

**SUPREME COURT OF NIGERIA**

27<sup>TH</sup> APRIL, 2007. SC. 297/2002

**CORAM:- U. A. KALGO, G. A. OGUNTADE, A. M. MUKHTAR,  
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH, JJSC**

EMEKA NWANA

..... APPELLANT

AND

FEDERAL CAPITAL DEVELOPMENT

AUTHORITY

..... RESPONDENT

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APPEALS - Master & servant - Records of appeal - Exclusion of exhibits tendered by appellant - Is a ground for revisiting lower court's decision (H1)

JUDGMENTS - Appeals - Slip rule - Delivery of judgment by Court of Appeal - On an incomplete record - Is a fundamental irregularity - That has occasioned miscarriage of justice (H2)

APPEALS - Record of appeal - Transmission of - To Court of Appeal - Is the trial court's duty vide O. 3 rr. 13 & 21(5) CA Rules - Appellant should not be blamed - For failure to transmit exhibits (H3)

APPEALS - Retrial - Mistake of Lower Court - That occasioned miscarriage of justice - Justifies order of retrial in this case (H4)

APPEALS - Issues - Grounds of appeal - Suo motu raising of sole issue by lower court - Is improper - Especially as that issue - Is not related to any ground of appeal (H5)

**FACTS**

The plaintiff/appellant was employed as the Principal Administrative Officer in the employ of the defendant/respondent. In his claim before the High Court, plaintiff sought inter alia, a declaration that his purported termination in 1989 vide a letter is null and void and of no effect

whatsoever. He also claimed an order reinstating him as a Principal Technical Officer. The trial court dismissed the claim and held that plaintiff's termination was proper.

Plaintiff appealed to the Court of Appeal which upheld the trial court's decision. In arriving at its decision, the lower court did not consider exhibits tendered by the plaintiff as they were not forwarded by the trial court. Again, its decision was based on its suo motu lone issue which is not related to any of the grounds of appeal. Aggrieved, plaintiff has further appealed to the Supreme Court.

**HELD** (Unanimously allowing the appeal vide a retrial order per **CHUKWUMA-ENEH JSC**)

***Records of appeal - Exclusion of exhibits***

1. These exhibits having formally been introduced as evidence at the trial Court should be seen as such. They should necessarily form part of the record of appeal as enjoined by Rule 21(5) of Order 3 of the Court of Appeal Rules 2002. In this light therefore, their exclusion from the record and the eventual determination of this appeal without advertng to them by the lower Court has to be revisited. Without more, it is quite evident from the drift of the submissions in the case of both parties in this matter in this Court that the most critical exhibits of them all include exhibits A, B & H. They, in particular contain the conditions of service and other regulations and instructions governing the relationship of the parties hereto, that is, between the appellant and the respondent as master and servant; they simply cannot be brushed aside. It is in this regard that the appellant's contention in this Court to the effect that his case before the lower Court has rested squarely on the interpretation of exhibits 'A' to 'I' in my view is well taken. There can be no doubt that these exhibits are the lifeline of the appellant's case here as I shall show presently. This is further borne out of his grounds of appeal in this Court and the issues distilled therefrom. Their importance cannot therefore be overemphasized.

(p. 1956 A/E)

***Appeals - Slip rule***

2. It is also preposterous for the respondent to categorize the instant mistake as a slip. It simply cannot be a slip as such. A slip under the banner of “Slip Rule” connotes accidental slip or omission as clerical mistakes in a judgment or Order and capable of being amended even at times without notice to the other party. The instant mistake in this case transcends the entire proceedings as it goes to the root of the decision. It is neither accidental slip nor omission. And even so it is not amenable to amendment as contemplated under the “Slip Rule” and as submitted by the respondent. It is an irregularity of fundamental nature. See: Ayoola V. Adebayo (1996) 1 NWLR 159.

Crucially, the foregoing extracts apart from speaking for themselves on their relevance in the question of construing of exhibits ‘A’ to ‘I’ in this matter, they have served to underscore the appellant’s contention in this Court that the construction of Exhibits ‘A’ to ‘I’ has recurred as the crux of the appeal before the Court below as also in the hearing before the trial Court. It is also conclusive in this case of the proposition that the lower Court has based its decision on an incomplete record as transmitted to it, that is, without the vital documentary exhibits to contend in the appeal. The lower Court is therefore wrong to have decided this case without having the privilege of seeing these documents i.e. the exhibits and to have based its decision on speculation. This is so as here where the lower Court has made serious pronouncements affecting the rights of the parties without the help of material documentary evidence as per exhibits “A” to ‘I’. There can be no doubt that the decision has occasioned a miscarriage of justice. (p. 1959 A)

***Record of appeal - Transmission of***

3. The respondent has totally misconceived the import of Rules 13 & 21(5) of Order 3 of the Court of Appeal Rules 2002 which have specifically imposed on the trial Court the duty to transmit the record of appeal to the Court below after preparing it in accordance with the provisions of ORDER 3 Rules 9 of the Court of Appeal Rules 2002. It is required that the record shall contain amongst other things copies of documents ten-

dered in evidence as the instant Exhibits “A” to “I” and proceedings constituting the record. One necessary implication of these Rules Vis-à-vis the instant appeal is that the trial Court has the responsibility of transmitting the record in this case to the Court below given that the appellant has  
 B fulfilled the conditions of appeal imposed at the settlement of Record. As is evident from, the instant record, Exhibits ‘A’ to ‘I’ have not been copied; the said exhibits having been introduced in evidence at the trial have remained in the custody of the trial Court which has the duty to forward  
 C them with the record to the Court below for the hearing of the appeal. - this it has failed to do. See: also Rule 21(5) of Order 3 of the Court of Appeal Rules, 2002. This is a serious default on the part of the trial Court in the performance of its function.

The appellant having done all that he is required under the Rules,  
 D the rest is left to the trial Court to carry out its responsibility of transmitting the record and the said exhibits to the Court below. Any thing more will be onerous. It does not lie in the mouth of the respondent to challenge the appellant’s conduct in the compiling and transmission of the  
 E instant record as wanting in diligent prosecution of the appeal. The failure to transmit the exhibits is entirely that of the trial Court and the blame should not be visited on the appellant. (p. 1960 E)

**F    *Retrial - Mistake of Lower Court***

4. Having come to the conclusion that miscarriage of justice has been occasioned in this matter, as the mistake of the lower Court is fatal to the decision, there can be no question of the Court as is being insinuated in line with the settled principle that where the Court is in a position after  
 G considering the evidence to do complete justice between the parties it should proceed to do so and not order for a retrial, see: Okeowo V Migliore (1979)” SC 177 at 201 per Idigbe JSC and also Eze V. Attorney-General of Rivers State (2001) 18 NWLR (Pt. 746) 524. But the facts and circumstances in the two cited cases above are totally dissimilar to the  
 H instant case. In Eze’s case for instance the issue of jurisdiction/competence of the Court has been raised for the first time before the appellate Court and it was upheld as no further evidence had to be adduced to

decide the issue. However, in this case to deal completely with this question would require that the documentary evidence as per exhibits ‘A’ to ‘I’ are placed before the Court so that the Court steps into shoes of the lower Court to deal with the question thereby saving time and expense. The instant decision must therefore be set aside and in its place an order of retrial be substituted as the most suitable cause to meet the justice of the matter. (p. 1961 F)

### ***Issues - Grounds of appeal***

5. Even then, the sole issue identified by the lower Court shows on its face that it is not premised on the grounds of appeal filed by the appellant but has been stated as having arisen from “the circumstances of this case”. With respect, this is a nebulous phrase without clearly defined limits in its import. An identical question as here arose in the case of Sha (Jnr.) V. Kwan (2000) 8 NWLR (Pt. 670) 685 where the lower Court reformulated an issue for determination so as to resolve the issue properly arising from the grounds of appeal. This Court upheld the decision on the reformulated issue as it had arisen from the grounds of appeal. It is beyond argument that the sole issue here does not stem from any of the grounds of appeal filed by the appellant; which otherwise are supposed to be definitive of the appellant’s complaints against the trial Court’s decision in the case. Indeed, they are reasons the decision is considered by the appellant to be wrong.

It is well settled that issues for determination in an appeal must come within the compass of the grounds of appeal. More importantly, the lower Court has not given the parties the benefit of being heard on the sole issue so raised and that is the final nail in the coffin of the decision. Issue 2 is also resolved in the appellant’s favour. (p. 1963 E)

### **NOTABLE POINT OF INTEREST**

#### **OGUNTADE JSC**

##### ***1. How to ensure meaningful rehearing by Court of Appeal***

As provided under the above rule 2(1) of Order 3, an appeal shall be by way of rehearing. What this means in effect, is that the Court of Appeal

must rehear fully and give a second consideration to such aspects of the proceedings and evidence called before the trial court to an extent as the grounds of appeal and issues for determination in the appeal necessitate. If the relevant evidence (including documentary exhibits) is not before the Court of Appeal, there could not be a meaningful rehearing as envisaged under Order 3 rule 2(1) above. It is important to bear in mind that the right of appeal is granted by the Constitution of Nigeria and it is not permissible to offer only a token compliance with the enjoyment of the right of appeal so granted. It will in my humble view amount to a token or a mere symbolic compliance if the evidence needed to hear the appeal is not placed before the Court of Appeal. (p. 1965 D)

### **REPRESENTATION**

D I. Ezechukwu Esq. (With him Ogechi Ogbonna Esq.,) for the Appellants.  
J. E. Agbonhese Esq. for the Respondent.

### **CASES REFERRED TO**

- E Ayoola v. Adebayo (1996) 1 NWLR 159  
Ashinyanbi & Ors. v. Adeniyi (1967) 1A NLR 82  
Thynne v. Thynne (1955) P. 272  
Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141  
F Attorney-General of the Federation v. Ajayi (2003) 12 NWLR (Pt. 682) 509  
T.A.S.A. Ltd. v. Dan Trans. Nig. Ltd (1996) 1 NWLR (Pt. 4) (478) 360 at 363  
Okeowo v Migliore (1979) SC 177 at 201  
G Sha (Jnr.) v. Kwan (2000) 8 NWLR (Pt. 670) 685  
Eze v. Attorney-General of Rivers State (2001) 18 NWLR (Pt. 746) 524  
Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 184  
Nwosu v. Udejaja (1990) 1 NWLR (Pt. 125) 188 at 217  
H Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546  
Engineering Enterprise v. Attorney-General Kaduna State(1987) 2 NWLR (pt. 87) 381  
Ogunbi v. Isholu (1996) 6 NWLR (Pt. 452 12 at p. 20

Ojah v. Ogbom (1996) 6 NWLR (Pt. 454) 272.

The Comptroller NPS. v. Adekanje & Ors. (2002) 7 SC (Pt. 11)209

Akpan v. Otong (1996) 10 NWLR (Pt 476) 108 at 112

Oladele v. Aromolaran II (1996) 6 NWLR (Pt. 453) 180 at 194

Onajobi v. Olanipekun (1985) 45C (Pt. 11) 156

B

### **STATUTE & RULES REFERRED TO**

Evidence Act s. 227(2)

Court of Appeal Rules 2002 O. 3 rr. 2, 9, 13, 21(5)

C

### **LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

This appeal is against the decision of the lower Court, (Court of Appeal, Kaduna Division) given on 10/01/94 upholding as proper the termination of the appellant's appointment as principal Administrative officer in the employ of the respondent. The appellant was the plaintiff and the respondent, the defendant, in the trial Court. In his claim before the High Court the plaintiff has claimed as follows:

*“(1) A declaration that his purported termination from the employment of the Federal Capital Development Authority (F.C.D.A.) vide letter reference No. PC/888/132 dated 11<sup>th</sup> of April, 1989 is null and void and of no effect whatsoever. :*

*(2) an order directing the defendant to re-instate the plaintiff to his status as a principal Technical Officer without prejudice to entitlements and promotions which might have accrued to him during the period of his termination.*

*(3) A declaration that the letter reference No. PC/888/132 dated 11<sup>th</sup> April, 1989 as far as it purportedly terminates his appointment with retrospective effect is Null and void.*

*(4) A declaration that the purported termination of his appointment vide letter reference No. PC/888/132 dated 11<sup>th</sup> April, 1989, violates his Fundamental Rights as entrenched in section 33(1) and (4) of the constitution of the Federal Republic of Nigeria, therefore Null and void.”*

The lower court in its decision, has held as at Page 103 of the

Record that the trial Court is right in refusing to grant any of the reliefs sought before it and therefore right in dismissing the suit in its entirety as having no merit. Before reaching this conclusion on a lone issue raised suo motu in this case by the lower Court it has observed at P. 93 of the B record that there is nothing on the record to show that the exhibits in this matter have been forwarded to it - the lower Court.

Aggrieved by the decision, the appellant has appealed to this Court and has raised six grounds of appeal. On 30/01/2007, at the oral hearing of this appeal before us both sides have adopted and relied on their C respective briefs of argument filed on 4/11/03 and 2/12/03 respectively.

The appellant on his part in his brief of argument has distilled four issues for determination, which the Respondent in its brief of argument has adopted. The four issues are as follows:

D *“1. Whether it is correct for the Court of Appeal to decide a case which was essentially documentary without seeing the exhibits (relates to ground 1)*

E *2. Whether the Court of Appeal was right to have formulated an issue for determination and base it's decision on the issue when it does not arise from the grounds of appeal filed by the appellant (relates to ground 2)*

F *3. Whether the Court of Appeal was right to have speculated on character and content of exhibits which were not place before it, especially “H” (relate to grounds 3, 4, and 5).*

G *4. Whether the Court of Appeal was right when it held that the Appellant's appointment is not the type that enjoys statutory favour, (relates to ground 6)”*

The facts of this case are not in dispute. It is common ground that until the appellant's appointment with Respondent was terminated he served as Principal Administrative Officer in the employ of the respondent. He, amongst other things, was charged with having absented himself from H duty without leave and for putting up fraudulent claims for journeys to and from Enugu on medical appointments. The immediate facts and circumstances of this appeal are that the trial Court having failed to forward the exhibits admitted in evidence along with the Record that the lower



Court nonetheless proceeded to determine the appeal on an incomplete record of Appeal based on a lone issue it raised suo motu.

The appellant arguing issue one in his brief of argument has challenged the lower Court for having determined the appeal on an incomplete record, and has therefore, reiterated that its decision has thereby occasioned a miscarriage of justice: See *Engineering Enterprise V. Attorney-General Kaduna State* (1987) 2 NWLR (pt. 87) 381. He also has taken the point that the lower Court has acted in error in determining suo motu the sole issue on which it has based its decision without hearing the parties and that the sole issue has no roots in the grounds of appeal filed by the appellant. The appellant has clearly distilled six issues for determination and the respondent has unequivocally adopted them in its brief of argument. See: *University of Calabar V. Essien* (1996) 12 SCNJ 304 at 326; *Obawol V. Williams* (1991) 12 SC NJ 415 at 430, *Ejudu V. Obi* (1992) 1 SCNJ 234 at 243, *Irom V. Okimba* (1998) 2 SCNJ 1 at 5 *Umaru V. Abdul-Madullahi* (1998) 7 SCNJ 203 at 214. C D

The appellant has again specifically challenged the lower Court's decision for not pronouncing on the criminal aspect of the matter pertaining to fraud and for speculating particularly on the character and content of Exhibit H that is FCDA Manual, one of the exhibits tendered in the case See: *Panalpina V. Wariboko* (1975) NSCC 24, *Oparaji V. Ohanu* (1999) 1 NWLR (Pt. 618) 290 at 294 0, *Abacha V. Fawehinmi* (2000) 6 F NWLR (Pt.660) 228 at 274. E F

In conclusion, he has taken the point that the lower Court could not have resolved the issue of whether his appointment has statutory favour without adverting to the exhibits numbered as exhibits 'A' to 'I' inclusive and the Civil Service Rules. The Court is urged to allow the appeal and order a retrial of the appeal by the lower Court. G

The respondent in paragraph 3.4 of its brief of argument has conceded that the lower Court has made a grave error by going ahead despite its critical observation on the incompleteness of the record to determine this matter without availing itself of the opportunity of seeing the said exhibits particularly exhibit 'H' - the FCDA Management Manual. H

It nonetheless has invoked the provisions of 227(2) of the Evi-

denance Act 1990 on wrongful exclusion of admissible evidence to submit that the outcome of the appeal would have been the same had evidence so excluded been admitted; See: Gbafé V Gbafé (1996) 6 NWLR (Pt. 455) 417 at 421. It has also argued that it is a slip which has not, all the same, occasioned a miscarriage of justice. See: Akpan V Oton (1996) 10 NWLR (Pt 476) 108 at 112, Oladele V. Aromolaran II (1996) 6 NWLR (Pt. 453) 180 at 194, Onajobi V. Olanipekun (1985) 45C (Pt. 11) 156 and Oye V. Babalola (1991) 4 NWLR (Pt. 185)267.

The Respondent on issue 2 has conceded that it is not the duty of the Court of Appeal to formulate issues for determination for appellants as in this case especially so where the issue does not arise from the grounds of appeal filed by appellant. The respondent has however argued that this course has to be taken in the interest of justice and should not be defeated by mere technicality.

On issue 3, the respondent has contended that the appellant having admitted the charges raised against him, the respondent has no need to go to Court to pursue the criminal aspect of the charge as it has become unnecessary.

The Respondent on issue 4 has stoutly refuted the contention that the appellant's appointment has statutory favour. It has made the point that the character of an appointment as well as the status of an employee as in the instant matter is determined by the contract of employment between the parties. See: Fakuade V. O.A.O Teaching Hospital Management Board (1993) 5 NWLR (Pt. 291) 47 at 63.

The Court is urged to dismiss the appeal as there is after all no miscarriage of justice to warrant an order of retrial.

If I may reiterate, at the oral hearing of this appeal before us on 30/01/2007, the appellant and the Respondent have adopted and relied on their respective briefs of argument in the case. As can be seen, issues one and two deal with the questions which are central to resolving at this stage the singular questions in controversy in the instant appeal. That is to say - the propriety of deciding this case without the exhibits and the propriety, or otherwise of formulating the lone issue that does not arise from the appellant's grounds of appeal without hearing the parties. The

other two issues i.e. issues 3 & 4 have raised questions which as canvassed in the appellant's brief of argument will otherwise lead to discussing the substantive questions in the case itself and indeed the merits or demerits of the appeal rather prematurely as will become obvious in the course of this judgment. See: E.D. Tsokwa & Sons Ltd. V. C.F.A.O. B (1993) 4 NWLR (Pt. 291) 120. I have therefore decided not to take issues 3 & 4 not being relevant to the immediate resolution of the questions thrown up under issues 1 & 2 as afore stated but to shelve the two issues and let sleeping dogs lie in view of the final order contemplated in this matter. Issues 3 & 4 are therefore shelved for now. See: Adenuga V. C Odumeru (2001) 1 SC (Pt. 1)72 at 79.

I think that issue one in particular is focused essentially on the documentary exhibits, that is to say, Exhibits 'A' to T formally introduced as evidence in this matter at the trial and properly in the Custody of the trial Court. In this regard the documentary Exhibits before the trial Court according to the record consist of the following Exhibits 'A', "B", "C", "D", "E", "F", "G", "H" and "I". The matter of excluding these exhibits from the record has been contended to be a grave error, just as not forwarding them to the lower Court and reaching a decision in the appeal without advertng to them. These omissions form the basis of the complaints against the decision of the lower Court. I have to emphasize further the importance of these exhibits by being more definitive. In this regard Exhibit 'A' is the letter of appointment while exhibit 'B' is the letter of confirmation of the appellant's appointment; Exhibit 'C' is the letter of promotion of the appellant to Higher Technical Officer on Grade Level 08; Exhibit 'D' is the letter of termination of appointment while exhibit E is the letter of invitation to the appellant to appear before Disciplinary G Committee; Exhibit F is the appellant's letter of admission of committing the offence; Exhibit "G" is the Disciplinary Committee's Report while exhibit 'H' is the FCDA Management Manual. Finally, Exhibit 'I' is the query given to the appellant. That such material documentary evidence H have to be left out in compiling of the record of appeal albeit in this case of master and servant relationship is a telling evidence of the strength of the appellant's case in this matter.

**These exhibits** having formally been introduced as evidence at the trial Court should be seen as such. They should necessarily form part of the record of appeal as enjoined by Rule 21(5) of Order 3 of the Court of Appeal Rules 2002. In this light therefore, their exclusion from the record and the eventual determination of this appeal without adverting to them by the lower Court has to be revisited. Without more, it is quite evident from the drift of the submissions in the case of both parties in this matter in this Court that the most critical exhibits of them all include exhibits A, B & H. They, in particular contain the conditions of service and other regulations and instructions governing the relationship of the parties hereto, that is, between the appellant and the respondent as master and servant; they simply cannot be brushed aside. The crucial nature of all these exhibits i.e. exhibits 'A' to 'I' inclusive which otherwise have been duly pleaded and received in evidence becomes the more pertinent where their exclusion from the record is considered along side the backdrops of the trial Court's specific findings on the appellant's conditions of service in its decision on appeal before the lower Court and also where they are considered alongside the issues raised for determination by the appellant and adopted by the respondent in their respective briefs of argument at the lower Court. **It is in this regard that the appellant's contention in this Court to the effect that his case before the lower Court has rested squarely on the interpretation of exhibits 'A' to 'I' in my view is well taken. There can be no doubt that these exhibits are the lifeline of the appellant's case here as I shall show presently. This is further borne out of his grounds of appeal in this Court and the issues distilled therefrom. Their importance cannot therefore be overemphasized.**

Some illustrations from the judgment of the trial Court will definitely go a long way to buttress the point that the interpretation of exhibits 'A' to 'I' has been the gist of the controversy before the trial Court and also in the appeal in the lower Court. The trial Court at P. 49 of the record in dealing with the four posers posed for resolution by the appellant has said at lines 10 to 15 of that page and I quote:

“.....whether Exhibit ‘A’ Para. 2 (v) can come to play and avail itself to the defendants. To this I say it cannot avail itself to the defendants. Hence the plaintiff’s appointment could not be said to have been validly terminated applying the condition under Para. 2(v) of Exhibit ‘A’.”

B

Another pungent instance is demonstrated in the aforesaid p. 49 of the record at lines 17 to 29 where the trial Court has dealt with one other poser of the appellant and I quote:

“.....whether the plaintiff’s appointment as a confirmed employee, could be terminated with on (sic) month notice or an offer to pay one month’s salary in lieu of notice. The plaintiff was confirmed to have ‘fraudulently collected the sum N532 as spurious medical expenses .....’per exh. D. This was after the proceedings of administrative disciplinary Committee had deliberated giving rise to Exh. ‘G’ the report. Exhibit ‘E’ evidenced the fact that the plaintiff was invited by the Committee to attend its sitting and state his own side of the story which according to DW1 he did. All these emanated out of Exhibit ‘I’, the query issued to the plaintiff by the defendants. In order to correct an error in his presentation the plaintiff sent in exhibit ‘F’.”

C

D

E

Even moreso at p. 51 of the record at lines 18 to 22, the trial Court, yet again, has this to say on this question and I quote,

“The next question then is as to whether the defendant’s termination of the plaintiff’s appointment was a nullity looking at the whole exercise from the point of view of the conditions of service of the plaintiff under the employment of the defendants.”

F

Further down on the same page at line 34 et seq. the trial Court has gone on to find that:

G

“The defendants have therefore been given free hand to hire and fire as it deems fit. It is in line with this power that the defendants produced Exhibit ‘H’ the Management Manual which to all intents and purposes governs its relationship with its employers and servants part III of Exhibit ‘H’ the Management procedures which provides at Para. 3.4 under heading Termination of appointment.....”

H

The foregoing extracts have not minced words in benchmarking

interpretation of Exhibits ‘A’ to ‘I’ as the crux of the matter in the appeal. I need say no more in view of the final Order being contemplated in this matter.

The respondent’s spirited effort to explain away the grave error committed by the lower Court by invoking the provisions of Section 227(2) of the Evidence Act and referring to the use made of the incomplete record as a “slip”, which has not occasioned a miscarriage of justice is not sustainable and it is even worse still to urge that this Court should not interfere in the circumstance. The respondent has oversimplified this grave matter. The misconception is borne out of misapprehension of the purport of Section 227(2) (*supra*) and the meaning of “slip” in the context of a judgment. These submissions do not have any immediate relevance whatsoever being too far fetched, and at best cannot serve as answer for the lower Court deciding this case which is essentially of documentary evidence without seeing the said exhibits. Even then, to bring the provisions of section 227(2) of the Evidence Act into play here there has to be firstly a wrongful rejection of admissible evidence by the trial Court; this is not the case here as exhibits ‘A’ to ‘I’ have been introduced as evidence in the proceedings before the trial Court. This as a first step has to precede the question of whether in the event that it would appear to Court that had the evidence so excluded been admitted it might presumably be held that the decision would have been the same. See: *Idundun V Okumagba* (1976) 9-10 SC 227 at 245. It is therefore wrong to invoke the provisions of 227(2) (*supra*) as covering the situation in this case: The case of *Gbafé V Gbafé* referred to by the respondent cannot apply. Even so, one of the pillars of complaint in this appeal is clearly founded on the improper application of the import of these documentary exhibits, say, in particular exhibit ‘H’. The lower Court has in recognition of this point reasoned at P. 102 lines 20 to 26 thus:

“.....that the character of an appointment and the status of an employee is determined by the legal character of the contract of employment. Contract of employment is determinable by the agreement of the parties *simpliciter* and there is no question of the contract having a statutory favour.”

And yet the exhibits to enable the lower Court reach the conclusion are not before it.

**It is also preposterous for the respondent to categorize the instant mistake as a slip. It simply cannot be a slip as such. A slip under the banner of “Slip Rule” connotes accidental slip or omission as clerical mistakes in a judgment or Order and capable of being amended even at times without notice to the other party. See: Ashinyanbi & Ors. v. Adeniyi (1967) 1A NLR 82; Thynne v. Thynne (1955) P. 272. The instant mistake in this case transcends the entire proceedings as it goes to the root of the decision. It is neither accidental slip nor omission. And even so it is not amenable to amendment as contemplated under the “Slip Rule” and as submitted by the respondent. It is an irregularity of fundamental nature. See: Ayoola V. Adebayo (1996) 1 NWLR 159.**

Crucially, the foregoing extracts apart from speaking for themselves on their relevance in the question of construing of exhibits ‘A’ to ‘I’ in this matter, they have served to underscore the appellant’s contention in this Court that the construction of Exhibits ‘A’ to ‘I’ has recurred as the crux of the appeal before the Court below as also in the hearing before the trial Court. It is also conclusive in this case of the proposition that the lower Court has based its decision on an incomplete record as transmitted to it, that is, without the vital documentary exhibits to contend in the appeal. The lower Court is therefore wrong to have decided this case without having the privilege of seeing these documents i.e. the exhibits and to have based its decision on speculation, See: Panalpina V. Wariboko (supra) Oparaji V. Ohanu (supra) and Abacha V. Fawehinmi (supra). This is so as here where the lower Court has made serious pronouncements affecting the rights of the parties without the help of material documentary evidence as per exhibits “A” to ‘I’. There can be no doubt that the decision has occasioned a miscarriage of justice. See: Udeze V. Chidebe (1990) 1 NWLR (Pt. 125) 141.

I must however, advert to the other aspects of this matter. Where as in the instant case some delay cannot really be avoided as otherwise

there must be on the peculiar circumstances of this case, the Court imbued with the overall interest of justice should not hesitate to accommodate such delay by granting short adjournments so as to enable it order for the production of the omitted portion of the record of proceeding as additional record. This would meet the justice of the matter and would have placed the lower Court in this case in a more advantageous position to decide the appeal on a Record of Appeal with “exhibits “A” to ‘I’ included which otherwise have constituted documentary evidence in the case.

Having reasoned as per the foregoing, I now go further to examine issue one as the respondent has argued that a party as the appellant here should have made sure that the Record of Appeal is transmitted to the Court below. It is trite that an appellant ought to prosecute his case diligently. In this regard he is obliged to place before the Court all the relevant materials on the issue he has called upon the Court, to consider and determine upon and that is even more so in matters of appeal as here. See: T.A.S.A. Ltd. V. Dan Trans. Nig. Ltd (1996) 1 NWLR (Pt. 4) (478) 360 at 363. However, **with respect**, the respondent **has totally misconceived the import of Rules 13 & 21(5) of Order 3 of the Court of Appeal Rules 2002 which have specifically imposed on the trial Court the duty to transmit the record of appeal to the Court below after preparing it in accordance with the provisions of ORDER 3 Rules 9 of the Court of Appeal Rules 2002. It is required that the record shall contain amongst other things copies of documents tendered in evidence as the instant Exhibits “A” to “I” and proceedings constituting the record. One necessary implication of these Rules Vis-à-vis the instant appeal is that the trial Court has the responsibility of transmitting the record in this case to the Court below given that the appellant has fulfilled the conditions of appeal imposed at the settlement of Record. As is evident from, the instant record, Exhibits ‘A’ to ‘I’ have not been copied; the said exhibits having been introduced in evidence at the trial have remained in the custody of the trial Court which has the duty to forward them with the record to the Court below for the hearing of the appeal. -this it has**



failed to do. See: also Rule 21(5) of Order 3 of the Court of Appeal Rules, 2002. This is a serious default on the part of the trial Court in the performance of its function. See: Attorney-General of the Federation v. Ajayi (2003) 12 NWLR (Pt. 682) 509.

The appellant having done all that he is required under the Rules, the rest is left to the trial Court to carry out its responsibility of transmitting the record and the said exhibits to the Court below. Any thing more will be onerous. It does not lie in the mouth of the respondent to challenge the appellant's conduct in the compiling and transmission of the instant record as wanting in diligent prosecution of the appeal. The failure to transmit the exhibits is entirely that of the trial Court and the blame should not be visited on the appellant. See: Engineering Enterprises V. Attorney-General of Kaduna State (supra). This being the case, the appellant should not be made to bear the brunt of the trial Court's failure in this regard. Respectfully, these circumstances ought to have been adverted to by the lower Court. The respondent's submission of want of diligence on the part of the appellant, in the prosecution of this appeal is therefore baseless, having been made without due regard as to who the Rules have placed the duty to compile and transmit the Record of Appeal to the lower Court; again, see: Rules 9 of 21/(5) of the CAR 2002. I reject the respondent's contention that no miscarriage of justice has, all the same, been occasioned; I find that nothing could be further from the truth of the matter. See: Akpan V. Otong (1996) 10 NWLR (Pt. 476) 108 at 117, Oladele V. Aromolaran II (supra) and Onajobi V. Olanipekun (supra).

Having come to the conclusion that miscarriage of justice has been occasioned in this matter, as the mistake of the lower Court is fatal to the decision, there can be no question of the Court as is being insinuated in line with the settled principle that where the Court is in a position after considering the evidence to do complete justice between the parties it should proceed to do so and not order for a retrial, see: Okeowo V Migliore (1979)" SC 177 at 201 per Idigbe JSC and also Eze V. Attorney-General of Rivers State (2001) 18 NWLR (Pt. 746) 524. But the facts and circumstances in

the two cited cases above are totally dissimilar to the instant case. In Eze's case for instance the issue of jurisdiction/competence of the Court has been raised for the first time before the appellate Court and it was upheld as no further evidence had to be adduced to decide the issue. However, in this case to deal completely with this question would require that the documentary evidence as per exhibits 'A' to 'I' are placed before the Court so that the Court steps into shoes of the lower Court to deal with the question thereby saving time and expense. The instant decision must therefore be set aside and in its place an order of retrial be substituted as the most suitable cause to meet the justice of the matter. See: *Engineering Enterprise V. Attorney-General, Kaduna State (supra)*.

Issue one, therefore is resolved in favour of the appellant.

D Issue 2: The appellant has taken exception to the lower Court formulating the lone issue for determination in this matter which issue it is contended does not even derive from the grounds of appeal filed by the appellant and to have predicated its decision on the sole issue so E raised. The lower Court as per the record suo motu. On having sidelined of the six issues formulated by the appellant in his brief has identified the sole issue for determination as follows:-

*"whether or not in the circumstances of this case, the appellant was entitled to the relief he sought in this case before the trial Court".*

F Much as the lower Court has the power to raise an issue suo motu because the issue is material and would otherwise determine the appeal the question is whether it could also proceed to predicate its judgment upon it without first giving the parties the benefit to address it on the said G issue. On the authorities as they stand today the parties must be given the benefit to argue the point of raising such issue for determination before the Court takes a decision on it. See: *T. O. Kuti V. S. Balogun (1978) 1 SC 534*, *J. O. Lahan & Ors. V. Lajoyetan & Ors. (1973) NWLR 44*; *Total H Nig. Ltd. V Nwako (1978) 5 SC 1* and *Irolo V. Uka (2002) NWLR (pt. 786)*. The respondent has remonstrated in his brief that since the course taken by the lower Court has not occasioned a miscarriage of justice that the appellant should not be allowed to resile from the admission of his

gross misconduct and so upturn a good decision on mere technicality. This submission with respect, has overlooked the principle that where a case as here has occasioned a miscarriage of justice which profoundly I so hold, it is liable to be set aside however well decided. See: Okonkwo V. Okonkwo (1998) 10 NWLR (Pt. 571) 554, Oyekanmi V. N.E.P.A. (2000) B 1259 (Pt.1) 75 at 88 paragraph 30-40, Governor of Gongola State V. Tukur (1989) 4 NWLR (Pt. 117) 592. Eholor V. Osanyande (1992) 1 NWLR (Pt. 249) 524. I think that the error here is more fundamental than the respondent has shown the stomach for. The respondent should know that it is not whether the decision is right that is the issue but whether the proceedings followed due process by giving the appellant fair hearing i.e. the benefit of being heard. The record in this case shows that, no such opportunity has been given to him, what has happened here by any stretch of imagination cannot be said to have served the interest D of justice. The truth of the matter is that none of the parties has called for the determination of the case on the sole issue identified by the lower Court. That is the question that has flawed the decision of the lower Court.

**Even then, the sole issue identified by the lower Court shows on its face that it is not premised on the grounds of appeal filed by the appellant but has been stated as having arisen from “the circumstances of this case”. With respect, this is a nebulous phrase F without clearly defined limits in its import. An identical question as here arose in the case of Sha (Jnr.) V. Kwan (2000) 8 NWLR (Pt. 670) 685 where the lower Court reformulated an issue for determination so as to resolve the issue properly arising from the grounds G of appeal. This Court upheld the decision on the reformulated issue as it had arisen from the grounds of appeal. It is beyond argument that the sole issue here does not stem from any of the grounds of appeal filed by the appellant; which otherwise are supposed to be definitive of the appellant’s complaints against the trial Court’s H decision in the case. Indeed, they are reasons the decision is considered by the appellant to be wrong. See: Saraki V. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 184 paragraphs A - E.**

**It is well settled that issues for determination in an appeal must come within the compass of the grounds of appeal.** This point has been decided by this Court in very many cases; See: Nwosu V. Udeaja (1990) 1 NWLR (Pt. 125) 188 at 217 Egbe V. Alhaji (1990) 1NWLR (Pt. B 128) 546 Ogunbi V. Isholu (1996) 6 NWLR (Pt. 452) 12 at p. 20. Ojah V. Ogbom (1996) 6 NWLR (Pt. 454) 272. **More importantly, the lower Court has not given the parties the benefit of being heard on the sole issue so raised and that is the final nail in the coffin of the decision.** See: The Comptroller NPS. V. Adekanje & Ors. (2002) 7 SC C (Pt. 11) 209. **Issue 2 is also resolved in the appellant's favour.**

The appellant has made out a case as borne out above to interfere with the two findings of the lower Court and the trial Court in this matter. See: Onwu V. Nka (1996) 7 NWLR (Pt. 458) 1, Kole V. Coker (1982) 12 D SC 252, Otogbolu V. Okeluwa (1981) 6 - 7 SC 99, Akinsanya V. U.B.A. (Nig.) Ltd. (1986) 4 NWLR (Pt. 35) 273, Adesoye Olanlege V. Afro. Continental. (Nigeria.) Ltd. (1996) 7 NWLR (Pt. 458) 29, Sebakin V. State (1981) 5 SC 75.

E There is merit in the appeal and I allow it and set aside the judgment of the lower Court given on 19/01/94. This case is remitted back to the lower Court to be heard de novo on a complete Record of Appeal which for the avoidance of doubt has to contain exhibits "A" to "I" inclusive. The appellant is entitled to the costs in the sum of N10,000.00. F

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#### KALGO JSC

G I have had the privilege of reading in advance the judgment just delivered by my learned brother Chukwuma-Eneh JSC in this appeal. I entirely agree with his consideration of all the issues therein which I adopt as mine. I find that there is merit in the appeal and I allow it. I abide by the consequential orders made therein including the order as to costs. H

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#### OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead

judgment by my learned brother Chukwuma-Eneh JSC. I agree with the said judgment and adopt his reasoning as mine. The central issue relates to the approach of the court below which had proceeded to affirm the judgment of the trial court without having before it some of the exhibits which had been tendered before the trial court.

B

Order 3 rule 2(1) of the Court of Appeal Rules provides:

*“2. -(1) All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called ‘the notice of appeal’) to be filed in the Registry of the court below which shall set forth, the grounds of appeal, stating whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal which shall be accompanied by a sufficient number of copies for service on all such parties; and it shall also have endorsed on it an address for service.”*

C

D

(italics and underlining mine) .

As provided under the above rule 2(1) of Order 3, an appeal shall be by way of rehearing. What this means in effect, is that the Court of Appeal must rehear fully and give a second consideration to such aspects of the proceedings and evidence called before the trial court to an extent as the grounds of appeal and issues for determination in the appeal necessitate. If the relevant evidence (including documentary exhibits) is not before the Court of Appeal, there could not be a meaningful rehearing as envisaged under Order 3 rule 2(1) above. It is important to bear in mind that the right of appeal is granted by the Constitution of Nigeria and it is not permissible to offer only a token compliance with the enjoyment of the right of appeal so granted. It will in my humble view amount to a token or a mere symbolic compliance if the evidence needed to hear the appeal is not placed before the Court of Appeal.

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I would also allow the appeal and award N10,000.00 costs in favour of the appellant.

H

**MUKHTAR JSC**

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Chukwuma-Eneh JSC. I am in complete agreement with the reasoning and conclusion reached that the appeal has merit and should be allowed. I allow the appeal and abide by the consequential orders made in the lead judgment.

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**ONNOGHEN JSC**

C This is an appeal against the judgment of the Court of Appeal holden at Kaduna in appeal No. CA/K/29/92 delivered on the 10<sup>th</sup> day of January 1994 dismissing the appeal of the appellant.

D The appellant was employed by the respondent as Higher Technical Officer, town planning in May 1982 and rose to the rank of Principal Technical Officer II by September 1987. His appointment was however terminated on 11/4/89 following certain allegations of wrong doings and after investigations by the “disciplinary committee of the respondent. E Consequently, appellant instituted an action claiming the following reliefs:-

“1. A declaration that the purported termination of the plaintiff’s as appointment as Principal Technical Officer is null and void.

F 2. A declaration that as a public office holder he is entitled to remain in the defendant’s employment until he attends the statutory retiring age of 55 years.

G 3. A declaration that he is still an officer with the Federal Capital Development Authority, Abuja and is entitled to his salaries, allowances, benefits and privileges attached to that office from the 11<sup>th</sup> day of April, 1989 until he attains 55 years of age.

**ALTERNATIVELY**

H 4. An order that plaintiff be paid all his salaries, allowances and benefits which he would have been entitled to as Principal Technical Officer between now and upon his attaining the statutory retiring age of 55 years.

5. An order that the salaries, allowances and benefits above be

*paid in lump sum as damages to the plaintiff subject to his paying the relevant court fees.”*

At the conclusion of the trial, the High Court dismissed the claims of the plaintiff resulting in an appeal, the judgment of which as earlier stated in this judgment, gave rise to the instant appeal. B

The issues for determination, as identified by learned counsel for the appellant in the appellant’s brief of argument filed by CHIEF KARINA TUNYAN are as follows:-

“1. *Whether it is correct for the Court of Appeal to decide a case which was essentially documentary without seeing the exhibits, (relates to ground 1).* C

2. *Whether the Court of Appeal was right to have formulated an issue for determination and base its decision on the issue when it does not arise from the grounds of appeal filed by the appellants (relates to ground 2).* D

3. *Whether the Court of Appeal was right to have speculated on character and content of exhibits which were not placed before it, especially “H” (relates to grounds 3, 4 and 5).* E

4. *Whether the Court of Appeal was right when it held that the appellant’s appointment is not the type that enjoys statutory favour, (relates to ground 6).”*

The above issues were adopted by learned counsel for the respondent in the respondent’s brief of argument filed on 2/ 12/03 by P.Y. OKALA. Esq. F

Looking closely at the four issues distilled for determination; I hold the view that the main issue in this appeal is whether the lower court could properly determine the appeal before it without seeing the exhibits tendered in the case in which the evidence is predominantly documentary. I hold the further view that a resolution of that issue will determine what further action needs to be taken in relation to the other issues in the appeal. G H

In his argument, learned counsel for the appellant referred the court to page 93 of the record where the lower court observed that the exhibits in the case were not forwarded to the lower court; that a total of

9 exhibits were tendered at the trial namely exhibits A, B, C, D, E, F, G, H and I; and that the judgment of the trial court was based on the interpretation of the exhibits and that it was wrong for the lower court to have proceeded to decide the appeal without taking steps to secure the exhibits from the trial court particularly as there was no evidence that the exhibits were lost.

On his part, learned counsel for the respondent conceded that the lower court failed to look at the exhibits before writing its judgment but submitted that no miscarriage of justice was thereby occasioned, relying on the case of Akpan vs Otong (1996) 10 NWLR (pt. 476) 108 at 112; Oladele vs Aromolaran II (1996) 6 NWLR (pt. 453) 180 at 194; that in view of the admission of the appellant of being absent from-duty without permission and his apology in exhibit F, there was no miscarriage of justice as the decision would still have been the same if the exhibits were available; learned counsel cited and relied on section 227(2) of the Evidence Act; Gbafe vs Gbafe (1996) 6 NWLR (pt. 455) at 417.

At page 93 of the record, the lower court found as follows:

*“Before I consider the briefs I must observe that the record of appeal itself was very poorly compiled. I searched for them in the registry of this court, but they were not available. There is nothing on record in our registry to show that the exhibits were ever forwarded to this court from the trial court. So much for the record of appeal.”*

As stated earlier in this judgment learned counsel for the respondent agreed that the lower court was in error in proceeding to deliver judgment in the case without seeing the exhibits. At page 2 of the respondent’s brief, learned counsel stated thus:

*“Even though it was wrong for the court below to have gone ahead to deliver judgment without availing itself the opportunity of seeing the exhibits particularly Exhibit “H”, it is our submission that for this honourable court to order retrial a miscarriage of justice ought to have been occasioned.”*

A close look at the above passage clearly admits the importance of the exhibits tendered in the proceedings “particularly Exh. “H”. To lay particular emphasis on the non consideration of exhibit “H” and to turn



round to say that the said non consideration has not resulted in a miscarriage of justice is to approbate and reprobate in my considered view. I hold the view that learned counsel admitted in the above passage that if the lower court had considered the said exhibit “H” its decision might have been different and as such the non consideration resulted, by necessary implication, in a miscarriage of justice. It should be noted that the case was mainly fought on documentary evidence which documents the lower court had no opportunity of examining before arriving at its decision now on appeal.

In the circumstance I agree with the reasoning and conclusion of my learned brother CHUKWUMA-ENEH, JSC that the appeal is meritorious and should be allowed. I order accordingly and set aside the judgment of the lower court and further order that the appeal be remitted to the lower court to be heard and determined properly. I abide by the other consequential orders including the order as to costs.

Appeal allowed.

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