

SUPREME COURT OF NIGERIA

19TH DECEMBER, 2008. SC. 197/2002

CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR, M. MO-HAMMED, F. F. TABAI, C. M. CHUKWUMA-ENEH, JJSC

SHELL PETROLEUM DEV. CO. LTD APPELLANT/ CROSS-APPELLANT
AND	
CHIEF VICTOR SUNDAY OLAREWAJU RESPONDENT/ CROSS-APPELLANT

MASTER & SERVANT - Termination - Rules of natural justice - Employer is not bound to give reason for termination - But where he does the reason must be justifiable - And the proceedings indicting the servant must observe the rules of natural justice (H1)

EVIDENCE - Proof - Standard - Flexibility of - There is no absolute standard of proof be it in civil or criminal trial - The more serious the allegation the higher the standard of proof to eliminate its unlikelihood (H2)

FAIR HEARING - Rules of natural justice - Breach - Evidence of - There is ample evidence on record - In support of the concurrent findings of the courts below - That there was a breach of the rules of natural justice in the proceedings indicting the respondent (H3)

MASTER & SERVANT - Miscarriage - Proof of - Where employee is dismissed for gross misconduct - It is not for the employee to prove that the proceedings of the panel were prejudicial to him - It suffices that there is a risk of prejudice (H4)

TORTS - Unlawful arrest - Instigation of police - Liability of complainant - There is a distinction between mere report of an incident to police - And instigating the police to arrest - As the appellant was found to have done in this case (H5)

ACTIONS - Reliefs - Special damages - Necessity for proof - Claim for pension and gratuity being claim for special damages - Ought to have been strictly proved but was not - Court of Appeal was there-

3422 *Shell Petroleum v. Olarewaju* (2008) 12 KLR (pt. 259) p. 3421;
fore right to have dismissed it (H6)

FACTS

The plaintiff/respondent/cross-appellant had sued the defendant/appellant/cross-respondent at the Warri Judicial Division of the High Court of Delta State. Plaintiff's claims were for sundry declarations and orders contending the alleged wrongful dismissal of the plaintiff from the defendant's services. Plaintiff sought to either be reinstated or to be retired with full retirement benefits. He also claimed damages for unlawful arrest and detention. After trial, the trial Court held the dismissal to be wrongful and also awarded N3m as damages for unlawful arrest and detention. But neither the order for reinstatement nor that for pension and gratuities was granted.

Both parties being dissatisfied with the judgment of the trial court appealed to the Court of Appeal against the respective unfavourable portions of the judgment. But the Court of Appeal dismissed both the appeal and cross-appeal and affirmed the judgment of the trial court. Hence both parties have respectively brought these further appeal and cross-appeal to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Were the learned Justices right in law in affirming the judgment granting reliefs IV and V as claimed in paragraph 42 of the Amended Statement of Claim on the basis that the dismissal was null and void when:

(a) the contractual relationship between defendant and Plaintiff affirmed by their Lordships is one of master and servant under the common law?

(b) Plaintiff is not entitled to the said reliefs.

(c) The binding judicial decision cited and relied on by defendant were not considered or followed.

(2) Were the learned justices right in law in holding that the cause or reason for summary dismissal was not established because the domestic committee which investigated and found against Plaintiff was not competent to determine allegation of crime when:

(a) on the pleadings, no allegation of crime was on issue?

(b) neither Plaintiff nor Defendant made allegation of crime basis of either the claim or defence?

(c) misconduct was established against the Plaintiff.

(3) Were the learned justices right in law in affirming the judgment for wrongful arrest and or detention of the Plaintiff when

(a) there was no evidence in support of such judgment

(b) the purported findings were:

(i) based on mere speculation without evidence not on issue joined on the pleadings?

(ii) evidence on record did not show that defendant did anything other than make report to the Police?

(4) Were the learned justices right to dismiss defendant's interlocutory appeal on admissibility of a pleaded document relevant to the case.

Whether or not the lower court was right in dismissing the Cross-Appeal before it relating to the Cross-Appellant's entitlements to pension and gratuity.

HELD (Unanimously dismissing both the appeal and the cross-appeal per **TABAI JSC**)

MASTER & SERVANT - Termination - Rules of natural justice

1. The guiding principle which has been articulated and applied in many cases is that an employer is not bound to give reasons for terminating the appointment of his employee. But where, as in this case, he gives a reason or cause for terminating the appointment, the law imposes on him a duty to establish the reason to the satisfaction of the court. In this case, the Appellant, having given gross misconduct as its reasons for the Respondent's dismissal, has the onus to establish that the Respondent was indeed guilty of the alleged misconduct to warrant his dismissal. And in a case such as this, the court must be watchful to ensure that in the investigations or proceedings of the domestic panel culminating in the employee's dismissal, the rules of natural justice were not breached. (p. 3436 D)

EVIDENCE - Proof - Standard - Flexibility of

2. The court below at page 322 of the record of proceedings took the view that the allegation against the Respondent of sending anonymous letters of threat is an allegation of crime which, by virtue of Section 138 of the Evidence Act, must be proved beyond reason-

able doubt. Learned counsel for the Appellant attacked this assertion of the Court of Appeal virulently, contending that the allegation was not that of a crime. I am inclined to agree with learned counsel for the Appellant that the allegation is not that of the commission of any crime. This however does not diminish the burden of proof placed
 B on the Defendant/Appellant. While it is settled that the standard of proof in a civil allegation is not as high as that in a criminal one. It can nevertheless be also very high, depending on the gravity of what is alleged. The standard of proof in any case be it criminal or civil is not
 C a static or absolute one, the more serious the allegation, the higher the standard of proof to eliminate its unlikelihood.

Thus the misstatement by the court below concerning the legal principle about the standard of proof notwithstanding, the standard of proof of the gross misconduct alleged against the Respondent was in
 D my view quite high. (pp. 3437 C/3438 G)

FAIR HEARING - Rules of natural justice - Breach

3. The crucial question therefore is whether these concurrent findings are supported by the evidence on record. First of all the Plaintiff/
 E Respondent was singled out for investigation. There is also uncontroverted evidence that the Respondent's manager Chief O.D. Adesanya initiated the investigations. The Respondent said so in his testimony in court. He also said so in Exhibit "F" dated the 4th of May 1998. He
 F took the DW1 Ndukwe Uche the computers specialist to the Respondent's office to check the Respondent's personal computer which sits on his desk. The DW1 also confirmed that Chief O.O. Adesanya was one of those who instructed him to carry out the investigations of the Respondent. He did not stop there. He joined in the investigations
 G himself. Under cross-examination the DW1 said "*I was not the only one who conducted the investigation. Others were Paul Iyela, Mr. Adesanya the manager..*"

On that same 20/4/1998 when the investigations started he prepared and signed Exhibit "D" the letter of suspension. He again
 H prepared and signed Exhibit "E" the letter of summary dismissal dated 24th April 1998. In Exhibit "S" prepared by the DWI dated 21st April 1998 the DWI said Chief Adesanya and Christine Duthie joined him in his office to continue the file recovery process. In the same

Exhibit “S” the DWI stated how Chief Adesanya, Christine Duthie and Dr. B. Odia joined him in his office to demonstrate to the Respondent how the files were recovered. Chief Adesanya also took part in the interviews of the Respondent on the 20th, 21st and 22nd of April 1998. And finally he, accompanied by Miss C. H. Duthie and Mr. M.B. Iyela prepared and signed Exhibit “V”. B

In view of the foregoing, the findings of the learned trial judge about the breach of the rules of natural justice cannot be faulted. (p. 3439 D)

Where employee is dismissed for gross misconduct C

4. In cases of this nature the employee who was dismissed or otherwise punished for gross misconduct need not prove that the proceedings of the domestic panel that investigated him were indeed prejudicial to him, it is sufficient that it might. The risk of any prejudice is enough. This was the principle reiterated in OLATUNBOSUN v N.I.S.E.R (supra). D

In the instant case although the DW1 investigations started in the room of the Respondent, the computer unit was taken subsequently to the office of the DW1 where the investigations continued to conclusion. While Chief Adesanya and Miss Duthie were present in the course of such investigation, the Respondent was only called when they wanted to demonstrate their findings to him. In my view the risk of miscarriage of justice was not eliminated. (p. 3440 C/G) E F

Unlawful arrest - Instigation of police

5. In addition to the oral evidence about his arrest and detention the Respondent also stated in Exhibit “F” how 5 Police Officers including the Commanding Officer of the Shell Supernumerary Lagos Command Mr. Ivora came into his office for a search, when Adesanya, Odia, Duthie, Uche and himself were there. G

It is not surprising therefore that the Court of Appeal concluded in the following terms:

“Clearly, a distinction has been drawn between merely reporting an incident to the Police and instigating the Police to arrest. In the instant case, I agree with the submission of learned Senior Advocate of Nigeria for the Respondent/Cross-Appellant that the arrest and H

detention of the Respondent by the Police was instigated by the Appellant/Cross-Respondent. Consequently the Appellant as defendant was liable as rightly in my view found by the learned trial judge."

I do not have any conceivable reason to interfere with the concurrent findings of the two courts below particularly having regard to the fact that there is evidence oral and documentary supporting same. And since there is no appeal against the quantum of damage I shall also resolve this issue in favour of the Respondent. (p. 3441 G)

C *Reliefs - Special damages - Necessity for proof*

6. The only issue submitted for determination is whether the court was right in dismissing the Plaintiffs cross-appeal on the claim for pension and gratuity. On this issue the Court of Appeal at pages 326-D 327 of the reacted:

"Even in the case of NIGERIA MARITIME SERVICES LTD v. ALHAJI BELLO AFOLABI (1978) 2 SC 79 at 81-82 relied upon by the cross-appellant, the court acted on the evidence unlike in the instant case where there is no credible evidence relating to the alternative reliefs. Pleadings cannot substitute evidence. Evidence must be led in support of averments by a party to warrant being granted the reliefs sought particularly in respect of a claim for special damages which by law must be strictly proved. For the reasons stated the cross-appeal also fails and is hereby dismissed."

Here again I have no reason to interfere with this findings. (p. 3442 F)

REPRESENTATION

G C. A. Ajuyah for the Appellant.
Respondent absent and not represented

CASES REFERRED TO

IMOLOAME v W.A.E.C. (1992) 9 N.W.L.R. (Part 266) 303
H UKPELLA CEMENT CO. LTD. v IGIEHUME (1979) 1 FCA 64 at 84
EBBAH v OGODO (1984) 4 SC 84 at 112
AJUWON v AKANNI (1993) 9 NWLR (Part 316) 182 at 199
ORIZU v ANYAEGBUNAM (1978) 1 LRN 216

OLATUNBOSUN v N.I.S.E.R (1988) 3 N.W.L.R. (Part 80) 25 at 54

ONAH v THE STATE (1985) 3 N.W.L.R. (Part 12) 236

ELIAS v OMO-BARE (1982) All N.L.R. 75

ODULAJA v HADDAD (1973) 11 SC 357

OBI OBENDE v WEMABOD ESTATE LTD (1976) SC 115

B

STATUTE REFERRED TO

Evidence Act, s. 132

LEAD JUDGMENT BY TABAI JSC

C

There are, before us, an appeal and a cross-appeal from the decision of the Benin Division of the Court of Appeal dated the 21st of January 2002. The action itself was commenced at the Warri Judicial Division of the High Court of Delta State on the 11th of December 1998 when the writ of summons was issued. Pleadings were settled. The Plaintiff who is the Respondent/Cross-Appellant herein claimed against the Defendant which is the Appellant/Cross-Respondent the reliefs set out in paragraph 42 of the Amended Statement of Claim as follows:

D

“42 WHEREOF the Plaintiff claims against the Defendant

E

(i) A DECLARATION THAT THE summary dismissal of the Plaintiff by the Defendant as contained on the Defendant’s letter of 24th April, 1998 is unlawful, illegal unconstitutional null and void and of no effect whatsoever.

F

(ii) A DECLARATION that the purported dismissal of the Plaintiff from the services of the Defendant for concocted reasons having criminal traits and ingredients, without affording the Plaintiff any hearing at all before a court of competent jurisdiction is illegal, null and void and of no effect.

G

(iii) A DECLARATION that the purported dismissal of the Plaintiff from the services of the Defendant as borne out by the Defendant’s letter of 24th April, 1998 without notifying the Honourable Minister of Petroleum Resource’s and or without the consent of the said Minister in breach of and contrary to the Minister of Petroleum Resource’s Circular No. P1: 5061/B/V.2/181 dated 6th February, 1997 and therefore null and void and of no effect whatsoever.

H

(iv) AN ORDER setting aside the purported dismissal of the

Plaintiff from the services of the Defendant as conveyed by the Defendant's letter of 20th April, 1998 and (an order re-instating the Plaintiff to his employment and post or rank with the Defendant.

(v) *AN ORDER commanding the Defendant to pay the salaries, allowances, bonuses, and entitlements of the Plaintiff from 24th April 1998 up to the date of judgment or until the Defendant finally re-instates the Plaintiff into its services.*

(vi) *AN ORDER commanding the Defendant to permit or allow the Plaintiff to collect all his personal belongings left in his office without any let or hindrance or alternatively, AN ORDER commanding the Defendant to pay for the values of the said personal belongings.*

(vii) *AN ORDER OF PERPETUAL INJUNCTION, restraining the Defendant, either by itself, directors, managers, officers, agents, D privies or servants or through any person or persons whatsoever from giving effect to the letter of dismissal dated 24th April, 1998 or from treating or further treating the Plaintiff as a dismissed staff of the Defendant or disturbing him in any way whatsoever from carrying out his duties as an officer or staff or employee of the Defendant,*

(viii) *A sum of N20 million being damages for the unlawful arrest, detention and humiliation of the Plaintiff at the instance, instigation and/or prompting of the Defendant.*

(ix) *IN THE ALTERNATIVE to (iv)(v) and (vii) supra AN ORDER commanding the Defendant to pay the Plaintiff:*

(a) *A SUM of N1,500,000.00 representing the three months salary due to the Plaintiff from the Defendant upon the determination of the Plaintiffs appointment by the Defendant.*

(b) *A SUM of N48,000.000.00 being the gratuity due to the Plaintiff from the Defendant as at 24th April 1998.*

(c) *A SUM of N230,000.00 being the pension payable to the Plaintiff by the Defendants per month as from 24th April 1998."*

The matter then went on trial, concluding with the address of counsel for the parties. In his judgment on the 18th of July, 2000, H the learned trial judge E. Akpomudjere J allowed the claim in part. Specifically, he held that the dismissal of the Plaintiff was wrongful and therefore null- and void, granted reliefs V and VI and awarded N3m as damages for his arrest detention and humiliation. The claim

for reinstatement was refused. No specific pronouncement was made in respect of the other reliefs.

Both parties not being satisfied with the judgment of the trial court appealed to the Court of Appeal. By its judgment on the 21st day of January 2002 the Court of Appeal affirmed the judgment of the trial court and dismissed both the appeal and cross-appeal. B

Both parties are still not satisfied with the judgment and have come on appeal to this Court. Briefs of argument were filed and exchanged. The Defendant/Appellant/Cross-Respondent filed the Appellant's brief, the Appellant's Reply Brief and the Cross-Respondent's brief. The Plaintiff/Respondent/Cross-Appellant on his part filed the Respondent's brief and the Cross-Appellant's brief. The Appellant's brief was prepared by T.J. Onomigbo Okpoko SAN. Therein he proposed four issues for determination which he couched as follows: C

(1) *Were the learned Justices right in law in affirming the judgment granting reliefs IV and V as claimed in paragraph 42 of the Amended Statement of Claim on the basis that the dismissal was null and void when:* D

(a) *the contractual relationship between defendant and Plaintiff affirmed by their Lordships is one of master and servant under the common law?* E

(b) *Plaintiff is not entitled to the said reliefs.*

(c) *The binding judicial decision cited and relied on by defendant were not considered or followed.* F

(2) *Were the learned justices right in law in holding that the cause or reason for summary dismissal was not established because the domestic committee which investigated and found against Plaintiff was not competent to determine allegation of crime when:* G

(a) *on the pleadings, no allegation of crime was on issue?*

(b) *neither Plaintiff nor Defendant made allegation of crime basis of either the claim or defence?*

(c) *misconduct was established against the Plaintiff.*

(3) *Were the learned justices right in law in affirming the judgment for wrongful arrest and or detention of the Plaintiff when* H

(a) *there was no evidence in support of such judgment*

(b) *the purported findings were:*

(i) based on mere speculation without evidence not on issue joined on the pleadings?

(ii) evidence on record did not show that defendant did anything other than make report to the Police?

(4) Were the learned justices right to dismiss defendant's inter-

locutory appeal on admissibility of a pleaded document relevant to the case.

The Respondent's brief of argument was, on the other hand, prepared by Chief Wole Olanipekun, SAN: In it he proposed three issues for determination. Plaintiff/Respondent's first issue says:

(i) Considering the totality and circumstances of the case, particularly the evidence adduced, coupled with the fact that the purported anonymous letter and other documents purportedly extracted from the Respondent's computer were not tendered, whether the lower court was not right in upholding the judgment of the trial High Court which set aside the Respondent's summary dismissal for gross misconduct by the Appellant. For his issues two and three he adopted the Appellant's issues three and four.

The Cross-Appellant's brief was also settled by Chief Wole Olanipekun, SAN. Therein he formulated just a single issue which is:

Whether or not the lower court was right in dismissing the Cross-Appeal before it relating to the Cross-Appellant's entitlements to pension and gratuity.

The Cross-Respondent's brief was prepared by C.A. Ajuyah Esq. He also submitted only one issue for determination. It is:

Whether the Court was wrong in dismissing the Plaintiffs Cross-Appeal on the claim for pension and gratuity.

So much for the issues raised in these appeals. On the 1st issue learned senior counsel for the Appellant referred to the two reliefs granted and submitted that commission of crime was not in issue on the pleadings and it was therefore not necessary to first try the Plaintiff/Respondent in a court before his dismissal. He referred to the conditions of service Exhibit R and argued that ministerial consent was not a conditional precedent to the dismissal of the Respondent. Learned senior counsel cited *CHUKWUMA v S.P.D.C. (1993) 4 N.W.L.R. (Part 289) 512 at 542-544* and submitted that ministerial circulars or policy not incorporated in the conditions of service do

not confer on the Respondent any such right or impose on the Appellant any obligation to seek and obtain any ministerial consent to dismiss. It was counsel's further argument that a wrongful dismissal does not thereby render the dismissal null and void. Counsel further argued that since the Respondent's employment with the Appellant was one of master and servant under the common law and not being one with statutory flavour a termination or dismissal even if wrongful brings the master and servant relationship to an end, and that nullity or voidity of the termination or dismissal does not arise. For this submission, counsel relied on *IMOLOAME v W.A.E.C.* (1992) 9 N.W.L.R. (Part 266) 303; *UKPELLA CEMENT CO. LTD. v IGIEHUME* (1979) 1 FCA 64 at 84; *VINCE v NATIONAL DAK LABOUR BOARD* (1956) 1 AER and *CHAPMAN v HOVIG* (1963) 2 QB 802. He argued therefore that there was no basis for the award of the two reliefs IV and V in paragraph 42 of the Amended Statement of Claim. If the dismissal was wrongful or unlawful counsel argued, the Respondent's remedy was only in damages. On the Appellant's power of dismissal counsel referred to paragraph 12 of Exhibit "R" and submitted that the Appellant acted within the terms in the conditions of service.

With respect to the 2nd issue for determination Learned Senior Counsel referred to the pleadings and contended that what was alleged and established against the Respondent was gross misconduct and that no commission of crime and no breach of the rules of natural justice was made a case on the pleadings. It was argued therefore that the trial court's findings in respect of these were erroneous. Further more, counsel argued, the issue of crime was not an issue in the briefs of the parties at the court below and that it was clearly wrong in law for it to use such an issue as the basis of its decision without hearing the parties on it. He relied on *EBBAH v OGODO* (1984) 4 SC 84 at 112; *AJUWON v AKANNI* (1993) 9 NWLR (Part 316) 182 at 199 and *ORIZU v ANYAEGBUNAM* (1978) 1 LRN 216. Paragraphs 6 and 7 of the Amended Statement of Defence on which the court below relied did not allege the Respondent's commission of any crime, learned senior counsel contended. It was further argued that the evidence of the computer expert DW1 as to the Respondent's misconduct of authoring and circulating anonymous letters of threat to management staff remained unchallenged. Counsel referred to

the Report of the Domestic Panel of Investigation Exhibit “W” and argued that the Respondent’s gross misconduct warranting his dismissal was established.

With regard to the 3rd issue, learned senior counsel referred to the pleadings in paragraphs 20, 21 and 22 of the Amended Statement of Defence and evidence of the Plaintiff/Respondent and submitted that there was no evidence that the Appellant did anything more than the mere report to the police and therefore that the finding that the Appellant did more than just informing the police is not supported by the evidence on record. There was therefore no basis for the Court of Appeal to agree with a finding of the trial court that is not supported by the evidence, learned senior counsel argued. According to counsel the view expressed by the trial court and affirmed by the Court of Appeal was merely speculative. Counsel further referred to Exhibit “G” written by the Plaintiff/Respondent and contends that the said Exhibit confirms that the Appellant did nothing more than reporting the matter to the police. Learned senior counsel argued that although the court below correctly stated the law in an action for false imprisonment and applied in the case of *ONYEDINMA v NNITE* (1997) 3 N.W.L.R. (Part 493) 333, it failed to apply it to this case. Counsel referred to the three letters of threat received by the Defendant/Appellant, the evidence of the Respondent that everybody received a copy of the letters, the Respondent’s admission in Exhibit “F” that the letter was found in his briefcase, his admission that he sent several envelopes to the mailroom through one Mohammed and the evidence of DW1 that the letters were traced to the Respondent’s computer and argued that the Appellant acted within its rights to report to the Police for investigation. Learned Senior Counsel argued that there was nothing the Appellant did that amounted to instigation.

On the 4th issue for determination learned Senior Counsel for the Appellant referred to the pleading in paragraph 20 of the Amended Statement of Claim and paragraph 6 of the Amended Statement of Defence and the fact that both parties referred to and relied on the letters of threat in support of their respective cases and submitted that the documents were wrongly rejected. It was counsel’s further submission that since by their rejection both the trial court and the

court below were denied the opportunity of considering their contents, the court below was in error to hold that their admission would not have made any difference. It was further argued that the court below was therefore in error in dismissing the interlocutory appeal.

Chief Wole Olanipekun, SAN in the Respondent's Brief of argument preferred the following arguments. He referred firstly to the Appellant's evidence on the contents of the letters of threat which were not before the court and submitted that the evidence was adduced in contravention of Section 132 of the Evidence Act. Learned Senior Counsel conceded that an employer can determine the appointment of his employee without notice. He however submitted that where an employer gives a reason for determining the appointment, he has a duty to prove and justify the reason where the dismissal or termination is challenged. For this submission he relied on *OLATUNBOSUN v N.I.S.E.R* (1988) 3 N.W.L.R. (Part 80) 25 at 54; *OGUNSANMI v C.F. FURNITURE (W.A.) Company Ltd* (1961) W.L.N.R. 327. For the failure to produce the alleged letters of threat counsel urged the invocation of 149(d) of the Evidence Act, against the Appellant. Counsel relied further on *ONAH v THE STATE* (1985) 3 N.W.L.R. (Part 12) 236 and *ELIAS v OMO-BARE* (1982) All N.L.R. 75.

It was the contention of learned senior counsel that the Respondent was not given a fair hearing at the domestic tribunal before its finding of gross misconduct against him.

With respect to the Respondent's second issue, counsel referred to the matters pleaded in paragraphs 20, 21, 22, 23, 24, 25 and 31 of the Amended Statement of Claim and the response in paragraph 7 of the Amended Statement of Defence and submitted that the case of the Respondent as pleaded in the aforesaid paragraph was at least admitted by implication. In addition, he argued, the evidence in support of these averments was not challenged by way of cross-examination and the courts below had no alternative than to believe the uncontradicted evidence. He relied on *NIGERIA MARITIME SERVICE LTD v ALHAJI BELLO AFOLABI OMOREGBE v LAWANI* (1980) 3-4 SC. 108 at 117; *ODULAJA v HADDAD* (1973) 11 SC 357 and *BABALOLA v BADMUS-WELLINGTON* (1998) 11 N.W.L.R. (Part 572) 167 at 176; *OBI OBENDE v WEMABOD ESTATE LTD*

(1976) SC 115. Learned Senior Counsel further argued that in view of the uncontradicted evidence about the Respondent's arrest, detention and torture by the police at the instigation of the Appellant, the N3 million awarded under this head was just too modest. For this contention counsel relied on *OLLE v SKEATS* (1945) 18 N.L.R. 7; *ONHEDIMA v NNITE* (1997) 3 N.W.L.R (Part 493) 333. Counsel again referred to the position of the Respondent and the fact of his services to the Appellant for 24 years and argued that the conduct of the Appellant was lacking the bona fide, malicious, cruel and in total disregard for the dignity of the Respondent's person. He urged that this issue be resolved in favour of the Respondent.

On the 3rd issue learned senior counsel, relying on the provisions of Section 227(2) of the Evidence Act, argued that even if the documents were admitted in evidence it would not have changed the judgment. The documents were rightly rejected and urged that the decision of the court below in that respect be also affirmed.

As I remarked earlier, the Appellant's Reply Brief was prepared by C.A. Ajuyah. He proffered the following arguments. With respect to the letters of threat Exhibits "T" and TI rejected he argued that the existence and contents were not put in issue on the pleading, same having been conceded by both sides and referred to Exhibit "F" made by the Respondent himself. According to counsel, those peritus in information technology know that files in a computer such as DET or BIC are just names of programmes in the Hard Disk of a computer. According to him such computer file is not a hard or tangible copy that can be tendered as Exhibit. He argued that the Appellant sought to tender the letter of threat and it was the Respondent that objected to its admissibility. It was therefore not open to the Respondent to complain about the Respondent's failure to tender the said threat letter, counsel argued. It was his further argument that Section 148(d) of the Evidence Act does not apply where a party is prevented from producing evidence on the objection of the opponent. Learned counsel contended that the evidence of the DW1, DW2, and DW3 together with the documentary evidence clearly established the Respondent's gross misconduct justifying his dismissal. The Respondent, counsel argued, did not adduce evidence on his paragraphs 20, 21, 23, 24, 25 and 31 of the Statement of Claim to warrant any

cross-examination. Counsel argued that a specific denial is not a general traverse and the case of *LEWIS & PEAT (NRI) v AKHIMIEN* supra; *OLLI v SKEATS* (supra) and *ONYEDIMA v NNITE* (supra) do not apply to this case. He urged in conclusion that the appeal be allowed.

The sole issue for determination in the cross-appeal is whether in the light of the facts pleaded and the evidence before the court the Respondent is entitled to the claim for pension and gratuity. Chief Olanipekun SAN in the Cross-Appellant's brief referred to paragraphs 2, 3, and 37 of the Amended Statement of Claim about the Respondent being a senior career and pensionable staff of the Appellant and his entitlement to pension of N230,000.00 per month and gratuity of N48,300,000.00 having spent 23 years in the service of the Appellant and which paragraphs, he submitted, were either expressly admitted or not seriously contested in paragraphs 1, 2 and 13 of the amended Statement of Defence and the totality of the evidence including Exhibits "E" "MI" and "N" the lower courts had no option than to allow the claim for pension and gratuity. Having declared and set aside the dismissal of the Respondent on the ground of it being unlawful, counsel submitted, the natural and consequential order should be to grant the alternative relief contained in paragraph 42(ix)(a)(b) and (c) of the Amended Statement of Claim. Learned Senior Counsel relying on *OMENKA v MORRISON IND. PLC* (2000) 13 N.W.L.R. 147 submitted that where an employee's termination is declared wrongful and set aside, he is entitled to all claims and damages due to him even though his reinstatement is not ordered. Reliance was further placed on *NIGERIAN MARITIME SERVICES LTD v ALHAJI BELLO AFOLABI* (1978) 2 SC 79 at 81-82. Counsel finally urged that the cross-appeal be allowed.

In the Cross-Respondent's Brief, Mr. C.A. Ajuyah referred to paragraphs 37, 38 and 42(ix)(b) and (c) of the amended Statement of Claim which were denied in paragraphs 13 and 15 of the amended Statement of Defence. Issues having being joined on this claim for pension and gratuity, the Respondent had the duty to adduce evidence in support of the claim. This, counsel submitted, the Respondent failed to do as there was no mention of his entitlement to any figure or gratuity in his evidence. It was counsel's further argument

that Exhibits “M” and “N” did not help his case as there was no evidence which specifically linked the documents to the claim. For this submission, he relied on *TERAB v LAWAN* (1992) 3 N.W.L.R. (Part 231) 569 at 590. He argued that *OMENKA v MORRISON INDUSTRY PLC* (2000) 13 N.W.L.R. (Part 683) 147 does not support the

B Respondent’s case. Learned counsel submitted that the Respondent failed to strictly prove the special damages for pension and gratuity and that the finding of the court below on that issue cannot be faulted. He argued finally that the Cross-Appeal be dismissed.

C Let me now deliberate on the issues raised in the two appeals starting with the Appellant’s issues one and two and Respondent’s issue one together. The question is whether the Defendant/Appellant failed to establish the Respondent’s gross misconduct as to render his dismissal wrongful null and void and thus entitling him to the reliefs

D granted and affirmed by the courts below. ***The guiding principle which has been articulated and applied in many cases*** including *OLATUNBOSUN v N.I.S.E.R. COUNCIL* (1988) 1 N.S.C.C. 1025; (1988) 3 NWLR (Part 80) 25 ***is that an employer is not bound to give reasons for terminating the appointment of his employee.***

E ***But where, as in this case, he gives a reason or cause for terminating the appointment, the law imposes on him a duty to establish the reason to the satisfaction of the court. In this case, the Appellant, having given gross misconduct as its reasons for the Respondent’s dismissal, has the onus to establish***

F ***that the Respondent was indeed guilty of the alleged misconduct to warrant his dismissal. And in a case such as this, the court must be watchful to ensure that in the investigations or proceedings of the domestic panel culminating in the employee’s dismissal, the rules of natural justice were not breached.***

G On this question of whether or not the Appellant breached the rules of natural justice in the investigations or proceedings that grounded the Respondent’s dismissal, the learned trial judge remarked
H at page 84 of the record of proceedings that only the Respondent was singled out for investigation; he was the only one reported to, arrested and detained by the police and that even after the Police had exonerated him, the Appellant refused to change its stand. He

then went on to say:

"Moreover and more importantly, the Plaintiff was not given a fair hearing as there was a serious breach of the rules of natural justice. The Plaintiff Manager, Chief O.D. Adesanya who pursued the Plaintiff from the departmental level out with the computer specialist to investigate the matter and now sat at the panel to try the Plaintiff. The same Adesanya sat with Miss Dorthie, sat to take the final decision to summarily dismiss the Plaintiff and to crown it all, he wrote the letter of dismissal. The court is not unaware of the fact that the company could adopt its own procedure of disciplining its employees, but the court cannot close its eyes when fundamental rights of individuals are thrown away through the whims and caprices of the company."

The court below at page 322 of the record of proceedings took the view that the allegation against the Respondent of sending anonymous letters of threat is an allegation of crime which, by virtue of Section 138 of the Evidence Act, must be proved beyond reasonable doubt. Learned counsel for the Appellant attacked this assertion of the Court of Appeal virulently, contending that the allegation was not that of a crime. I am inclined to agree with learned counsel for the Appellant that the allegation is not that of the commission of any crime. This however does not diminish the burden of proof placed on the Defendant/Appellant. While it is settled that the standard of proof in a civil allegation is not as high as that in a criminal one. It can nevertheless be also very high, depending on the gravity of what is alleged. The standard of proof in any case be it criminal or civil is not a static or absolute one, the more serious the allegation, the higher the standard of proof to eliminate its unlikelihood.

In the English case of *BATER v BATER* (1950) 2 All E.R. 458 at 459 the Court of Appeal per Denning LJ. (as he then was) stated the principle about standard of proof and the degrees of proof within a standard in the following terms:

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is

a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees within that standard. Many great judges have said that in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The degree depends on the subject matter....”

(Underlining is mine)

In yet another English case of HORNAL v NEUBERGER PRODUCTS LTD (1956) 3 All E.R. 970 the Court of Appeal again applied the principle in BATER v BATER (supra). In that case Hodson L.J. after expressing his complete concurrence with the Statement of Lord Denning in BATER v BATER added at page 977 as follows:

“Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may be more readily be attained in some cases than in others.”

In the same case of HORNAL v NEUBERGER PRODUCTS LTD (supra) at page 978 Morris L.J. stated:-

“Though no court and no jury would give less careful attention to issues lacking gravity than those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.”

Although the above English authorities are only persuasive the principle as to the determination of balance of probabilities applies with equal force to our circumstances in this case. **Thus the misstatement by the court below concerning the legal principle about the standard of proof notwithstanding, the standard of proof of the gross misconduct alleged against the Respondent was in my view quite high.**

The Respondent, a confirmed and senior career and pensionable officer of the Appellant was in Appellant’s employment for nearly 24 years during which time he earned several promotions and even commendation for outstanding performance as evidenced in Exhibit

“C”. But for his dismissal he would have been entitled to the earned benefits including pension and gratuity at the end of his tenure. Now he was dismissed and thus robbed of all these benefits in addition to the stigma of a dismissed officer. And all these on the allegation that he authored and circulated the anonymous letter of threat. Although the allegation is not that of the commission of any criminal offence, it is nevertheless a serious one given the consequences flowing therefrom. The result therefore is that the standard of proof of the allegation is high. B

The Appellant maintains that the allegation was proved against the Respondent to justify his dismissal. In the passage of the learned trial judge which I have reproduced above, he took the view that in the investigations conducted by the Appellant leading to the Respondent’s dismissal, the rules of natural justice were breached. The Court of Appeal upheld the findings. If these concurrent findings and conclusions of the two courts below are supported by the evidence on record then the dismissal based thereon is null and void and would be held to be rightly so declared. C D

The crucial question therefore is whether these concurrent findings are supported by the evidence on record. First of all the Plaintiff/Respondent was singled out for investigation. There is also uncontroverted evidence that the Respondent’s manager Chief O.D. Adesanya initiated the investigations. The Respondent said so in his testimony in court. He also said so in Exhibit “F” dated the 4th of May 1998. He took the DW1 Ndukwe Uche the computer specialist to the Respondent’s office to check the Respondent’s personal computer which sits on his desk. The DW1 also confirmed that Chief O.O. Adesanya was one of those who instructed him to carry out the investigations of the Respondent. He did not stop there. He joined in the investigations himself. Under cross-examination the DW1 said “I was not the only one who conducted the investigation. Others were Paul Iyela, Mr. Adesanya the manager..” E F G H

On that same 20/4/1998 when the investigations started he prepared and signed Exhibit “D” the letter of suspension. He again prepared and signed Exhibit “E” the letter of sum-

mary dismissal dated 24th April 1998. In Exhibit “S” prepared by the DWI dated 21st April 1998 the DWI said Chief Adesanya and Christine Duthie joined him in his office to continue the file recovery process. In the same Exhibit “S” the DWI stated how Chief Adesanya, Christine Duthie and Dr. B. Odia joined him in his office to demonstrate to the Respondent how the files were recovered. Chief Adesanya also took part in the interviews of the Respondent on the 20th, 21st and 22nd of April 1998. And finally he, accompanied by Miss C. H. Duthie and Mr. M.B. Iyela prepared and signed Exhibit “V”.

In view of the foregoing, the findings of the learned trial judge about the breach of the rules of natural justice cannot be faulted. In cases of this nature the employee who was dismissed or otherwise punished for gross misconduct need not prove that the proceedings of the domestic panel that investigated him were indeed prejudicial to him, it is sufficient that it might. The risk of any prejudice is enough. This was the principle reiterated in OLATUNBOSUN v N.I.S.E.R (supra). In GARBA V. UNIVERSITY OF MAIDUGURI (1986) 1 N.W.L.R. 550 at 618, the Supreme Court said of this principle thus:

“The court will not inquire whether such evidence or representation did work to the prejudice of the person being investigated. It is sufficient that it might. The risk of it is enough.”

In B. SURUNDER SINGH KANDA v GOVT. OF THE FEDERATION OF MALASIA (1962) A.C. 322 at 337 the Privy Council spoke of the principle thus:

“It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representation from one side behind the back of the other. The court will not inquire whether the evidence of representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.”

In the instant case although the DW1 investigations started in the room of the Respondent, the computer unit was taken subsequently to the office of the DW1 where the investigations continued to conclusion. While Chief Adesanya and Miss Duthie were present in the course of such investigation,

the Respondent was only called when they wanted to demonstrate their findings to him. In my view the risk of miscarriage of justice was not eliminated. In these circumstances I fully endorse the conclusion of the learned trial judge that the rules of natural justice were breached in the whole process and the Respondent's dismissal based thereon cannot stand. I hold that the dismissal was wrongful, null and void and was rightly so declared by the two courts below. B

This takes me to the next issue of whether there was wrongful arrest and detention of the Respondent. In paragraph 21 of the Amended Statement of Claim the Respondent averred: C

"21 At the instance of the Defendant, the plaintiff was arrested on or about the 12th day of April 1998 and detained till 14 day of May 1998 by the Police."

And in paragraph 31 he averred: D

"31" During the detention of the Plaintiff as instigated by the defendant the Plaintiff was made to share the same cell with hardened criminals and was also subjected to several physical and mental tortures and agonies."

At the trial the Respondent adduced evidence in support of these averments at page 27 of the record. Although the Appellants denied these in the amended statement of defence no evidence was led to substantiate the denial. In his judgment the learned trial judge at page 84 of the record stated: E

"The defendant argued that it merely informed the police who on their own decided to arrest the plaintiff and so it could not be liable. There is no doubt in the mind of the court that the report made against the Plaintiff by the defendant was more than just informing the Police of a crime being committed. The court is of the firm view that the defendant instigated the arrest of the plaintiff." F G

The court then awarded N3 million under this head of claim. I have carefully examined the submissions of counsel on this issue. **In addition to the oral evidence about his arrest and detention the Respondent also stated in Exhibit "F" how 5 Police Officers including the Commanding Officer of the Shell Supernumerary Lagos Command Mr. Ivara came into his office for a search, when Adesanya, Odia, Duthie, Uche and himself were** H

there.

It is not surprising therefore that the Court of Appeal concluded in the following terms:

“Clearly, a distinction has been drawn between merely reporting an incident to the Police and instigating the Police to arrest. In the instant case, I agree with the submission of learned Senior Advocate of Nigeria for the Respondent/Cross-Appellant that the arrest and detention of the Respondent by the Police was instigated by the Appellant/Cross-Respondent. Consequently the Appellant as defendant was liable as rightly in my view found by the learned trial judge.”

I do not have any conceivable reason to interfere with the concurrent findings of the two courts below particularly having regard to the fact that there is evidence oral and documentary supporting same. And since there is no appeal against the quantum of damage I shall also resolve this issue in favour of the Respondent.

The Appellant’s issue No.4 deals with the lower court’s dismissal of the interlocutory appeal. In view of the resolution of issues 1 and 2 in favour of the Respondent this issue becomes merely academic. Even if Exhibits T and TI were admitted in evidence it would not alter the decision of the court since the proceedings of the domestic tribunal were declared null and void for reasons already stated in this judgment.

On the whole this appeal fails and is accordingly dismissed.

I now come to the cross-appeal. ***The only issue submitted for determination is whether the court was right in dismissing the Plaintiffs cross-appeal on the claim for pension and gratuity. On this issue the Court of Appeal at pages 326-327 of the reacted:***

“Even in the case of NIGERIA MARITIME SERVICES LTD v ALHAJI BELLO AFOLABI (1978) 2 SC 79 at 81-82 relied upon by the cross-appellant, the court acted on the evidence unlike in the instant case where there is no credible evidence relating to the alternative reliefs. Pleadings cannot substitute evidence. Evidence must be led in support of averments by a party to warrant being granted the reliefs sought

particularly in respect of a claim for special damages which by law must be strictly proved. For the reasons stated the cross-appeal also fails and is hereby dismissed.”

Here again I have no reason to interfere with this findings. I have carefully considered the address of counsel on this single issue on the cross-appeal. Chief Olanipekun, SAN submitted that in view of the oral evidence and Exhibits “E” “MI” and “N” the court ought to have granted the relief for pension and gratuity. Mr. G.A. Ajuyah for the Cross-Respondent contended that there was no evidence in support of the claim for pension and gratuity and that Exhibits “E”, “MI” and “N” do not help him. I have carefully examined the evidence of the Plaintiff/Cross-Appellant at pages 26-28 and 29-30 of the record. There is no evidence at all in support of the claim for pension and gratuity. Exhibit “E” is the letter of dismissal. No mention is contained therein regarding the Plaintiff/Cross-Appellant’s entitlement to pension and gratuity. Exhibit “MI” dated 15th May, 1992 states:

“Further to MD’s Circular No. SL 886 of 24th April 1992 concerning a general increase to Nigerian Staff Salaries, I am pleased to advise that with effect from 1st April 1992 your pensionable salary will be N3 53,472 p.a.”

Exhibit “N” is a bundle of Pay Slips. I cannot see anything in the said Exhibits “MI” and “N” about the Plaintiff/Cross-Appellant’s entitlement to pension and gratuity. In my assessment there is no evidence oral or documentary in support of the claim for pension and gratuity.

This is an appeal against the decision of the Court of Appeal of Benin Division which in its judgment delivered on 21st January, 2002, affirmed the decision of the High Court of Justice of Delta State finding the dismissal and detention of the Respondent by the Police at the instant of the Appellant wrongful, resulting in the award of appropriate damages claimed by the Respondent in his reliefs V and VI in his amended statement of claim.

The main case of the Respondent as the Plaintiff at the trial Court against the Appellant which was the employer of the Respondent, was that the dismissal of the Respondent from the employment of the Appellant was unlawful, illegal, unconstitutional, null and void

and of no effect whatsoever. The finding of the trial Court that the dismissal of the Respondent was wrongful was affirmed by the Court below. It is trite that in cases of wrongful dismissal such as the present case, the measure of damages is prima facie, the amount the Plaintiff would have earned had the employment continued according to the contract of employment, subject to the deduction in respect of amount accruing from any other employment which the Plaintiff in minimising damages either obtained or should reasonably have obtained. See *Nigeria Produce Marketing Board v. Ademunmi* (1972) 11 S.C. 111; *WNDC v. Abimbola* (1966) N.M.L.R. 381 and *Imoloame v. W.A.E.C.* (1992) 9 N.W.L.R. (Pt. 266) 303 at 319. Reliefs V and VI granted to Respondent by the trial Court and affirmed by the Court below are quite in order.

It is for the foregoing reasons and other fuller reasons given by Tabai JSC in his lead judgment in this appeal and the cross-appeal with which I am in complete agreement, that I also find no merit in this appeal and the cross-appeal as well. The appeal and the cross-appeal are accordingly hereby dismissed. I abide by the orders made in the lead judgment including the order on costs.

MUKHTAR JSC

I agree.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Tabai JSC in this appeal. I agree with it and for the reasons given therein I also dismiss both the appeal and the cross-appeal. I also make no order as to costs.

CHUKWUMA-ENEH

I have read before now in draft the judgment of my learned brother Tabai JSC just delivered and I have nothing to add. I agree with him that there is no merit in both the main appeal and the cross-appeal and that they should be dismissed.

I abide by the orders in the lead judgment.