabilitate Yelewata market. That amount was the imprest granted to him as mentioned above. The claim he instituted was aimed at setting aside the decision of his employer to retire him from service and the order on him to refund the ₦92,000.

The main contention of the appellant, as canvassed in Issue 1 of his brief is that the decision to retire him from service was taken without giving him an opportunity of a hearing. It is submitted that since the appellant's appointment was one with statutory flavour, that is, one governed or protected by statute, it was wrong for the 2nd respondent to retire him from service abruptly without giving him a hearing in respect of any allegation made against him. It is alleged that the appellant was neither given a query nor was any other disciplinary measure taken against him before he was suddenly retired from service. It is then submitted that the failure to give the appellant a hearing amounted to a fundamental breach, which should render the action taken subsequently by the 2nd respondent null and void.

It is also submitted that the investigation panel, being a fact-finding body, is bound by the rules of evidence and procedure applicable in the regular court. Consequently, the appellant, who is affected by the decisions of the investigation panel as contained since the allegation made

against the appellant is criminal in the White Paper, ought to be given the opportunity of being heard before any action could justifiably be taken against him.

Reference is made to the decision in *Garba v. University of Maiduguri* (1986) 17 NSCC (Pt. 1) 245. It is then argued that since the allegation made against the appellant is criminal in nature, disciplinary actions against him should have been delayed until after the disposal of any criminal charge against him. It is conceded that following the decisions in *Yusuf v. Union Bank* (1996) 6 NWLR (Pt. 457) 632 and *Osakwe v. Nigerian Paper Mills Ltd.* (1998) 10 NWLR (Pt. 568) 1 where it was decided that where an employee is confronted with an allegation of crime by the employer and is given an opportunity of explaining himself, then he cannot later turn round to say he was not given a fair hearing; or where an employee accepts the misconduct, such employee could be summarily dismissed without being prosecuted first for the criminal offence. It is then submitted that such was not the position in the instant case because the appellant was neither confronted with the allegations nor did he admit same. The action taken by the 2nd respondent in retiring the appellant is therefore said to be improper and should be set aside.

Reliance on two of the exhibits (Exhibits C5 and C6) by the lower court in dismissing the appellant's appeal is said to be improper. It is argued that a perusal of the said Exhibits C5 and C6 would reveal clearly that the documents, which are payment vouchers, were made by the store keeper in the Works Department of Guma Local Government based on an approval made in file No.GULA/S/MKT/7 on pages 25-29. It is argued that since the date of approval was not stated, both the trial High Court and the court below were in grave error by proffering an explanation. It is also argued that since it is a notorious fact that retirement of imprest is meant to legalize expenses incurred in the past by the officer given approval to incur them, the dates on the receipts for such expenses might therefore predate the date of the payment voucher prepared to cover such expenses.

The point taken up in the appellant's second issue is in respect of the non-production of the whole of the White Paper by the appellant. It is

argued that what the appellant pleaded and tendered were the pages relevant to his case and as such it was wrong to hold that he withheld vital evidence from the trial court. The issue of non-production of the whole white paper is also said to be an irrelevant matter since there was no dispute on the issue among the parties. The lower court is therefore said to have acted erroneously by invoking the provisions of section 149(d) of the *Evidence Act* against the appellant for non-production of the whole white paper.

It is submitted in reply on Issue 1 in the respondent's brief that in considering whether or not the principle of *audi alteram partem* has been breached, regard must be had to all the circumstances surrounding the case. Failure to obtain oral evidence from parties to a dispute, it is argued, would not necessarily entail a breach of the principle of fair hearing. The decisions in *Adigun & Ors. v. Attorney-General of Oyo State* (1987) SCNJ 118 at 147; and *The Queen v. Director of Audit (Western Region)* (1961) All N.L.R 659 at 660 are cited in support of this submission. It is further submitted that the only approach the law frowns at is when one of the parties whose written evidence is considered, is given an additional opportunity of oral hearing at the expense of the other party. The decision in *Hart v. Military Governor of Rivers State* (1976) NMLR 102 is cited in support of this view.

It is argued that since the documents (Exhibits C5 and C6) were submitted by the appellant to the Guma Local Government long before the Investigative Panel wound up its investigation, the said documents were therefore available at the Guma Local Government at the time the Investigative Panel was carrying out its functions. The said documents, which the appellant relied on in support of his contention that he had duly retired the amount advanced to him, were receipts issued for purchases made long before the money was advanced to the appellant. This is said to be *ex facie* defective and for which the appellant offered no accompanying explanation.

It is further submitted that fair hearing lies in the procedure followed in a particular case and not in the correctness of the decision. In the instant case, the appellant is said to have failed to prove that there was

a particular procedure used by the Investigative Committee in arriving at its decision that indicted him. He failed to lead evidence in support of the procedure adopted by the said Committee. Since the position in law is that he who alleged that there was a breach of fair hearing must prove such allegation, the failure of the appellant to prove the allegation is said to be fatal to his case. Reference is made to findings of fact made by the trial court to the effect that the appellant's appointment was terminated as a result of the report of the Committee on Guma Local Government Council and not as a result of discoveries made by DW2 and DW3, two of the witnesses that testified for the defence at the trial. The defects in the documents submitted at Guma Local Council were already available to the Committee and since the appellant had not denied that the documents never emanated from him, the action taken in his case is said to be justifiable. Decision In the instant case, the appellant is said to have failed to prove that there was a particular procedure used by the Investigative Committee in arriving at its decision that indicted him. He failed to lead evidence in support of the procedure adopted by the said Committee. Since the position in law is that he who alleged that there was a breach of fair hearing must prove such allegation, the failure of the appellant to prove the allegation is said to be fatal to his case. Reference is made to findings of fact made by the trial court to the effect that the appellant's appointment was terminated as a result of the report of the Committee on Guma Local Government Council and not as a result of discoveries made by DW2 and DW3, two of the witnesses that testified for the defence at the trial. The defects in the documents submitted at Guma Local Council were already available to the Committee and since the appellant had not denied that the documents never emanated from him, the action taken in his case is said to be justifiable.

On the failure of the appellant to tender the entire Government White Paper but that lie merely tendered the cover page and page 17 which concerned the appellant, he is said to have, by that action, deliberately withheld the pages of the document which contained the procedure followed in arriving at the findings which the government accepted. This again is said to be fatal to his case. As already stated earlier above, the

appellant's appointment was first terminated as per a letter written to him (Exhibit A5) dated 20th June, 1996. But that letter was later withdrawn. Another letter dated 25th September 1996 (Exhibit A6) was written in its place. The appellant was informed in Exhibit A6 that he was retired from service with immediate affect. The said letter, Exhibit A6 reads, *inter alia*, as follows:

“25th September, 1996

Augustine Maikyo
Senior Personnel Officer,
Buruku Local Government Council
u. f. s.
The Hon. Chairman
Buruku Local Government Council
Buruku.

THE PUBLIC OFFICERS (SPECIAL PROVISIONS) ACT INSTRUMENT AUTHORIZING THE REMOVAL OF PUBLIC OFFICER FROM SERVICE

Pursuant to the Powers conferred on him by Section 1 (1) of the Public Officers' (Special Provisions) Act., Cap. 381 Laws of the Federation of Nigeria, 1990, the Military Administrator of Benue State, GROUP CAPTAIN JOSHUA O. OBADEMI, has by an Instrument under His hand dated the 19th day of June, 1996 directed that you be retired from service, on the ground that the performance of your duties has been such that your further or continued employment in the service would not be in the public interest.

2. You are hereby retired from service with immediate effect.
3. You are to hand over all government properties in your possession and thereafter contact the Local Government Pensions Board for your entitlement if and where applicable.
4. The letter is copied to the Auditor-General (Local Government) and the Local Government Pensions Board for information and necessary action.
5. This letter supersedes our earliest letter Ref No. S. ADM/OFF/

159/1/2/206 of 20th June, 1996.

W. E. ITODO

For: Chairman

Local Government Service Commission.”

It is clear from the contents of the letter, Exhibit A6, that the decision to retire the appellant was based on a directive from the then Military Administrator of Benue State pursuant to the powers conferred on him by section 1(1) of the *Public Officers (Special Provisions) Act*, Cap. 381, Laws of the Federation 1990. The said section 1 (1) of the Act provides as follows:

“1. (1) Notwithstanding anything to the contrary in any law, the appropriate authority if satisfied that-

(a) It is necessary to do so in order to facilitate improvements in the organization of the department or service to which a public officer belongs; or

(b) By reason of age or ill health or due to any other cause a public officer has been inefficient in the performance of his duties; or

(c) The public officer has been engaged in corrupt practices or has in any way corruptly enriched himself or any other person; or

(d) The general conduct of a public officer in relation to the performance of his duties has been such that his further or continued employment in the relevant service would not be in the public interest, the appropriate authority may at any time after 31st December, 1983 -

(i) Dismiss or remove the public ‘ officer summarily from his office, or

(ii) Retire or require the public officer to compulsorily retire from the relevant public service.”

Section 3(3) of the same Act ousts the jurisdiction of the courts in respect of acts done under the Act. The section 3(3) provide thus: 3(3) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to done by any person under this Act and if any such proceedings have been or are instituted before, on or after the making of this Act, the proceedings shall abate, be discharged and made void.”

Chapter IV of the Constitution dealing with Fundamental Rights is suspended for the purposes of the Act in section 3 (4) of the said Act. There is no doubt that section 3(3) of the Act creates an ouster clause in that the rights of an aggrieved person to challenge actions taken by the appropriate authority under the Act are expressly taken away by the provision.

The attitude of the courts to such provisions was recently extensively considered by me in a recent decision in Inakoju & Ors. V. Adeleke & Ors, (unreported, Suit No. SC 272/2006 delivered on 12th January, 2007). I stated the position of the law in the matter, inter alia, as follows in the said case:

“The attitude of the courts to such provisions is that they are regarded as an aberration, outrageous provision and one that should be treated with extreme caution since they are regarded as unwarranted affront and unnecessary challenge to the jurisdiction of the courts which the courts guard jealously. Where, therefore, a person’s right of access to court is taken away or restricted by either the Constitution or any statute, the language of any such provision is usually construed very cautiously and strictly. In the course of interpreting such provisions, the language of any such Statute or provision will not be extended beyond its least onerous meaning unless clear words are used to justify such extension. This is mainly because it is the practice of the courts to guard its jurisdiction jealously:

See Barclays Bank Nig Ltd v. Central Bank of Nigeria (1976) 1 ALL NLR 409; Agwunna v. Attorney-General of Federation (1995) 5 NWLR (Pt. 396) 418; Osadebey v. Attorney-General of Bendel State (1991) 1 NWLR (Pt. 169) 525; Attorney-General of Bendel State. V. Agbofodoh (1999) 2 NWLR (Pt. 592) 476; and Attorney-General of Federation v. Sode (1990) 1 NWLR (Pt.128) 500.

Thus when interpreting the provisions of an ouster clause in a statute including that of the Constitution, the courts usually scrutinize every aspect of such provision with a view to ensuring that every thing done under such statute is done strictly in compliance with the provisions of the statute. This is because where the court finds that there is a failure

to strictly comply with what the statute provides for, such act purported to be done under the statute would be ultra vires, and would be declared null and void as such action would be regarded not to have been carried out under the said provisions of the statute or Constitution: See Ekpo V. Calabar Local Government (1993) 3 NWLR (Pt. 281) 324.” B

Applying the law as declared above to the facts of the instant case, the Military Administrator of Benue State had in October 1996 constituted a panel to look into financial mismanagement of local governments in the State. The report of the Committee was submitted to the Administrator and a White Paper was published in which the government’s decisions on the report were set out. The appellant’s name was mentioned on page 17 of the White Paper (Exhibit B). What was said about the appellant in the White Paper on page 17 is as follows: C

“Augustine Maikyo D

Findings: Collected the sum of ₦92,000 to rehabilitate the Yelwa Market but did not execute the project.

Comments: Government notes the findings and directs that the appointment of the officer be terminated forthwith. Government further notes that earlier release of funds to the officer is still being investigated by the police.” E

The disciplinary power conferred on the “appropriate authority” in section 1 (1) of the Act can only be inflicted on those who commit any of the acts specified in the section. In the instant case, the allegation made against the appellant and which was relied on in retiring him from service is said to be that the ₦92,000 imprest granted to him for a job which he is said to have failed to perform. The appellant’s defence was that he spent the money on the job and that he duly retired the imprest in accordance with the laid down regulations. He relied on the payment voucher (Exhibit C6) to which he attached receipts for materials he bought with the money while executing the assignment. F G

The payment voucher which the appellant signed when the money was paid to him is Exhibit C5. The appellant signed for the money on 17/12/93. Exhibit C6 is the payment voucher which the appellant filed when he retired the amount he collected. It was dated 31/12/93. Seven receipts H

in all were attached to the said voucher. The dates on each of the seven receipts respectively are 5/5/93; 30/5/93; 2/5/93; 16/5/93; 15/2/93; 20/1/93 and 30/5/93. It is clear from the dates on the receipts that none of the purchases covered by any of the receipts was made after the money was paid to the appellant on 17/12/93 as shown on Exhibit C5. These two vouchers were available at the accounts section of the Local Government Council where the appellant filed them and they were available to the said Committee set up by the State Government.

The allegation that the appellant was not given a fair hearing cannot stand in that his defence that he had retired the amount he collected was not supported by the documents he filed in support of his contention that he spent the money for the job for which the money was given to him. This is because there is a presumption to the effect that the money he collected was to be spent on a job he was to carry out and not for a job he had carried out on behalf of his employer. If his case was that he had incurred the expenses before he received the money, he ought to have made that clear as at the time he filed Exhibit C5 and not wait till after the discovery by the Committee. The findings of the Committee, as reflected in the White Paper is therefore justifiable and the allegation by the appellant that he was not given a fair hearing is totally without any foundation.

The contention that the allegation made against the appellant, being criminal in nature, the disciplinary action taken against him should not have been embarked upon until after his trial by a competent court is also untenable. This is because what the appropriate authority needed to ascertain against an officer before taking necessary action under section 1 (1) of the Act include showing that the action to be taken would facilitate improvement in the organization, or that the general conduct of the public officer in relation to the performance of his duties has been such that his further or continued employment would not be in the public interest.

In the instant case, the appropriate authority's decision on

the appellant is covered by and within the provisions of the Act. The point raised in the appellant's Issue 2 regarding the appellant's failure to tender the entire White Paper is totally irrelevant and of no consequence.

In conclusion, I hold that there is totally no merit in the appeal and I accordingly dismiss it. I however make no order on costs.

B

KUTIGICJN

I read in draft the judgment just delivered by my learned brother Akintan J.S.C. I agree with his reasoning and conclusions. The appeal completely lacks merit. It is hereby dismissed with no order as to costs.

C

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Akintan JSC. I agree with it and for the reasons given by him, I would also dismiss the appeal. I make no order as to costs

D

E

TOBI JSC

I have read in draft the judgment of my learned brother; Akintan, JSC and I agree with him that the appeal should be dismissed. The appellant was a Senior Personnel Officer under the employment of Benue State Local Government Service Commission. He was posted to Guma Local Government. While serving there, he was appointed a member of a committee set up for the re-organization and reconstruction of Yelwata market. He served as secretary to the committee. In his position as secretary, the appellant received an imprest of N92,000.00 in furtherance of the objectives of the committee.

F

G

The appellant was transferred from Guma Local Government to Buruku Local Government. A letter of termination of his appointment was issued to him on the ground that his continued stay in office was not in the interest of the Local Government Service Commission. The termination of the appellant's appointment was later changed to retirement.

H

The retirement of the appellant was as a result of the views of a committee set up by the Guma Local Government which inquired into the financial affairs of the Local Government. The committee indicted the appellant for failure to rehabilitate Yelewata market. The appellant B was requested to refund the amount, which he subsequently did.

The appellant sued. He asked for five reliefs. The learned trial Judge dismissed his action. On appeal to the Court of Appeal, that court also dismissed his appeal. He has come to this court. Appellant formulated two issues for determination. Respondents also formulated two issues C for determination.

The plank of the case of the appellant is that he was not given a fair hearing before he was retired from the service. He specifically submitted that he was not heard before he was retired. The case of the D respondent is that as the investigation was conducted purely on documents and not on oral evidence of witnesses, the appellant was not denied fair hearing. The respondent submitted that Exhibits A4, B and B1 were tendered by the appellant himself.

E The Court of Appeal examined the issue of fair hearing and said at page 143 of the Record:

“Learned counsel for the Appellant in his brief of argument further submitted that it is trite law that, it is duly established that the constitutional right to fair hearing has been breached, the court has to declare such action invalid, null and void and where a trial court fails to so declare, the Appellate court has to allow the appeal and declare such action which are (sic) in breach of the constitutional right of fair hearing null and void... The position of the law as stated above is correct, but the condition in which the principle of law is applicable is clearly stated and I would like to emphasize, the requirement of the establishment of the breach of S. 33(1) of the 1979 Constitution of the Federal Republic of Nigeria. It is abundantly clear in the case on hand that the breach, has not been proved or established by the Appellant to warrant the declaration that the investigation was in breach of the supra constitutional provision. The cases of Kimi v. The State and Ogundoyin v. Adeyemi supra are not applicable to this case.”

H

It is clear that the appellant was retired from the service of the Benue Local Government Service Commission on the views of the committee set up by the Guma Local Government. In the circumstance, I agree entirely with the Court of Appeal that the appellant ought to have produced the minutes of the committee that investigated the matter. B

The burden is on the party alleging breach of fair hearing in a case to prove the breach; and he must do so in the light of the facts of the case. This is because the facts of a case and the facts only donate non-compliance with the principle of fair hearing. C

I am of the view that the appellant has not proved that he was denied fair hearing. The appeal therefore fails and it is dismissed. I abide by the order as to costs in the judgment of my learned brother.

D

MUSDAPHER JSC

I have had the opportunity to read before now, the judgment of my learned brother Akintan JSC just delivered with which I entirely agree, for the same reasons contained therein, which I respectfully adopt as mine, I too, hold that there is totally no merit in this appeal, I accordingly dismiss it. I make no order as to costs.

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