

SUPREME COURT OF NIGERIA

20TH MAY, 2011. SC.68/2003

CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F. TABAI, I. T. MUHAMMAD, B. RHODES-VIVOUR, JJSC

B. A. IMONIKHE APPELLANT
AND

UNITY BANK PLC RESPONDENT

EVIDENCE - Appeals - Undisputed findings of lower court - Effect - Since appellant failed to dispute the findings that his acts constitute gross misconduct under exhibit P.18 - He is deemed to have accepted the findings as correct (H1)

MASTER & SERVANT - Allegation of fraud - Proof - Alleged fraud can be proved - By considering the issued queries and replies thereto - Without a formal testimony of appellant before the disciplinary committee (H2)

WORDS & PHRASES - Contract of employment - Use of “fraud” and “dishonesty” in exhibit P.18 - The words are used in general sense and not with criminal flavour - As such standard of proof in this case is on balance of probability (H3)

MASTER & SERVANT - Termination - Validity - Dismissal of appellant - Complied with the contract of employment - Since the allegation of his misconduct was satisfactorily proved before the disciplinary committee (H4)

MASTER & SERVANT - Termination - Validity - Since appellant was given fair hearing before the Tribunal - His dismissal cannot be set aside merely because he was not subjected to criminal prosecution (H5)

APPEALS - Issues - Joinder of - Issues between parties are joined in the pleadings - The parties joined issues as to whether the alleged fraud is as defined under the Criminal Code or used in ordinary general sense (H6)

EVIDENCE - Crime - Burden of proof - He who asserts the affirmative must prove same - No duty on a party to prove the negative - Appellant herein has a duty to prove that the fraud is within the contemplation of Criminal Code (H7)

FACTS

Appellant was an employee of the respondent bank. He was its branch manager at Ugbokpo in Benue State. Appellant was issued with a query dated 12th February, 1990 (Exhibit P.12), wherein he was accused by respondent inter alia, of fraudulent manipulation of a customer's account contrary to Article 4 (iii) of Senior Staff Collective Agreement (Exhibit P.18) and also aiding and abetting forging of credentials contrary to Article 4 (iv) (ix) of Senior Staff Collective Agreement (Exhibit P.18). Appellant denied the above charges in Exhibit P.11 and 13 respectively. The matter was referred to the disciplinary committee of respondent which found the replies of appellant unsatisfactory and consequently found appellant guilty of the relative offence as charged.

Consequently, appellant was dismissed from the services of respondent resulting in the institution of this action in the High Court of Bendel (now Edo) State Holden at Benin City. Appellant claimed several reliefs from the Court and sought that his dismissal by respondent be set aside. The court partly granted the reliefs claimed by appellant in its judgment delivered on 5th January, 1996. Aggrieved, respondent appealed to Court of Appeal Holden at Benin City against the judgment. The Court delivered its judgment on 10th December, 2001 allowing the appeal and setting aside judgment of the High Court. Dissatisfied, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether or not mere issuance of queries and answers without more discharged the provision of Article 5(d) of Exhibit P.18 which makes provisions amongst other things for summary dismissal on proving case of acts of misconduct which include fraud, dishonesty, irregular practice in respect of record and customer's account?

(ii) Whether or not with the combined effect of Exhibit P.8 and P.10 the onus is on the appellant to prove alleged fraud?

(iii) Whether or not the Justices of the Court of Appeal were right to hold that it is the bounden (sic) duty of the appellant to

specially adduce evidence to establish that the allegation of fraud in point has a criminal flavour within the contemplation of the criminal code.

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)
Undisputed findings of lower court - Effect on appeal

1. The issue before this court is clearly which of the two courts is right? In answering the question, it should be noted that learned counsel for the appellant has not attacked the finding by the lower court on the exhibits on record that appellant was queried variously by the respondent and that appellant replied to the said queries as required by the conditions of service Exhibit p.18 between the parties, neither has the appellant disputed the finding that the various acts of the appellant complained of and resulting in the queries, replies and warnings constitute acts of gross misconduct within the context of Exhibit p.18. The above findings/holding having not been impeached by the appellant they are deemed to have been accepted by the appellant and therefore correct.

What I understand appellant's complaint to be is the fact that he was not taken to court to be tried and convicted of the alleged crime of fraud etc, neither was he summoned before the disciplinary committee of the respondent to defend himself prior to the issuance of the letter of summary dismissal. (p. 1308D)

MASTER & SERVANT - Allegation of fraud - Proof

2. In the first place, it is not disputed that appellant was accused of having committed acts of misconduct as defined in Article 5 of Exhibit P18 and he was queried and he replied to the queries as required by the conditions of service Exhibit p.18. Can the allegations against the appellant not be proven or unproven by merely going/wading through the queries and the replies thereto without going further to hear oral testimony from the appellant at a disciplinary committee hearing? I think a conclusion on the matter can be easily reached by examining the queries and replies thereto to see whether the replies satisfactorily explain the conduct of the appellant alleged to amount to misconduct. Where the committee comes to the conclusion that it does, then the alleged misconduct has not been proved but where the answer is in the negative, then it has been proved.

I had also held that the alleged fraud, attributable to the conduct of the appellant can be said to have been “proven” or otherwise by merely going through the queries and replies thereto, as was done in the instant case, without the further oral testimony of the appellant before the disciplinary committee. Having held as above, it is clear
 B that the present issue becomes irrelevant and hypothetical. The fact remains that appellant was queried on the issue and he replied thereto which reply was found unsatisfactory by a disciplinary committee set up by the respondent to go into the matter. That is clearly the end of
 C the matter. (pp. 1308H/1310G)

Contract of employment - Use of “fraud” and “dishonesty”

3. I think appellant is confused by the use of the words proven, fraud, dishonesty, etc in the said Article 5 in Exhibit P.18. It should be noted
 D that Exhibit P.18 is merely a contract of employment - a collective agreement and the sense in which the words are used therein are not strictly in the technical legal context in which the legally trained mind understands them but in the ordinary day to day application of the words in the relationship between the parties.

E I had earlier in this judgment, particularly during the consideration of issue 1 supra, held that the use of the word “fraud” in Exhibit P.18 and in any other documents between the parties is in the general sense of the word connoting an act that involves moral
 F obliquity; the act of obtaining a material advantage by unfair or wrongful means and that it does not carry with it the sense in which it is used in the criminal or Penal code or criminal Law, particularly as the authors of Exhibit P.18 are not learned in law.

In the instant case, I have to repeat that haven found as a
 G fact the “fraud” used in this case is not that with criminal law flavour but of general sense, it follows that the issue of the standard of proof of same i.e. of prove beyond reasonable doubt does not arise at all. I had also held that as regards the general sense in which the words “fraud” and “dishonesty” are used in Exhibit P.18 and other related
 H documents in this case, the mere issue of queries and replies thereto without more discharged the obligation on the respondent particularly as the respondent can thereby be satisfied or not satisfied with the explanations offered by the appellant. In other words, the standard of proof applicable to the facts of this case is that of balance of

probability. I hold the view that the above holdings clearly make the present issue irrelevant. (pp. 1309C/1310E/1312D)

MASTER & SERVANT - Termination - Validity

4. To say that whenever an employee is alleged to have committed acts of misconduct in relation to Article 5 supra he must be charged to court where the allegation is to be proved to the satisfaction of the court before any disciplinary action can be taken against him despite being issued with queries and his replies thereto is to stretch the principle of fair hearing to an absurd end, particularly in view of the provisions of Article 5(d) of Exhibit P.18. Appellant's argument centres only on the accusation of fraud and dishonesty totally ignoring the allegation that he held out his brother from Edo State as an indigene of Benue state for the purpose of getting him employed in the service of the respondent and also that he was involved in irregular practices in respect of a customer's account which allegations can also be proved to the satisfaction of the disciplinary committee of the respondent by merely going through the queries and replies thereto, and appropriate punishment meted out to the appellant under Exhibit P.18.

In the circumstance, I agree with the lower court that the dismissal of the appellant was in strict compliance with the conditions of service of the appellant and consequently resolve issue 1 against the appellant. (p. 1309D)

Dismissal is not always set aside for want of prosecution

5. To now raise the issue as to who is to prove "fraud" and who is not to, granted that the issue was a life issue arising from the letter of dismissal, is clearly far fetched. It is clear that appellant is fishing for grounds that clearly do not exist or arise for consideration. Appellant was given the opportunity of defending himself against the allegations revered against him and he utilized same. He was therefore given fair hearing. So I hold the considered view that his dismissal in the circumstance cannot be set aside simply because he was not subjected to criminal prosecution prior to the dismissal.

In the circumstance, issue 2 is hereby discountenanced by me. (p. 1311A)

Issues between parties are joined in the pleadings

6. The above notwithstanding, it is settled law that issues between the parties are joined in the pleadings filed. In the instant case, the appellant in paragraphs 10 and 19 of the Amended statement of claim at page 48 of the record of appeal, pleaded as follows:-

B 18. The plaintiff avers that under the main collective agreement between the Nigerian Employers' Association of Banks, Insurance and Allied institutions and the Association of Senior Staff of Banks, Insurance and Financial Institutions, there must be proven cases of fraud before the plaintiff could be dismissed.

C 19. The plaintiff avers that the fraud alleged against him apart from being unfounded was not reported to the police neither was he charged to law court".

The answer of the respondent to the above averments is contained D in paragraph 11 of the Amended Statement of Defence at pages 26 and 27 of the record where it is pleaded thus:

E "11. The defendant says in further reply to paragraphs 18 and 19 of the Statement of Claim, that the plaintiff was at no time charged with or suspected of fraud as defined in the criminal code by the defendant in its said queries to him. Rather, the plaintiff was directed in the queries to explain out his banking operational misconduct as can be ascertained in the queries. The queries were tied to the plaintiff's condition of service. The defendant in its day to day banking operations does not report ordinary acts of misconduct to the police. Acts F of banking and/or operational misconduct are in-house offences which are treated under the staff conditions of service. The plaintiff's offences were punishable under the conditions of service only."

G From the above paragraphs, it is clear that the parties joined issues as to whether the fraud in issue is as defined under the criminal code or that in ordinary general sense; whether it ought to have been reported to the police and prosecuted or not. (p. 1312G)

EVIDENCE - Crime - Burden of proof

H 7. Whereas, appellant averred that it was fraud under the criminal code and therefore subject to being reported to the police for prosecution which put the burden on him to adduce evidence in proof, the respondent averred the contrary. It is trite law that he who asserts the affirmative has the duty to prove same. There is no duty,

generally, on a party to prove the negative. In the instant case, it is the appellant who asserted the affirmative or positive and therefore has the burden of proving same particularly as the respondent denied what was pleaded.

In the circumstance, it is very clear and I hereby hold that the lower court was right in holding that the burden of proof lies on appellant to prove the fact that the fraud in issue has criminal code flavour or as contemplated therein, which appellant failed to discharge. Even though I consider the issue irrelevant in view of my earlier holdings on the previous issues, it is clear, as demonstrated supra, that the issue is also without merit and is consequently resolved against the appellant. (p. 1313F)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Termination of employment - Main issues for determination

I have always held the view that in an action for wrongful dismissal/termination of appointment, the main issues calling for determination or in contention are:-

(a) Whether the dismissal/termination is in accordance with the terms and conditions of the contract of employment between the parties?

Where the dismissal/termination is in compliance with the contract of employment the matter ends there but where it is found not to be, then the next and final issue is

(b) What is the measure of damages recoverable in the circumstances of the case? (p. 1312A)

RHODES-VIVOUR JSC

2. "Audi alteram partem" - Meaning

Audi alteram partem is a maxim denoting basic fairness. It is a canon of natural justice that has its roots in the Old Testament. The Good Lord heard Adam before he passed sentence. It simply means hear the other side.

Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirements of fair hearing or natural justice. The appellant was given a fair hearing since

he answered the queries before he was dismissed. (p. 1317H)

REPRESENTATION

J. E Legbedion Esq, with him is S. Ebesunun Esq. for Appellant

J. T Ehigbai (Mrs.) for Respondent

B

CASES REFERRED TO

Akinfosile vs Ajose (1960) SCNLR 447

Okechukwu vs Nalah (1967) NWLR 368

C College of Medicine v. Adegbite (1973) 5 SC. 149

N.B.N Ltd vs Opeola (1994) 1 NWLR (pt.319) 126

Olatunbosun vs Nig. Institute of Social & Economic Research

Council (1988) 3 NWLR (Pt. 80) 21 at 32

D

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Benin City in appeal no. CA/B/301/98 delivered on the 10th day of December, 2001 allowing the appeal of the present respondent against the judgment of the High Court of Edo State Holden at Benin city in suit no. B/127/91 delivered on the 5th day of January, 1996.

E

The present appellant had instituted an action against the respondent in which he claims in paragraphs 25 and 26 of the Amended Statement of Claim as follows:-

F

“25. The plaintiff claims from the defendant as follows:-

(i) A declaration that the dismissal of the plaintiff from the Defendant Bank through a letter dated 6/7/1990 signed by Mrs. G.A. Almona, the Industrial Relations Manager of the defendant Bank of Industrial Relation Department on the basis of consideration by the Disciplinary committee is wrongful, unconstitutional, null and void.

G

(ii) A declaration that the dismissal of the plaintiff by the Defendant Bank on the grounds of fraud of lodgment of fictitious and dud National Bank of Nigeria Otukpo Cheque NO.OTH) 72976 into Account NO. 209, Mr. Innocent Nja (sic)

H

Without his knowledge and approval and gross administrative fraud and irregularity in the employment of Mr. Edmond Ojo at Ugbokpo Branch without giving the plaintiff opportunity to defend himself for the allegations against him before the disciplinary com-

mittee is wrongful, unconstitutional, null and void and contrary to the principle and rules of natural justice.

(iii) An order that the said letters of dismissal dated 6/7/1990 be set aside.

(iv) An order of perpetual injunction to restrain the Defendant Bank, its agent and/or privies from giving effect to the said letter of dismissal.

(v) An order on the defendant bank that the plaintiff be reinstated forthwith as the Defendant Bank unilaterally repudiated the employment of the plaintiff of permanent and pensionable status.

26. In the alternative, the plaintiff claims from the defendant (without the particulars of claim)

(i) The sum of N501,986.68 being damages for unlawful and wrongful dismissal, in that on or about 6/7/1990 the defendant summarily and without notice dismissed the plaintiff or caused him to be so dismissed from the services of the Defendant Bank - New Nigeria Bank Limited.

(ii) By reason of the said wrongful and unlawful dismissal as aforesaid the plaintiff has lost the benefit of further services in the said New Nigeria Bank Limited until he attains the age of retirement or retires and has lost all his benefits by way of salaries, allowances medical treatment, gratuity and person and has suffered loss and damages."

It is the case of the appellant that he was employed by the respondent as a custom clerk on 11/1/1971 and rose to the position of Branch Manager after commendable meritorious and satisfactory services; that on 30/10/1989 he was issued with a query, Exhibit P10 in which he was accused of fraud having benefited from N3,000.00 and cheque which had earlier been drawn from an account of a customer when it was not yet cleared, thereby acting contrary to Article 4(iii) (a) of the collective Agreement, Exhibit P18.

Secondly, that he was issued with another query dated 12/2/1990 Exhibit P.12 accusing him of aiding and abetting forging of credentials and thus guilty of dishonesty, lapse, gross administrative fraud in breach of Article 4(iv) and (ix) of the Senior Staff Collective Agreement, Exhibit P.18 which he replied by denying the charges in Exhibit P.11 and P.13 respectively. The matter was referred to the disciplinary committee of the respondent which found the replies of the appellant unsatisfactory and consequently found the appellant

guilty of “the relative offence as charged”. Consequently, appellant was dismissed from the services of the respondent resulting in the institution of the present action.

On the other hand, it is the case of the respondent that appellant was the Branch Manager of Ugbokpo branch, Benue State in 1988 while Mr. Dore was the branch accountant and one Innocent Nja was a customer with account no, 209 at the branch; that the branch accountant requested Mr. Nja to bring his teller and cheque booklets to the branch which the customer did. The branch accountant then completed a sheet of the customer’s teller booklet for the sum of N3,000.00 being the value of a National Bank of Nigeria cheque in possession of the accountant, the source of which was unknown to the customer. The accountant also wrote on a leaf of the customer’s cheque no. LA 328985 a like sum of N3,000.00 and requested the customer, who could barely write his name, to sign the cheque which he did after which the customer was asked to go without the money. The accountant later collected the value of the cheque. The above happened in the absence of the appellant.

The cheque was subsequently brought before the appellant by the accountant and the appellant counter signed it thereby giving official approval for the transaction despite the fact that the sum involved was within the competence of the account (sic) to approve and the appellant’s counter signature was not required. It is alleged that the appellant and the accountant shared the value or proceeds of the cheque. To privately regularize the customer’s account, the appellant and the branch accountant on different and several dates directed some junior staff of the respondent to complete the branches loose tellers for the appellant/accountant who personally contributed cash which was then lodged into the customer’s account without the knowledge of the customer until the debt was settled.

When the transaction was discovered appellant was queried vide Exhibit P.10 but appellant did not deny using his personal money and that of the accountant to regularize the debit of N3,000.00 in that account neither did he deny that the installment payments were not reflected in the customer’s teller booklet.

It is also the case of the respondent that despite established rules and regulations of the respondent in connection with employment of indigenes of the catchment area of operation when employ-

ing low level workers, appellant brought his brother, Edward Ojo Imonikhe from his home town, Afuze, Edo State and got him employed as security officer in his Ugbokpo branch, Benue State. In the process, the surname of his brother was completely dropped. When the facts came to light appellant was queried to which appellant wrote Exhibit P.13 in reply; that the disciplinary committee of the respondent went through the replies and found them unsatisfactory and accordingly dismissed the appellant for gross misconduct resulting in the action. B

In the appellant brief deemed filed on 2/11/2010 by learned counsel for the appellant, J. E. LEGBEDION ESQ identified the following issues for determination. C

“(i) Whether or not mere issuance of queries and answers without more, discharged the provision of Article 5(d) of Exhibit P.18 which makes provisions amongst other things for summary dismissal on proving case of acts of misconduct which include fraud, dishonesty, irregular practice in respect of record and customer’s account? D

(ii) Whether or not with the combined effect of Exhibit P.8 and P.10 the onus is on the appellant to prove alleged fraud? E

(iii) Whether or not the Justices of the Court of Appeal were right to hold that it is the bounden (sic) duty of the appellant to specially adduce evidence to establish that the allegation of fraud in point has a criminal flavour within the contemplation of the criminal code?.” F

Learned counsel for the respondent, CHIEF C. O. OKPABHELE in the respondent’s brief filed on 13/9/2005 identified the following three issues for determination.

“i. Whether or not the written queries and written replies thereto as required under Exhibit P.18 Article 5(d) being part of the conditions of service of the plaintiff/respondent/appellant (not copied in record of appeal) were not all the disciplinary committee of the defendant/appellant/respondent needed in order to be seised of the position to consider, for resultant action the alleged gross misconduct of the plaintiff/respondent/appellant? H

ii. Whether or not in the circumstances of paragraph 11 (see page 41 of The Record of Appeal) of the Amended Statement of Defence and of Exhibit P.11 and P.13 in which the plaintiff/respondent/appellant intentionally and awfully failed to reply to the specific

allegations of gross misconduct contained in Exhibit P.10 to P.10F the defendant/appellant/respondent had any onus whatsoever to prove 'fraud' against the plaintiff/respondent/ appellant?.

iii. Whether or not the court below was not right to hold that the plaintiff/respondent/appellant had the onus to adduce evidence to establish 'fraud' within the definition of the criminal code?. "J

In arguing issue 1, learned counsel for the appellant submitted that the mere issue of queries and answers thereto do not discharge the provisions of Article 5(d) of Exhibit P.18 in view of the fact that the disciplinary procedure applicable to the appellant deals with proven cases of theft, fraud, dishonesty irregular practice in respect of record and customer's account and not the case of proven unsatisfactory service of staff under Article 5(d) of Exhibit P.10 and P.12, the said offences must be proved as stated under paragraph (d) of Article 5(d) of the said Exhibit P.18; that Innocent Nja who made the allegation of irregular practices in respect of the record of the customer's account was not called as witness for the purpose of cross examination; that the allegation of aiding and abetting his brother in forging credentials was also not proved; that an employer is not bound to give reasons for terminating the appointment of an employee but where he gives reasons for the termination, it is his duty to establish the causes or reasons for the termination at the trial to the satisfaction of the court, relying on *Olatunbosun vs Nigeria Institute of Social and Economic Research Council* (1988) 3 NWLR (Pt. 80) 21 at 32; that appellant was allegedly " found guilty of the relative offences as charged" which said offences are as stated in the queries — Exhibit P.8 and P.10 and p.9 and p.12 which are fraud, dishonesty and aiding and abetting forgery.

Learned counsel finally urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent submitted that the conditions of the appellant's service were complied with by the respondent in dismissing the appellant, relying on the provisions of Article 5 of Exhibit P.18 and Exhibit P.10 - P.10F and P.12 as well as Exhibit p.11 and p.13 being replies to the queries issued to the appellant on his gross misconduct; that the acts of gross misconduct were found proven by the disciplinary committee of the respondent after examining the queries and the replies thereto and urged the

court to resolve the issue against the appellant.

In dealing with this issue, the learned trial Judge at page 88 of the record found as follows:-

In this case, the defence relied on Article 4(iii) (a) of Exhibit P18 conditions of service. Exhibit P18 stipulates at p.20 that a staff may be summarily dismissed for certain offences governed by the board headings of misconduct. It stated such offences to include: proven cases of theft fraud, dishonesty, defalcation and irregular practices in respect of cash, vouchers, records, returns or customer's account and foreign exchange transaction and many others. The above, i.e. fraud is the one that is relevant to the plaintiff. The defendant failed to show that the fraud referred to in Exhibit P18 is proven. In any case as earlier said fraud is a crime and the defendant ought to have complied with the rules of natural justice as discussed above. The letter of dismissal must be set aside. It is hereby declared null and void and of no legal effect whatsoever for reasons earlier discussed."

From the above, it should be noted that the trial Judge did not consider the other reason for dismissing the appellant which has to do with irregular practice in relation to a customer's account so as to determine whether it is also an allegation/accusation of crime or just a misconduct not requiring trial and probably conviction. It should, however, be noted that either of the two alleged gross misconduct, can sustain the summary dismissal of the appellant if established to have taken place.

However, in the passage reproduced above, the trial Judge concentrated on the use of the word "fraud" in the letter of query by the respondent to the appellant and concluded that since it imports the commission of a crime appellant ought to have been tried and convicted by a court of competent jurisdiction before the allegation could be said to have been proven and that since there was no such trial and since appellant never appeared before any court or tribunal in answer to the allegation of fraud, the dismissal of the appellant is null and void and of no effect whatsoever.

In reacting to the issue relevant to the decision of the trial court supra, the lower court, at pages 161 - 162 of the record found/held as follows:-

"It is observed from the foregoing chronicle of misconducts perpetrated by the respondent while in the employ of the appellant,

the respective proceedings already reproduced were strictly complied with. It is worthy of particular note that the appellant cautiously girded itself by the principle of fair hearing because on each occasion that the respondent misconducted himself in the course of his duty in the employ(sic) of the appellant, he the respondent, was queried in writing and he replied in writing. That approach was glaring in keeping with Article 5 (i.e. conditions of service) of Exhibit P.18. The eventual dismissal of the respondent can hardly be impeached because it was a necessary consequence of the series of his gross acts of misconduct which included fraud, dishonesty, irregular practices in respect of records and customer's account.

In view of the strict compliance with the conditions of service (Exhibit P.181) which led to the dismissal of the respondent by the appellant, I answer issue 3 in the affirmative and allow grounds 1 and 3 of the grounds of appeal."

The issue before this court is clearly which of the two courts is right? In answering the question, it should be noted that learned counsel for the appellant has not attacked the finding by the lower court on the exhibits on record that appellant was queried variously by the respondent and that appellant replied to the said queries as required by the conditions of service Exhibit p.18 between the parties, neither has the appellant disputed the finding that the various acts of the appellant complained of and resulting in the queries, replies and warnings constitute acts of gross misconduct within the context of Exhibit p.18. The above findings/holding having not been impeached by the appellant they are deemed to have been accepted by the appellant and therefore correct.

What I understand appellant's complaint to be is the fact that he was not taken to court to be tried and convicted of the alleged crime of fraud etc neither was he summoned before the disciplinary committee of the respondent to defend himself prior to the issuance of the letter of summary dismissal.

In the first place, it is not disputed that appellant was accused of having committed acts of misconduct as defined in Article 5 of Exhibit P.18 and he was queried and he replied to the queries as required by the conditions of service Exhibit p.18. Can the allegations against the appellant not be proven

or unproven by merely going/wading through the queries and the replies thereto without going further to hear oral testimony from the appellant at a disciplinary committee hearing? I think a conclusion on the matter can be easily reached by examining the queries and replies thereto to see whether the replies satisfactorily explain the conduct of the appellant alleged to amount to misconduct. Where the committee comes to the conclusion that it does, then the alleged misconduct has not been proved but where the answer is in the negative, then it has been proved.

I think appellant is confused by the use of the words proven, fraud, dishonesty, etc in the said Article 5 in Exhibit P.18. It should be noted that Exhibit P.18 is merely a contract of employment - a collective agreement and the sense in which the words are used therein are not strictly in the technical legal context in which the legally trained mind understands them but in the ordinary day to day application of the words in the relationship between the parties. To say that whenever an employee is alleged to have committed acts of misconduct in relation to Article 5 supra he must be charged to court where the allegation is to be proved to the satisfaction of the court before any disciplinary action can be taken against him despite being issued with queries and his replies thereto is to stretch the principle of fair hearing to an absurd end, particularly in view of the provisions of Article 5(d) of Exhibit P.18. Appellant's argument centres only on the accusation of fraud and dishonesty totally ignoring the allegation that he held out his brother from Edo State as an indigene of Benue state for the purpose of getting him employed in the service of the respondent and also that he was involved in irregular practices in respect of a customer's account which allegations can also be proved to the satisfaction of the disciplinary committee of the respondent by merely going through the queries and replies thereto, and appropriate punishment meted out to the appellant under Exhibit P.18.

In the circumstance, I agree with the lower court that the dismissal of the appellant was in strict compliance with the conditions of service of the appellant and consequently

resolve issue 1 against the appellant.

On issue 2, learned counsel for the appellant submitted that with the combined effect of Exhibit P.8 and P.10 the onus is not on appellant to prove the alleged fraud against him as it is the person who alleges that must prove the allegation, relying on section 137 (1) of the Evidence of Act; that the mere denial in paragraph 11 of the Amended statement of Defence is not enough to shift the burden of proof to the appellant as wrongly held by the lower court; that it was not the appellant who raised the issue of fraud as held by the lower court, relying on Okechukwu vs Nalah (1967) NWLR 368: Akinfosile vs Ajose (1960) SCNLR 447: N.B.N Ltd vs Opeola (1994) 1 NWLR (pt.319) 126 and urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent submitted that the word “fraud” used in Exhibit P.18 Article 5 (d) thereof was not used by the lay authors of Exhibit p.18 in the strict light of the criminal code but in general sense of obtaining a material advantage by unfair means as defined in A Concise Law Dictionary by P.G Osborn, 4th ed, page 149; that though the issue of fraud was pleaded in paragraphs 20 - 21 of the Amended Statement of Claim, it was abandoned as no evidence was adduced thereon and urged the court to resolve the issue against the appellant.

I had earlier in this judgment, particularly during the consideration of issue 1 supra, held that the use of the word “fraud” in Exhibit P.18 and in any other document between the parties is in the general sense of the word connoting an act that involves moral obliquity; the act of obtaining a material advantage by unfair or wrongful means and that it does not carry with it the sense in which it is used in the criminal or Penal code or criminal Law, particularly as the authors of Exhibit P.18 are not learned in law. I had also held that the alleged “fraud”, attributable to the conduct of the appellant can be said to have been “proven” or otherwise by merely going through the queries and replies thereto, as was done in the instant case, without the further oral testimony of the appellant before the disciplinary committee, Having held as above, it is clear that the present issue becomes irrelevant and hypothetical. The fact remains that appellant was queried on the

issue and he replied thereto which reply was found unsatisfactory by a disciplinary committee set up by the respondent to go into the matter. That is clearly the end of the matter.

To now raise the issues as to who is to prove “fraud” and who is not to, granted that the issue was a life issue arising from the letter of dismissal, is clearly far fetched. It is clear that appellant is fishing for grounds that clearly do not exist or arise for consideration. Appellant was given the opportunity of defending himself against the allegations revered against him and he utilized same. He was therefore given fair hearing so I hold the considered view that his dismissal in the circumstance cannot be set aside simply because he was not subject (sic) to criminal prosecution prior to the dismissal- see *Baba vs N.C.A.T.C (1991) 5 NWLR (Pt.192) 388.*

In the circumstance, issue 2 is hereby discountenanced by me.

On issue 3 which is whether or not the Justices of the court of Appeal were right to hold that it is the duty of the appellant to specially adduce evidence to establish that the allegation of fraud in point has a criminal flavour within the contemplation of the criminal code, learned counsel for the appellant submitted that the fraud used in Exhibit p.10 and dishonesty used in Exhibit p.12 connote fraud and dishonesty used in the criminal code, and that where a party in a civil action alleges the commission of a crime, it is his duty to prove the allegation beyond reasonable doubt as required by section 138 (1) of the Evidence Act; that it is the duty of the respondent to establish the fact that the words in question do not have the criminal law flavour attached to them; that mere issue of queries and replies is not enough to discharge the burden and urged the court to resolve the issue in favour of the appellant and allow the appeal.

On his part, learned counsel for the respondent referred the court to paragraph 11 of the Amended Statement of Defence where the respondent pleaded that the appellant was neither charged nor suspected of fraud as defined in the Criminal Code; that it was the appellant who, in paragraphs 18 and 19 of the Amended Statement of Claim, averred that the alleged fraud was not proved against him neither was it reported to the police nor charged to court; that in the circumstance the lower court was right in holding that the burden was on the appellant to adduce evidence to establish that the fraud

alleged was within the contemplation of the Criminal Code; that from the pleadings the burden of proving the issue as joined lies on the appellant and urged the court to resolve the issue against the appellant and dismiss the appeal.

B I have always held the view that in an action for wrongful dismissal/termination of appointment, the main issues calling for determination or in contention are:-

C (a) Whether the dismissal/termination is in accordance with the terms and conditions of the contract of employment between the parties?.

Where the dismissal/termination is in compliance with the contract of employment the matter ends there but where it is found not to be, then the next and final issue is

D (b) What is the measure of damages recoverable in the circumstances of the case?.

In the instant case, I have to repeat that haven found as a fact the “fraud” used in this case is not that with criminal law flavour but of general sense, it follows that the issue of the standard of proof of same i.e. of prove beyond reasonable doubt does not arise at all. I had also held that as regards the general sense in which the words “fraud” and “dishonesty” are used in Exhibit P.18 and other related documents in this case, the mere issue of queries and replies thereto without more discharged the obligation on the respondent particularly as the respondent can thereby be satisfied or not satisfied with the explanations offered by the appellant. In other words, the standard of proof applicable to the facts of this case is that of balance of probability. I hold the view that the above holdings clearly make the present issue irrelevant.

The above notwithstanding, it is settled law that issues between the parties are joined in the pleadings filed. In the instant case the appellant, in paragraphs 10 and 19 of the Amended statement of claim at page 48 of the record of appeal, pleaded as follows:-

18. The plaintiff avers that under the main collective agreement between the Nigerian Employers’ Association of Banks, insurance and Allied institutions and the Association of Senior Staff of Banks insurance and Financial Institutions

there must be proven cases of fraud before the plaintiff could be dismissed.

19. The plaintiff avers that the fraud alleged against him apart from being unfounded was not reported to the police neither was he charged to law court”.

The answer of the respondent to the above averments is contained in paragraph 11 of the Amended Statement of Defence at pages 26 and 27 of the record where it is pleaded thus:

“11. The defendant says in further reply to paragraphs 18 and 19 of the Statement of Claim, that the plaintiff was at no time charged with or suspected of fraud as defined in the criminal code by the defendant in its said queries to him. Rather, the plaintiff was directed in the queries to explain out his banking operational misconduct as can be ascertained in the queries. The queries were tied to the plaintiff’s condition of service. The defendant in its day to day banking operations does not report ordinary acts of misconduct to the police, Acts of banking and/or operational misconduct are in-house offences which are treated under the staff conditions of service. The plaintiff’s offences were punishable under the conditions of service only.”

From the above paragraphs, it is clear that the parties joined issues as to whether the fraud in issue is as defined under the criminal code or that in ordinary general sense; whether it ought to have been reported to the police and prosecuted or not. Whereas, appellant averred that it was fraud under the criminal code and therefore subject to being reported to the police for prosecution which put the burden on him to adduce evidence in proof, the respondent averred the contrary. It is trite law that he who asserts the affirmative has the duty to prove same. There is no duty, generally, on a party to prove the negative. In the instant case, it is the appellant who asserted the affirmative or positive and therefore has the burden of proving same particularly as the respondent denied what was pleaded.

In the circumstance, it is very clear and I hereby hold that the lower court was right in holding that the burden of proof lies on appellant to prove the fact that the fraud in issue

has criminal code flavour or as contemplated therein, which appellant failed to discharge. Even though I consider the issue irrelevant in view of my earlier holdings on the previous issues, it is clear, as demonstrated supra, that the issue is also without merit and is consequently resolved against the appellant.

In conclusion, I find no merit whatsoever in this appeal which is accordingly dismissed.

I however, order that parties to bear their costs.

Appeal dismissed.

MUKHTAR JSC

The appellant who was the plaintiff in the High Court of the then Bendel State instituted an action against the respondent claiming several reliefs. The defendant/respondent was originally New Nigeria Bank Ltd., which was substituted with the present name with the leave of this court on an application for substitution. Edo State was carved out of Bendel State, and so proceedings were concluded by a judge of the Edo State High Court, who gave judgment in favour of the plaintiff and granted the reliefs as per his amended statement of claim partially. The defendant was aggrieved by the decision and so appealed to the Court of Appeal on five grounds of appeal. In the Court of Appeal, the defendant succeeded, as the judgment of the trial court was set aside. The plaintiff has now appealed to this court. In compliance with the rules of this court, the learned counsel for the parties exchanged briefs of argument. At the hearing of the appeal learned counsel for the appellant adopted their amended brief of argument, and the learned counsel for the respondent adopted their own brief of argument.

Three issues for determination were raised in the appellant's brief of argument, and the issues are:-

“(1) Whether or not mere issues of queries and answers without more discharged the provision of articles 5(d) of exhibit P18 which makes provisions amongst other things for summary dismissal on proving cases of acts of misconduct which include fraud, dishonesty, irregular practice in respect of record and customer's accounts?.

(2) Whether or not with the combined effect of exhibits P.8 and P.10 the onus is on the Appellant to prove alleged fraud?.

(3) Whether or not the Justices of the Court of Appeal were right to hold that it is the bounden duty of the Appellant to specially adduce evidence to establish that the allegation of fraud in point has a Criminal flavour within the contemplation of the Criminal code?."

The issues raised in the respondent's brief of argument are in pari materia with the above issues. The plaintiff in his amended statement of claim predicated his case on his wrongful dismissal from the services of the defendant vide the following averments:-

"8. The Plaintiff avers that the Defendant by its letter dated 6/7/90 dismissed the Plaintiff from the service of the Defendant Company...

9. The Plaintiff avers that his dismissal was consequent upon two queries issued by the defendant to the plaintiff where the Defendant accused the Plaintiff of giving tacit approval to fraudulent action and the irregularity in the employment of Mr. Edmund Ojo at Ugbokpo Branch.

(i) Query headed "LODGEMENT OF FICTITIOUS AND DUD NATIONAL BANK OF NIGERIA, OTUKPO CHEQUE NO. OT.H072876 INTO ACCOUNT 209, MR. INNOCENT NJA, WITH OUR UGBOKPO BRANCH WITHOUT HIS KNOWLEDGE AND APPROVAL" dated 30/10/89 issued by the Defendant to the Plaintiff. And

(ii) Query headed "IRREGULARITY IN THE EMPLOYMENT OF ONE MR. EDMUND OJO AT UGBOKPO BRANCH" dated 12/2/90 issued by the Defendant to the Plaintiff.

12. The Plaintiff avers that the offences allegedly committed by him that led to his dismissal are unfounded, far fetched, absurd and imagination of the defendant."

The queries which were admitted in evidence as exhibits P10 and P12 alleged fraud, dishonesty and irregularity on the part of the appellant in the course of his employment. In the last paragraph of exhibit P10 the appellant was advised thus:-

"If you have any representations to make why disciplinary action should not be taken against you for this dastardly act, in line with the aforementioned article of the collective agreement, you should let us have same in quadruplicate not latter than Monday 6th Nov, 1989."

The same goes for exhibit 12 which has the following as its conclud-

ing paragraphs:-

“You should therefore, show onus (sic) why severe disciplinary action should not be taken against you for this gross administrative fraud which contravenes Article 4 subsection IV. I & IX of the Senior Staff Collective Agreement.

B Your reply to this query should reach us in triplicate not later than Friday, 23rd February, 1990.

The appellant replied the said queries and made representations in exhibits P11 and P12, which the respondents found not satisfactory and then dismissed appellant vide exhibit P8, a pertinent paragraph of which reads:-

C *“We wish to inform you that the appropriate committee has carefully considered the matter in all its ramifications and found your representations unsatisfactory and unacceptable, you were therefore*
D *found guilty of the relative offences as charged.*

Consequently, it was decided that you be dismissed from the services of the Bank in accordance with the conditions of service as applicable to you.”

On page 20 of exhibit P18 which is the recognition and procedural agreement and main collective agreement, paragraph (d) provides for summary dismissal thus :-

E *“The law provides that staff may be summarily dismissed for certain offences covered by the broad headings of gross misconduct, such offences include:*

F *(i) Proven cases of theft, fraud, dishonesty, defalcations and irregular practices in respect of cash, vouchers, records, returns or (sic) customer’s account and foreign exchange transaction.”*

The above is one amongst many offences that could earn an employee a summary dismissal. It may well be that the dismissal of the appellant was informed by reasons of the facts related to the above reproduced offences, but careful perusal of the content of exhibit P8 does not however specify the reason for the dismissal of the appellant from the employment of the respondent. Although it is
G instructive to note that the fraud was alluded to by virtue of reference to the queries, nonetheless this is not specifically contained in exhibit PB. This being the case, the argument of the appellant that the offence of fraud had not been proved against the appellant is of no
H moment. Exhibit P18 talks of the respondent’s power of summary

dismissal, and in paragraph (d) it states that ‘such offences include’ which connotes that there may be any other offence apart from the ones enumerated under the said paragraph (d). In the circumstance of this case, I find that the appellant did not discharge the onus placed on him by law to prove that his dismissal was wrongful. See *College of Medicine v. Adegbite* 1973 5 SC. 149. B

I have had the advantage of reading in advance the lead judgment delivered by my learned brother, Onnoghen JSC, and I am in full agreement that the appeal lacks merit and should be dismissed. I also dismiss the appeal, and I abide by the consequential orders made in the lead judgment. C

MUHAMMAD JSC

I read before now the judgment just delivered by my learned brother Onnoghen, JSC. I agree with him that the appeal lacks merit. I too dismiss the appeal. I order parties to bear their costs.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment of my learned brother Onnoghen, JSC. I am in full agreement that the appeal be dismissed. I would say a thing or two to show where the appellant and the learned trial judge went painfully wrong. E

The appellant was an employee of the Respondent’s Bank. In 1988, he was its branch Manager at Ugbokpo in Benue State. He was accused by his employees of fraud and dishonesty. A disciplinary Committee was set up by the Respondent. It issued queries to the appellant- Exhibits P10 and P12. The appellant answered them - Exhibits P11 and P12. F

The Disciplinary Committee did not find the appellant’s answers satisfactory and so the respondent dismissed the appellant vide Exhibit P8. The thrust of the appellant’s case is that his dismissal without giving him an opportunity to defend himself before the Disciplinary Committee is wrongful, unconstitutional, null and void and contrary to the principle of rules of natural justice. G H

What appellant is really saying is that since the allegations are on the commission of crime there ought to have been a trial and conviction by a court properly constituted before he can be dismissed. Audi alteram partem is a maxim denoting basic fairness. It is a canon

of natural justice that has its roots in the Old Testament. The Good Lord heard Adam before he passed sentence. It simply means hear the other side. See

F.C.S.C v Laoye (1989) 2 NWLR Pt.106 p.652; Akande v State (1988) 3 NWLR Pt 85 p.681.

B Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirements of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.

C The reasons for dismissing the appellant are easily categorized in two.

1. Allegations of a criminal nature, and
2. Irregular practice.

By the clear provisions of Article 5 of Exhibit P18, the conditions
D of service, proof of any of the above can result in dismissal.

Accusations of crime must be proved beyond reasonable doubt in a court of competent jurisdiction before an employer can rely on an accusation of crime to dismiss an employee.

As regards irregular practice, the respondent sent queries to
E the appellant for the appellant to explain:

(a) His role in irregular practices in respect of a Customer's account.

(b) How he made his brother claim Edo State instead of Benue
F State (where he comes from) so that he can be employed by the Bank.

The appellant answered the queries on the above, but the respondent did not find the answers satisfactorily, and so he was dismissed. Can it be said that the above also has to be proved in a
G court of Law?. I do not think so. By the conditions of service of any organization properly so called an employer ought to be able to discipline erring employees and that was precisely what the respondent did.

The learned trial Judge did not aver his mind to the disciplinary
H powers in article 5 of Exhibit P18 which is not limited to proof in a court of Law alone.

This appeal clearly lacks merit. I agree that it should be dismissed.