

SUPREME COURT OF NIGERIA

11TH JUNE, 2010, SC. 104/2006

**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN, F. F.
TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC**

‘EX’-CAPT. CHARLES C. EKEAGWU APPELLANT
AND

1. THE NIGERIAN ARMY

2. ATTORNEY-GENERAL RESPONDENTS

OF THE FEDERATION

AND MINISTER OF JUSTICE

MASTER & SERVANT - Retirement benefits - Absence of evidence -
The record did not show iota of evidence - That appellant was paid
retirement benefits - Following his compulsory retirement (H1)

MASTER & SERVANT - Retirement benefits - Claim - Onus of proof
- Respondents who pleaded - That appellant was paid retirement
benefits - Must prove same - (H2)

MASTER & SERVANT - Retirement benefits - Misconception - Re-
spondents assumed any payment - Made to appellant following his
reinstatement - Was his retirement benefits - Which cannot be true
(H3)

MILITARY LAW - Retirement of officers - Regulation of - Chapter
09. 02 (b) of Harmonised Terms and Conditions of Service - For
Force Officers - Stipulates 6 months salary in lieu of notice - For
officers retired not on disciplinary ground (H4)

APPEALS - Briefs - Reply - Failure to reply on issue raised - Effect -
Appellant has not reacted contrary - To submission of respondents -
And is deemed to have conceded same (H5)

MASTER & SERVANT - Compulsory retirement - Effect - Appellant
having been compulsorily retired - Is only entitled to retirement ben-
efits - And six months salary in lieu of notice (H6)

FACTS

Plaintiff/appellant previously sued defendants/respondents at the Federal High Court Lagos praying for his reinstatement as captain of the Nigerian Army and other sundry reliefs. As a matter of fact, appellant was a captain in the Nigerian Army, commissioned on 19th December, 1980. He was later posted as cashier to finance office of Artillery Division of the Army until the Division was disbanded in December, 1989, which led to appellant being posted to 15 Mechanised Brigade, Yola as Brigade Finance Officer from January, 1990. Thereafter, appellant was requested to report to the Directorate of Military Intelligence Lagos in connection with alleged missing N9,000,000.00 (Nine Million Naira) from the account of the disbanded Artillery Division, between April and May 1990, when appellant has left the Division. Appellant and others were charged to Special Military Tribunal on Recovery of Public Property which acquitted him on 30th July, 1993. However, on 31st October, 1994, appellant was by a letter, dismissed from the service of the Nigerian Army which led to the institution of suit No. FHC/L/CS/492/98. Trial Court held the dismissal null and void and ordered appellant to be reinstated and paid backlog salaries.

Appellant received another letter dated 18th June, 2001, which compulsorily retired him from the Nigerian Army. This led to the institution of this suit at Federal High Court Abuja. Respondents in defence claimed that appellant was paid retirement benefits following the said compulsory retirement. They pleaded estoppel which relates to payment of appellant's entitlement following the judgment of trial court in suit No. FHC/L/CS/492/98, not considering that reliefs claimed in the instant suit were against compulsory retirement after the order of reinstatement. Appellant's case was dismissed on the ground that plea of *res judicata* raised by respondents availed them. On appeal to the Court of Appeal, the decision of trial court was confirmed. Appellant has filed a further and final appeal to the Supreme Court.

ISSUE FOR DETERMINATION

“2. Whether the Appellant can challenge his compulsory retirement after accepting his entitlements.”

HELD (Unanimously allowing the appeal per **ONNOGHEN JSC**)
Retirement benefits - Absence of evidence

1. The above testimony of D. W. 1 clearly supports the Claim of the Appellant that what was paid to him was his arrears of salary following his reinstatement and not retirement benefits which D. W. 1 affirms that Appellant was yet to apply for. From the Record therefore there is no iota of Evidence that Appellant was paid his retirement benefits following his compulsory retirement vide Exhibit 7. The holding by the lower Court that Appellant was paid his retirement benefits is clearly not supported by the Evidence on Record and I consequently hold that the said holding or finding is perverse and consequently subject to being set aside. (p. 3263 C)

Retirement benefits - Claim - Onus of proof

2. The above notwithstanding, it is settled law that he who asserts must prove. The Respondents pleaded that Appellant was paid his retirement benefits but produced no Evidence, documentary or otherwise, to prove same - no voucher evidencing the payments etc. Even during oral testimony, D. W. 1 never claimed that Appellant was paid his retirement benefits. D. W. 1 was rather emphatic that Appellant never applied to be paid his retirement benefits. (p. 3263 E)

Retirement benefits - Misconception

3. The confusion as to whether or not Appellant was paid his retirement benefits emanates from the contents of Exhibit 7, the letter of compulsory retirement copied at page 79 of the Record.

It is clear that the compulsory retirement was substituted for the dismissal of the Appellant which resulted in the earlier Court action for reinstatement. The retirement of the Appellant in a letter dated 3/7/2001 is also said to have come into effect from 28th September, 1999. It is clear therefore that the Respondents assume that whatever payment that was made to the Appellant following his reinstatement, it was his retirement benefits which cannot be true particularly as upon reinstatement Appellant was entitled to payment of his arrears of salaries and other fringe benefits and upon retirement vide Exhibit 7, Appellant was in addition, entitled to payment of retirement benefits which from the Record has not been paid to the

Appellant. (pp. 3263 G/3264 G)

MILITARY LAW - Retirement of officers - Regulation of

4. It is not the case of the Appellant that the Respondents have no authority to compulsorily retire him. That being the case the next question is what is the entitlement of the Appellant upon retirement by the Respondents. Is it as claimed by the Appellant in the reliefs earlier reproduced in this Judgment? Learned Counsel for the 1st Respondent has referred this Court to Chapter 09.02 of the Harmonised Terms and Conditions of Service for the Nigerian Armed Forces Officers dealing with retirement of officers. Paragraph 09. 02 (b) provides thus:

“(b) An officer compulsorily retired not on disciplinary ground shall be entitled to 6 months salary in lieu of Notice.” (p. 3265 E)

Briefs - Reply - Failure to reply on issue raised - Effect

5. In the circumstance, I hold the considered view that Appellant haven been compulsorily retired is entitled to be paid all his retirement benefits including six months salary in lieu of Notice.

The Claim for re-instatement following compulsory retirement from the Nigeria Army is clearly misconceived particularly as the conditions of service clearly gives the Appellant a remedy in the circumstance. (p. 3266 A)

**NOTABLE POINTS OF INTEREST
ONNOGHEN JSC**

1. Wrongful termination - Two primary issues to be determined

It is important to remind us that in an action for wrongful termination/dismissal/retirement only two primary Issues call for Determination. These are

(1) Whether the termination/dismissal/ retirement of the Plaintiff is wrongful, And

(2) What is the measure of damages recoverable where the termination/dismissal/retirement is found to be wrongful.(p. 3259 D)

2. In a claim for reinstatement - Measure of damages is irrelevant

I am, however, not unmindful of the fact that where a Plaintiff seeks the relief of reinstatement which relief is granted, the issue of mea-

sure of damages for wrongful termination/dismissal/retirement becomes irrelevant because upon reinstatement the Plaintiff/Party is entitled to be paid all his arrears of salary/emoluments including fringe benefits up to the point/time of reinstatement and thereafter as and when due and payable. (p. 3259 F)

B

REPRESENTATION

Chukwuma-Machukwu-Umeh, (With him, Njaka Innocent, Lilian Ojinma, Victor Agbara, Obiaju Onyinye), for the Appellant.
Ibrahim Sanni Mohammed, for the 1st Respondent.
Sheni Ibiwoye, (with him, T. Okwute), for the 2nd Respondent.

C

CASES REFERRED TO

Ajolare v. Kwara State College of Technology (1986) 2 SC 374
Morohunfola v. Kwara State College of Tech. (1990) 7 SC (Pt. I) 40; D
(1990) 4 NWLR (Pt. 145) 506
Nwana v. F. C. D. A (2004) 4 SC (Pt. II) 1; (2004) 12 NWLR (Pt. 886) 51
UNTHMB v. Nnoli (1994) 8 NWLR (Pt. 363) 376 at 392

E

STATUTES REFERRED TO

Armed Forces Act, Cap 20, laws of the Federation of Nigeria, 2004, s. 10
Evidence Act, s. 135 (1)
Harmonised Terms and Conditions of Service for the Nigerian Armed Forces Officers, 2007, chapter 09.02

F

LEAD JUDGMENT BY ONNOGHEN JSC

This is an Appeal against the Judgment of the Court of Appeal, Holden at Abuja, in Appeal No. CA/A/43/904 delivered on the 12th day of January, 2006 in which the Court dismissed the Appeal of the Appellant against the Judgment of the Federal High Court, Holden at Abuja, in Suit No FHC/BJ/CS/28601 delivered on the 8th day of January, 2004, dismissing the action of the Appellant on the ground that the plea of res judicata set up by the Respondents, then Defendants, availed the said Defendants.

H

The reliefs claimed by the appellant in the Suit in question are as follows:-

“(1) *A declaration that the compulsory retirement of the Plaintiff by the 1st Defendant through a letter (ref. NA/278/1/A) dated 18601 is illegal, null and void, as it was based on a criterium that never existed.*

B (2) *An order reinstating the Plaintiff as a Captain of the Nigerian Army and directing an accelerated promotion of the Plaintiff to the rank of a full colonel or any other rank that he would have attained if the 1st Defendant had not stagnated his growth in the Nigerian Army.*

C *ALTERNATIVELY*
N 130,000,000.00 (One Hundred and Thirty Million Naira) being general damages against the Defendants for loss of expectation in the Plaintiff’s chosen career as a result of the illegal action of the Defendants, and the training and psychological torture suffered
D by the Plaintiff as a result of the illegal action of the Defendants.

(3) *N10,000,000.00 (Ten Million Naira) being cost of all legal services and actions taken by the Plaintiff from 1990 till date.”*

The facts of the case are simple and straight forward. They include the fact that the Appellant was a Captain in the Nigerian
E haven been commissioned on the 19th day of December, 1980. In January, 1988 Appellant was posted to Artillery Division of the Army, the finance office therein, as the cashier until the vision was disbanded in December, 1989, resulting in the Appellant being posted to 15
F Mechanised Brigade, Yola as the Brigade Finance Officer from January 1990.

In June, 1990, Appellant was requested by signal to report to the Directorate of Military Intelligence, Lagos in connection with an alleged missing N9,000,000.00 (Nine Million Naira) from the account
G of the disbanded Artillery Division with the Central Bank of Nigeria between April and May, 1990, after the Appellant had left the said Division... As a result of investigation, Appellant and others were charged to a Special Military Tribunal on Recovery of Public Property which acquitted and discharged the Appellant on the 30th day
H of July, 1993. A copy of the Judgment of the said Tribunal was forwarded to Army Headquarters as a result of which by a letter referenced (NA/218/DLS) dated 28th February, 1994, the Appellant was recommended for redeployment which eventually came by a letter referenced NA/217/A dated 16th September, 1994. However, on

the 31st day of October, 1994, Appellant was by a letter referenced as NA/226/MS dismissed from the services of the Nigerian Army resulting in the Appellant instituting Suit No. FHC L/CS/492/98 by virtue of which the dismissal was declared null and void and Appellant reinstated and ordered to be paid his backlog of salaries etc.

However, by a letter dated 18th June, 2001 and referenced as NA/278/A Appellant was compulsorily retired from the Nigerian Army culminating in the institution of the suit resulting in the instant further Appeal.

It is the case of the Respondents that Appellant was duly paid his retirement benefits which he accepted. In paragraph 12 of the Statement of Defence, at page 57 of the Record, the Defendants/ Respondents pleaded estoppel as follows:-

“12. The Defendants aver that since the Plaintiff has been paid all his entitlement pursuant to a Court Judgment, he is estopped from further suing the Defendants on the same cause of action of losing his job and rank in the Army.”

Again, the Respondents pleaded in paragraph 13 of the Statement of Defence as follows:-

“13. The Defendants aver that having been paid all his entitlements upon retirement which he collected without any complaint, the Plaintiff - is not entitled to any relief as contained in the Plaintiff's Statement of Claim.”

It should be noted that the estoppel pleaded in paragraph 12 of the Statement of Defence, supra, relates to payment of Appellant's entitlements following the Judgment of the Trial Court in Suit No. FHC/L/CS/492/98 challenging Appellant's wrongful dismissal which dismissal was declared null and void and reinstating the Appellant. That suit, and the reliefs claimed therein do not relate to the facts and reliefs claimed in the instant suit which was seeking reliefs against compulsory retirement after the Appellant was reinstated following the Judgment in Suit No. FHC/L/CS/492/98. From the facts averred in paragraph 13 of the Statement of Defence, the Respondents' Claim is that Appellant was paid his retirement benefits following the said compulsory retirement.

In deciding the matter, the Learned Trial Judge held, at page 141 of the Record as follows:-

“I do not therefore have any doubt as to the fact that the issue

of the retirement of the Plaintiff which is the fulcrum of this suit is not a cause separate, and distinct from the earlier cause which was thoroughly litigated in Exhibit 6. It is clear and certain that the cause in the instant case is the same cause in Exhibit 6. It is equally clear that the issue of reinstatement validly tackled in Exhibit 6 is still the issue generated in Relief 2 of the Amended Statement of Claim in the instant case. The parties in the earlier case Exhibit 6 and the instant case are the same. The decision in Exhibit 6 is valid, and subsisting and above all a decision of a Court of competent Jurisdiction. This no doubt has effectively precluded this Plaintiff from vexing the Defendant twice on the same issue. I hold therefore that the plea of res judicata set up by the Defendants succeeds. This action is therefore dismissed.”

The lower Court, while confirming the above decision in part D held, at page 217 of the Records thus:

“..... it is clear that the Appellant received some money after he was compulsorily retired. The law is well settled that where an employee accepts salary or payment after employment is brought to an end he cannot be heard to complain later that his contract of employment was not properly determined.

Acceptance of payment by the Appellant has rendered the determination mutual. See -

Dr. O. Ajolore v. Kwara State College of Technology (1986) 2 S.C. 374.

F *In the circumstances this Appeal fails and it is hereby dismissed*”

In the Appellant’s Brief of Argument deemed filed on 10th October, 2007, Learned Counsel for the Appellant, Chukwuma Machukwu Umeh, Esq., submitted the following three Issues for Determination, namely:

“ISSUE 1.

Whether from the facts and circumstances of this case, the Court of Appeal was not in error to have found as a fact that Appellant received his retirement benefits from the Respondents? (Ground 1).

H ISSUE 2.

Whether the Court of Appeal was right to have suo motu raised the issue that the Appellant received his retirement benefit from the Respondents and based its Judgment on same without calling on the parties to address the Court on the imported issue? (Ground 3).

ISSUE 3.

Assuming (but not conceding) that the Appellant had received his retirement benefit from the Respondents, whether the Court of Appeal was not in error in its conclusion of the legal consequences of the purported receipts? (Ground 2). ”

On the other hand in the 1st Respondent’s Brief of Argument deemed filed on 4th May, 2009, Ibrahim Sani Mohammed Esq., formulated the following two Issues for Determination:

“1. Whether the compulsory retirement of the Appellant was lawful.

2. Whether the Supreme Court can be successfully called upon to overrule itself without meeting the condition precedents. ”

Only one issue was formulated by Learned Counsel for the 2nd Respondent, Sheni Ibiwoye, Esq; in the Brief of Argument filed on the 10th day of June, 2008. The issue posits thus:

“Whether from the circumstances of this Appeal the Learned Justices of the Court of Appeal were correct to hold that the compulsory retirement of the Appellant was sustainable at law. ”

It is important to remind us that in an action for wrongful termination/dismissal/retirement only two primary Issues call for Determination. These are

(1) Whether the termination/dismissal/ retirement of the Plaintiff is wrongful, And

(2) What is the measure of damages recoverable where the termination/dismissal/retirement is found to be wrongful.

I am, however, not unmindful of the fact that where a Plaintiff seeks the relief of reinstatement which relief is granted, the issue of measure of damages for wrongful termination/dismissal/retirement becomes irrelevant because upon reinstatement the Plaintiff/Party is entitled to be paid all his arrears of salary/emoluments including fringe benefits up to the point/time of reinstatement and thereafter as and when due and payable.

In arguing the Appeal, however, Learned Counsel for the Appellant submitted that the lower Court was in error when it held that Appellant collected his retirement benefit from the Respondents whereas what Appellant was ordered to be paid and actually collected was his salary arrears following the nullification of his dismissal by the Federal High Court vide Exhibit 6; that there is no Evidence

contradicting the fact that Appellant was only paid his arrears of salary following his reinstatement; that even though the Respondents pleaded that Appellant was paid retirement benefits, they called no Evidence in proof of same thereby abandoning their pleadings; that the onus of proof lies on the Respondents to prove that Appellant
B was duly paid the retirement benefits, relying on UNTHMB v. Nnoli (1994) 8 NWLR (Pt. 363) 376 at 392; that it is erroneous for the lower Court to hold that Appellant accepted payment of his benefits and that the acceptance rendered the determination of his employment mutual.

C It is the further submission of Learned Counsel in relation to Issue 2 that the issue as to whether Appellant was paid his retirement benefits was raised suo motu by the lower Court which proceeded to base its Judgment thereon without giving Appellant the opportunity
D to be heard thereon, relying on Nwana v. F. C. D. A (2004) 4 S.C. (Pt. II) 1; (2004) 12 NWLR (Pt. 886) 51.

Turning to Issue 3, Learned Counsel submitted that the case of Ajolore v. Kwara Tech. (1986) 2 S.C. 374, relied upon by the lower Court in holding that after the receipt of retirement benefits Appel-
E lant cannot challenge his retirement subsequently particularly that issue did not fall for determination in the Appeal; that the case of Morohunfola v. Kwara Tech., supra, is also not relevant as the issue in that case was whether the Appellant was appointed to the office he wanted to be restored to; that the Court should overrule the obiter in
F Morohunfola's case (supra) as the same is per incuriam, granted that the finding that Appellant collected retirement benefits is confirmed by the Court; that such collection does not validate an otherwise invalid retirement.

G Finally, Learned Counsel urged the Court to resolve the issues in favour of the Appellant and allow the Appeal.

It is the submission of Learned Counsel for the 1st Respondent that by virtue of the provisions of Section 10 of the Armed Forces Act, Cap. A20, Laws of the Federation of Nigeria, 2004 and Chapter
H 9 (Part 1) of the Harmonised Terms and Conditions of Service for the Nigerian Armed Forces Officers, 2007 (Revised) which was formerly referred to as Terms and Conditions of Service of Officers, the Army Council has the power to compulsorily retire any army officer, including the Appellant; that Appellant collected money after retire-

ment and is consequently estopped from challenging his retirement; that it is not correct to say that the issue of collection of money after retirement was raised suo motu by the lower Court as there is Evidence on Record to support that finding by the lower Court; that the Issue of Fair Hearing as it relates to the collection of money after retirement does not arise at all or is misconceived; that Appellant has not fulfilled the conditions necessary for the invitation of the Court to overrule the decision complained of - that is *Ajolare v. Kwara State College of Tech.* (1986) S.C. 374 and *Morohunfola v. Kwara State College of Tech.* (1990) 7 S.C. (Pt. I) 40; (1990) 4 NWLR (Pt. 145) 506 and urged the Court to decline the invitation and dismiss the Appeal. B C

On his part, Learned Counsel for the 2nd Respondent submitted that the fact that Appellant was paid his entitlements after retirement was concurrently found by the lower Courts and that Appellant has not satisfied this Court why that finding should be disturbed; that the burden of proving that the compulsory retirement of the Appellant was not lawful rests with the Appellant which he failed to discharge as he failed to plead the terms and conditions of service applicable to his employment and who can appoint or terminate him from office or under which conditions his employment can be determined, relying on *Morohunfola v. Kwara State College of Tech.* supra and Section 135(1) of the Evidence Act. D E

Finally Learned Counsel urged the Court to dismiss the Appeal. F

Learned Counsel for the Appellant filed a Reply Brief on the 25th day of July, 2008 which is in effect a repeat of his arguments in the Appellant Brief.

It is important to begin a consideration of the issues in this Appeal by referring to the issues that called for determination by the lower Court as formulated by Learned Counsel for the Appellant. The said issues are two, and they posit thus:- G

"ISSUE 1

Whether the Honourable Trial Court in the Suit No. FHC/ABJ/CS/286/01 was right in holding that the Judgment in Suit No. FHC/L/CS/492/98 constituted estoppels per rem judicatam against the Appellant's Claim, having regard to the acts of the case and the totality of the Evidence before the Court. H

ISSUE 2

Whether the Learned Trial Judge made a proper evaluation of the totality of the Evidence before the Court in dismissing the Appellant's action."

B In resolving Issue I, the lower Court held, at page 214 of the Record as follows:

"The Judgment in Suit No. FHC/L/CS/492/98 does not constitute estoppels per rem judicatam against the Appellant's Claim for compulsory retirement in Suit No. FHC/ABJ/CS/ 286/01..."

C There is no Appeal or Cross-Appeal against the above holding by the lower Court. This Appeal therefore relates only to the resolution of the second issue by the lower Court, which was reformulated by the Court as follows:

D *"2. Whether the Appellant can challenge his compulsory retirement after accepting his entitlements."*

In resolving the above second issue and as earlier reproduced in this Judgment, the lower Court, at page 217 of the Record held thus:

E *"..... It is clear that the Appellant received some money after he was compulsorily retired. The law-is well settled that where an employee accepts salary or payment after employment is brought to an end he cannot be heard to complain later that his contract of employment was not properly determined."*

F *Acceptance of payment by the Appellant has rendered the determination mutual....."*

It is funny that the current three issues formulated by Learned Counsel for the Appellant for determination arc said to have arisen from an Appeal against the above holding of the lower Court.

G However, it is the case of the Appellant that after his reinstatement as ordered by the Federal High Court in its decision in Suit No. FHC/L/CS/492/98, Exhibit 6, he was paid some money, which Appellant insists was made up of his arrears of salary. At page 72 of the Record, Appellant, stated, under Cross-Examination, inter alia thus:

H *"Yes, I was paid some money when I was retired. The money was paid to me by the Nigeria Army What I was paid was my salary areas (sic)"*

I had earlier reproduced the relevant paragraphs of the Statement of Defence where the Respondents pleaded that Appellant was

duly paid his retirement benefits - see paragraphs 7 and 13 of the Statement of Defence particularly paragraph 7 where the Respondents pleaded thus:

“7. The Defendant aver that the Plaintiff accepted his retirement and was paid his full benefits contrary to the Plaintiff’s averments in paragraph 21 of his Statement of Claim.” B

The Respondents called a witness at the Trial who testified, inter alia, at page 97 of the Record as follows:-

“.....Once you have been retired, you follow up the issue of payment of your benefit. Since the Plaintiff did not come to request for benefits we take it that he has no problems.” C

The above testimony of D. W. 1 clearly supports the Claim of the Appellant that what was paid to him was his arrears of salary following his reinstatement and not retirement benefits which D. W. 1 affirms that Appellant was yet to apply for. From the Record therefore there is no iota of Evidence that Appellant was paid his retirement benefits following his compulsory retirement vide Exhibit 7. The holding by the lower Court that Appellant was paid his retirement benefit is clearly not supported by the Evidence on Record and I consequently hold that the said holding or finding is perverse and consequently subject to being set aside. D E

The above notwithstanding, it is settled law that he who asserts must prove. The Respondents pleaded that Appellant was paid his retirement benefits but produced no Evidence, documentary or otherwise, to prove same - no voucher evidencing the payments etc. Even during oral testimony, D. W. 1 never claimed that Appellant was paid his retirement benefits. D. W. 1 was rather emphatic that Appellant never applied to be paid his retirement benefits. F G

The confusion as to whether or not Appellant was paid his retirement benefits emanates from the contents of Exhibit 7, the letter of compulsory retirement copied at page 79 of the Record. H

Exhibit 7 states as follows:-

“CONFIDENTIAL

Headquarters
Nigerian Army

Department of Military
Secretary
Bonny Camp
Victoria Island
Lagos

B NA/226/MS

Tel: (01) 2619064

See Distribution 3 July, 2001

C

COMPULSORY RETIREMENT NA OFFICER
CAPTAIN CHARLES CHIMA EKEAGWU
(N/6618)

D References:

A. NA/226/MS dated 31 October, 94.

B. Minutes of Army Council Meeting dated 3 April, 2001.

C. NA/278/1/A dated 18 June 2001.

E 1. Pursuant to Army Council (2001) 19 decision, the Compul-
sory Retirement of Captain Charles Chima Ekeagwu (N/6618) from
the Nigerian Army has been approved with effect from 28 Septem-
ber, 99. This letter supersedes Reference A which conveyed the officer's
dismissal from the Nigerian Army.

F 2. The officer is authorized to retain his substantive rank of
Captain. He is also entitled to a Certificate of Military Service and
Retired Officers Identity Card.

3. Occurrence will be published in the Army Orders and Fed-
eral Government Gazette in due course.

G P.A. AKPA
Maj. Gen.
MS (A)"

H From paragraph 1 supra, ***it is clear that the compulsory
retirement was substituted for the dismissal of the Appellant
which resulted in the earlier Court action for reinstatement.
The retirement of the Appellant in a letter dated 3/7/2001 is
also said to have come into effect from 28th September, 1999.
It is clear therefore that the Respondents assume that what-
ever payment that was made to the Appellant following his***

reinstatement, it was his retirement benefits which cannot be true particularly as upon reinstatement Appellant was entitled to payment of his arrears of salaries and other fringe benefits and upon retirement vide Exhibit 7, Appellant was in addition, entitled to payment of retirement benefits which from the Record has not been paid to the Appellant.

On the question of the lower Court raising the issue of payment of retirement benefits to the Appellant suo motu and without giving Appellant the opportunity to address the Court on same and thereby denying the Appellant his right to Fair Hearing, I hold that the issue does not arise at all. I had earlier reproduced Appellant's Issue 2 before the lower Court which called for evaluation of the Evidence before the Trial Court and a finding in favour of the Appellant's Claims. In any event haven found and/or held that there was no Evidence in support of the holding that Appellant was paid his retirement benefits and consequently set aside that finding/holding, it follows therefore that the issue as to the raising of that issue suo motu becomes spent and is consequently discountenanced by me as it deserves no further consideration.

The question that follows the finding that Appellant was never paid his retirement benefits, which the Respondents have not contended Appellant is not entitled to is, what is the retirement benefits of the Appellant in the circumstance.

It is not the case of the Appellant that the Respondents have no authority to compulsorily retire him. That being the case the next question is what is the entitlement of the Appellant upon retirement by the Respondents. Is it as claimed by the Appellant in the reliefs earlier reproduced in this Judgment? Learned Counsel for the 1st Respondent has referred this Court to Chapter 09.02 of the Harmonised Terms and Conditions of Service for the Nigerian Armed Forces Officers dealing with retirement of officers. Paragraph 09. 02 (b) provides thus:

“(b) An officer compulsorily retired not on disciplinary ground shall be entitled to 6 months salary in lieu of Notice.”

Though Learned Counsel for the Appellant filed a Reply Brief in reaction to the Brief filed by the 2nd Respondent, he filed none in relation to the Brief of the 1st Respondent. It is

settled law that Appellant not haven reacted contrary to the submission of Learned Counsel for the 1st Respondent supra, is deemed to have conceded the point being made.

In the circumstance, I hold the considered view that Appellant haven been compulsorily retired is entitled to be paid all his retirement benefits including six months salary in lieu of Notice.

The Claim for re-instatement following compulsory retirement from the Nigeria Army is clearly misconceived particularly as the conditions of service clearly gives the Appellant a remedy in the circumstance.

Issue 3 is based on the assumption that Appellant collected his retirement benefits before instituting the present action and the legal effect thereof. I have already found that Appellant did not collect his retirement benefits neither have the Respondents proved that he did.

The above finding has rendered the resolution of Issue 3 academic or hypothetical.

In conclusion, I find merit in the Appeal which is accordingly allowed. The Judgment of the lower Court is hereby set aside and in its place there shall be Judgment for the Appellant in terms of payment of six months salary in lieu of Notice in addition to any other retirement benefits, such as gratuity, that accrue to an officer of the Appellant's rank upon retirement including those mentioned in Exhibit 7.

There shall be costs to the Appellant which I assess and fix at N20,000.00 in the Court below and N50,000.00 in this Court.

MUSDAPHER JSC

I have read before now the Judgment of my Lord, Onnoghen, JSC., just delivered with which I entirely agree. For the same reasons so clearly spelt out in the aforesaid Judgment which reasons I respectfully adopt as mine, I too allow the Appeal and set aside the decisions of the Court below. In place of, I enter Judgment in favour of the Appellant in that his compulsory retirement must be in accordance with the law that is Chapter 09.02 of the Harmonized Terms And Conditions Of Service of the Nigerian Armed Forces which provides:-

“6. An officer compulsorily retired not on disciplinary ground

shall be entitled to 6 months salary in lieu of Notice.”

I accordingly adjudge, that the Appellant having been compulsorily retired, is entitled to be paid all his retirement benefits payable to the officer of his status including six months salary in lieu of Notice. The Appellant is entitled to costs both at the Court below and this Court assessed at N20,000.00 and N50,000.00 respectively. B

MUHAMMAD JSC

I have had the benefit of reading before now, the Judgment just delivered by my learned Brother, Onnoghen, JSC., I am in full agreement with his conclusion that the Appeal has merit and it should be allowed. I, too, allow the Appeal and abide by consequential orders made in the Leading Judgment including order as to costs. C

ADEKEYE JSC

I had read before now the Judgment just delivered by my Learned Brother, W. S. N. Onnoghen, JSC. I agree with his reasoning and conclusion. The issues of the entitlement of members of the Armed Forces are as embodied in Chapter 9.02 of the Harmonised Terms and Conditions of Service for the Nigerian Armed Forces Officers. It also covers the retirement of such officers. D

Paragraph 9. 02 (b) provides that-

“An officer compulsorily retired not on disciplinary ground shall be entitled to 6 months salary in lieu of Notice.” E

On the foregoing, the Appellant who was compulsorily retired going by the Evidence in this case is entitled to be paid all his retirement benefits including the six months salary in lieu of notice. Such retirement benefits include his gratuity and any other entitlements accruing to an officer of the Appellant’s rank particularly categorized in Exhibit 7. F

With fuller reasons given by my Learned Brother in the leading Judgment, I conclude that the Appeal is meritorious. Judgment of the lower Court is set aside. Cost is assessed at N20,000.00 in the Court below and N50,000.00 in this Court in favour of the Appellant. H