

SUPREME COURT OF NIGERIA
9TH DECEMBER, 2011. SC. 69/1998
CORAM:- **M. MOHAMMED, C. M. CHUKWUMA-ENEH,**
M. S. MUNTAKA-COOMASSIE, J. A. FABIYI,
B. RHODES-VIVOUR, JJSC

P. C. MIKE EZE APPELLANT
AND
SPRING BANK PLC. RESPONDENT

APPEALS - Orders of court - Not in record of appeal - Fate - By s.132 of Evidence Act 2004 - Court does not rely on such orders (H1)

FAIR HEARING - Principles - Application of principles of natural justice is not limited to judicial proceedings - It is applicable to every situation involving determination of right of a person (H2)

MASTER & SERVANT - Dismissal - Validity - An employee may be summarily dismissed without notice and without wages - If he is guilty of gross misconduct (H3)

MASTER & SERVANT - Dismissal - Complaint of breach of fair hearing - Propriety - Since appellant was given fair hearing prior to his dismissal - His complaint of denial of same has no basis (H4)

MASTER & SERVANT - Contract of employment - Termination - Where an employee commits a crime which amounts to gross misconduct - Criminal prosecution is not needed before the termination of his employment (H5)

APPEALS - Concurrent findings - Supreme Court does not interfere - Save where the findings are perverse or have occasioned miscarriage of justice (H6)

FACTS

Plaintiff/appellant was an employee of the defendant/respondent bank where he rendered 21 years of service before his dismissal

by a letter dated 19th December, 1988, marked as exhibit F. Prior to his dismissal, appellant was issued with a query in accordance with the rules governing his conditions of service which required him to explain why severe disciplinary action should not be taken against him for his involvement in various acts of foreign exchange malpractices which the employer regarded as gross misconduct. Appellant duly responded to the query in writing denying the allegations against him. However, appellant's employer was not satisfied with his explanation and proceeded to first suspend him from service and later dismissed him on the ground of gross misconduct. Dissatisfied, appellant instituted this action against respondent at High Court of Lagos State.

He sued respondent for wrongful termination of employment, sought for a declaration that the said exhibit F (letter of dismissal) is unlawful, null and void and also claimed damages for breach of contract of employment. Appellant based his case on the fact that he was not subjected to criminal prosecution in respect of the offences alleged against him. Hence, his dismissal was wrong. At the end of hearing, the court dismissed the claims of appellant. Aggrieved, appellant filed an appeal at Court of Appeal, Lagos division. The court also dismissed his appeal. Aggrieved further, appellant has appealed to Supreme Court. Meanwhile, respondent filed a notice of preliminary objection contending that the notice of appeal filed by appellant on 17th July, 2007 with the name African Continental Bank, a non legal person, as respondent, is incompetent, null and void.

ISSUES FOR DETERMINATION

"1. Whether or not the learned Justices of the Court of Appeal were correct when they held that it is the determination of whether the contract of employment relied on by the appellant was one of mere master and servant or one protected by statute that will resolve the issue of fair hearing necessitating trial before dismissal.

2. Whether or not the Justices of the Court of Appeal were correct when they held that the appellant did not challenge the definite findings of fact by the trial Court."

HELD (Unanimously dismissing the preliminary objection and dismissing the appeal per **MOHAMMED JSC**)

Orders of court - Not in record of appeal - Fate

1. Although it is clear from the judgment of the Court of Appeal of 17th November, 1994, now on appeal in this court that the respondent at the court below was the African Continental Bank Ltd. and not African Continental Bank simpliciter as claimed by the respondent in its objection. Further, all other processes in the record of appeal including the appellant's brief of argument, the respondent's brief of argument and the appellant's reply brief upon which this appeal was heard, bear Spring Bank Plc as the respondent. Again, it is apparent from the arguments of the respondents in support of the preliminary objection that it arose mainly from the alleged order of the Federal High Court given on 1st February, 2006, dissolving the African Continental Bank Ltd. That order being the root of the preliminary objection is not part of the record of the appeal and as such I cannot see how it will be relied upon in support of the objection having regard to Section 132 of the Evidence Act CAP E14 Laws of the Federation of Nigeria 2004 and the case of *Nzekwu & 7 Ors. v. Nzekwu & Ors.* (1989) 2 NWLR (Pt. 104) 373 at 404 on the requirement of proof of judgments or orders of court by the production of certified copies thereof. In any case, with the order of this court given on 28th January, 2009, substituting Spring Bank Plc as the respondent in this appeal, the order had the effect of consequential amendment to all the processes of the court reflecting the name of Spring Bank Plc as the respondent. Not only that, it is also plain that all the cases relied upon by the respondent in support of its objection, are not applicable because the respondent had failed to show that the respondent was dead or had ceased to exist as at 4th July, 2007, when this court granted the appellant's application for extension of time to appeal. The preliminary objection is accordingly hereby dismissed. (p. 2355 F)

FAIR HEARING - Principles

2. In resolving this first issue for determination in this appeal, it is very important to observe that notwithstanding the manner in which the issue was framed in the appellant's brief and adopted by the respondent, the real issue having regard to the undisputed facts of this case is whether in the exercise of the respondent's right under the contract of employment to dismiss the appellant from its employment, the appellant was given a fair hearing in line with the requirement of

Section 36(1) and (4) of the 1999 Constitution of the Federal Republic of Nigeria. It is indeed quite correct as asserted by the appellant in its arguments that the principle of natural justice as enshrined in the rules of natural justice, the common law and the Constitution of this Country is certainly not confined to the proceedings of Courts or Tribunals under Section 6(5) of the Constitution but to every situation wherever a person or authority is concerned in the determination of rights of another in such a manner that the version of the person against whom the determination is to be made, is an essential requirement of the process of determination. (p. 2358 A)

MASTER & SERVANT - Dismissal - Validity

3. In any case, on the accepted general legal principles, an employee may be summarily dismissed without notice and without wages if he is guilty of gross misconduct.

And gross misconduct has been identified as a conduct that is of a grave and weighty character as to undermine the confidence which should exist between an employee and the employer. So, too (sic, also) working against the deep interest of the employer amounts to gross misconduct entitling an employer to summarily dismiss the employee.

To warrant a summary dismissal, it suffices that the conduct of the employee, as in the present case, is of such grave and weighty character as to undermine the relationship of confidence which should exist between the employer and employee as found by the trial court and affirmed by the court below. (p. 2360 A)

MASTER & SERVANT - Complaint of breach of fair hearing

4. It is quite plain therefore that the appellant was in fact dismissed for serious breaches of the respondent's regulations in his application for foreign exchange found to have been irregularly made and not for having committed offences of forgery on foreign exchange malpractices as asserted by the appellant. Since the appellant was clearly given fair hearing by the respondent before his dismissal, his complaint of denial of fair hearing or breach of his right of fair hearing under the 1999 Constitution in section 36 thereof as raised under this issue has no basis whatsoever. (p. 2361 A)

MASTER & SERVANT - Contract of employment

5. It is quite clear from the record of this appeal that the specific findings of fact by the trial court in contention in this issue include the fact that there were serious breaches of the respondent's rules and regulations by the appellant; that the appellant was duly queried for the breaches by the respondent; that the appellant's reply to the query had failed to exonerate him from the alleged breaches of the respondent's regulations and finally that the trial court was satisfied that the respondent had discharged the onus on it in proving acts of gross misconduct justifying its action in dismissing the appellant. The complaint of the appellant in the present issue is that what the court below termed as breaches committed by the appellant are in fact criminal allegation of forgery and foreign exchange malpractices for which the appellant ought to have been charged to court and prosecuted before proceeding with his dismissal. Unfortunately for the appellant, this is not the present position of the law governing disputes between master and servant in the interpretation of contracts of employment. The correct position of the law is stated by this court in the case of Francis C. Arinze v. First Bank of Nigeria Ltd. (2004) 12 N.W.L.R. (Pt. 888) 663 at 673.

Applying this decision to which I am no doubt bound, to the present case which is virtually on all fours with the present case, where the appellant was also dismissed for gross-misconduct arising from his gross violation of the foreign exchange regulation to remit foreign exchange abroad to his wife. I am of the view that it was not necessary for the respondent to have waited for the prosecution of the appellant for the criminal offences disclosed in his various acts of gross misconduct, before taking steps to deal with him by appropriate dismissal. In other words, it is no longer the law that where an employee commits acts of gross-misconduct against his employer which acts also disclose criminal offences under any law, the employer has to wait for the outcome of the prosecution of the employee for such criminal offences before proceeding to discipline the employee under the contract of service or employment.

APPEALS - Concurrent findings

6. Finally, I am also not unaware that the present appeal is against

the concurrent findings of fact by the two courts below. Ordinarily, this court will not interfere to reverse concurrent findings of fact by the trial High Court and the Court of Appeal unless such decisions are perverse, not supported by evidence or had occasioned a miscarriage of justice. Thus, on the concurrent findings of fact in the instant case that the appellant was guilty of gross-misconduct in the discharge of his duties as employee of the respondent in consequence of which he was dismissed, such dismissal is clearly justified in law in spite of the fact that the acts of gross-misconduct committed by the appellant also disclosed criminal offences for which the appellant was not tried and convicted before his dismissal. There is therefore no reason whatsoever to disturb those decisions. (p. 2363 G)

REPRESENTATION

- D E. A. Oyebanji with Jide Olawepo, P. C. Anah and V. O. Arasiola, for Appellants
I. E. Mawku with Jude Ezeobi, for Respondents

CASES REFERRED TO

- E Maja v. Stocco (1968) All NLR 141 at 151
Egbo v. Agbara (1997) 1 NWLR (Pt. 481) 293
Shuaibu v. Nigeria-Arab Bank Ltd. (1998) 4 S.C. 170
Margaret Nzom v. Jinadu (1987) 1 NWLR (Pt. 51) 533
A.G. Anambra State v. A.G. Federation (2005) 5 S.C. (Pt. 1) 73
F Teliat Sule v. Nigerian Cotton Board (1985) 2 NWLR (Pt. 5) 17
Olatunbosun v. NISER Counsel (1988) 3 N.W.L.R. (Pt. 80) 25 at 41
Shitta-Bay v. Federal Civil Service Commission (1981) 1 S.C. 40
Otu v. A.C.B. International Plc. & Anor (2008) 2 FWLR (Pt. 419) 18
G Oloruntoba-Oju & Ors. v. Abdul-Raheem & Ors. (2009) 5-6 S.C. (Pt. 11) 57
Ajayi v. Texaco Nig. Ltd. & Ors. (1987) 3 NWLR (Pt. 62) 577
Lasisi Yusuf v. Union Bank of Nig. Ltd. (1995) 6 NWLR (Pt. 457) 632
Arinze v. First Bank of Nig. Ltd. (2004) 12 NWLR (Pt. 888) 663
H Co-operative and Commerce Bank Ltd. V. Alex Onwuchekwa (2000) 3 N.W.L.R. (Pt. 647) 65 at 73
Tesi Opebiyi v. Shittu Oshoboja (1976) 9/10 SC

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 36(1)(4), 6(5)

Evidence Act Cap. E14 LFN 2004, s.132, 138(1)

Supreme Court Rules, O.8 r. 9(1) (2)

LEAD JUDGMENT BY MOHAMMED JSC

B

The appellant in this appeal was the plaintiff at the High Court of Justice of Lagos State and the appellant at the Court of Appeal Lagos Division. The Appellant was also an employee of the Defendant/Respondent Bank where he rendered 21 years of service before his dismissal by a letter dated 19th December, 1988. By a writ of summons and a statement of claim, the appellant challenged his dismissal at the Lagos High Court where he claimed for the following reliefs-

C

“1. A Declaration that the dismissal of the plaintiff from the defendant’s service vide letter reference No. PAD/TR/STA.819 dated 19th December, 1988 is unlawful, irregular, null and void and of no effect whatsoever.

2. The sum of N285,690.00 (Two Hundred and Eighty Five Thousand, Six Hundred and Ninety Naira) being damages for breach of contract of employment committed by the defendant against the plaintiff on 19th December, 1988.”

E

Before his dismissal, the appellant was issued with a query dated 3rd May, 1988 in accordance with the rules governing his conditions of service which required him to explain why severe disciplinary action should not be taken against him for his involvement in various acts of foreign exchange malpractices which the employer regarded as gross misconduct. The appellant duly responded to the query in writing denying the allegations against him. However, the appellant’s employer was not satisfied with his explanation and proceeded to first suspend him from service and later dismissed him on the ground of gross misconduct.

F

G

At the conclusion of the hearing of the appellant’s action at the High court, that court in its judgment delivered on 24th April, 1992, dismissed the appellant’s claims and his subsequent appeal against that judgment to the Court of Appeal, Lagos Division was also dismissed on 17th November, 1994, thereby giving rise to the present appeal by the appellant.

H

In the appellant's brief of argument, the two issues distilled from the three grounds of appeal are -

B "1. Whether or not the learned Justices of the Court of Appeal were correct when they held that it is the determination of whether the contract of employment sued on by the appellant was one of mere master and servant or one protected by statute that will resolve the issue of fair hearing necessitating trial before dismissal (formulated from ground 3).

C 2. Whether or not the Justices of the Court of Appeal were correct when they held that the appellant did not challenge the definite findings of fact by the trial Court (formulated from grounds 1 & 2).

The two issues were adopted by the respondent in its respondent's brief of argument in which the respondent also raised a preliminary objection to the competence of the appellant's appeal itself.

Preliminary Objection

E The respondent's preliminary objection is grounded on the fact that on 4th July, 2007, when this court granted the appellant's application for extension of time to seek leave to appeal, leave to appeal and extension of time to file the notice of appeal, there was no respondent before the court as the African Continental Bank without the addition of 'Ltd.' was not a legal personality having ceased to exist as a Company following the order of the Federal High Court of 1st February, 2006, dissolving the Company. It was the contention of F the respondent that the notice of appeal filed by the appellant on 17th July, 2007 with the same African Continental Bank, a non legal person, as respondent, is also incompetent, null and void. Relying on the cases of Margaret Nzom v. Jinadu (1987) 1 N.W.L.R. (Pt. 51) G 533; Co-operative and Commerce Bank Ltd. V. Alex Onwuchekwa (2000) 3 N.W.L.R. (Pt. 647) 65 at 73; Tesi Opebiyi v. Shittu Oshoboja (1976) 9/10 SC v. United Africa Co. Ltd. (1965) 33 A.E.R. 1169 at 1172 1, learned counsel to the respondent urged this court to strike out this appeal in the absence of a competent respondent to defend H the appeal following the demise of the respondent even before initiating this appeal on 4th July, 2007, when this court granted the appellant's application for extension of time to appeal.

In the appellant's reaction to the preliminary objection, its learned counsel in the appellant's reply brief of argument, pointed

out that the preliminary objection was misconceived and ought to be dismissed for failure to take into account the fact that since December, 2005, the Spring Bank Plc, the present respondent had acquired African Continental Bank in a recapitalizing(sic) exercise; that upon the application of the appellant for substitution under Order 8 Rule 9(1) and (2) of the Rules of this Court which was granted on 28th January, 2009, Spring Bank Plc became the new respondent in this appeal resulting in amending all the processes in this appeal including the notice of appeal; that unless and until the order of this Court of 28th January, 2009 is set aside it remains binding on the court and the parties that Spring Bank Plc is the respondent in this appeal, which the respondent itself recognised in filing its application for extension of time to file and serve its respondent's brief of argument. Learned counsel pointed to the decisions of this Court in *Otu v. A.C.B. International Plc. & Anor.* (2008) 2 F.W.L.R. (Pt. 419) 18; *Akinfolarin & Ors. v. Akintola* (1994) 4 S.C.N.J. 30; *A.G. Anambra State v. A.G. Federation* (2005) 5 S.C. (Pt. 1) 73; *Oloruntoba-Oju & Ors. v. Abdul-Raheem & Ors.* (2009) 5 - 6 S.C. (Pt. 11) 57; *Egbo v. Agbara* (1997) 1 N.W.L.R. (Pt. 481) 293 and *Shuaibu v. Nigeria-Arab Bank Ltd.* (1998) 4 S.C. 170 and urged this court to dismiss the preliminary objection as the parties are bound by the ruling of this court of 28th January, 2009, in the application for substitution taking into consideration that the age of relying of technicalities to defeat substantial justice, is over.

Although it is clear from the judgment of the Court of Appeal of 17th November, 1994, now on appeal in this court that the respondent at the court below was the African Continental Bank Ltd and not African Continental Bank simpliciter as claimed by the respondent in its objection. Further, all other processes in the record of appeal including the appellant's brief of argument, the respondent's brief of argument and the appellant's reply brief upon which this appeal was heard, bear Spring Bank Plc as the respondent. Again, it is apparent from the arguments of the respondents in support of the preliminary objection that it arose mainly from the alleged order of the Federal High Court given on 1st February, 2006, dissolving the African Continental Bank Ltd. That order being the root of the preliminary objection is not part of the record of

the appeal and as such I cannot see how it will be relied upon in support of the objection having regard to Section 132 of the Evidence Act CAP E14 Laws of the Federation of Nigeria 2004 and the case of Nzekwu & 7 Ors. v. Nzekwu & Ors. (1989) 2 N.W.L.R. (Pt. 104) 373 at 404 on the requirement of proof of judgments or orders of court by the production of certified copies thereof. In any case, with the order of this court given on 28th January, 2009, substituting Spring Bank Plc as the respondent in this appeal, the order had the effect of consequential amendment to all the processes of the court reflecting the name of Spring Bank Plc as the respondent. Not only that, it is also plain that all the cases relied upon by the respondent in support of its objection, are not applicable because the respondent had failed to show that the respondent was dead or had ceased to exist as at 4th July, 2007, when this court granted the appellant's application for extension of time to appeal. The preliminary objection is accordingly hereby dismissed.

Substantive Appeal

The first issue is whether or not the court below was right in holding that it is the determination of whether the contract of employment sued on by the appellant was one of mere master and servant, or one protected by statute that will resolve the issue of fair hearing necessitating trial before dismissal. Learned counsel to the appellant on this issue had submitted that the appellant's case all along had been that the nature of employment notwithstanding, the appellant was entitled to fair hearing before he could be dismissed in accordance with his guaranteed right under Section 35 of the 1999 Constitution; that the court below had misdirected itself on the applicability of the principle of fair hearing as being available only to employees whose employment was clothed with statutory flavour which resulted in causing miscarriage of justice to the appellant. The cases relied upon in support of this stand of the appellant include, *Aiyetan v. NIFOR* (1978) 3 N.W.L.R. (Pt. 59) 48 at 75 - 76; *Denloye v. Medical & Dental Practitioners Disciplinary Committee* (1968) 1 All N.L.R. 306; *Garba v. University of Maiduguri* (1986) 1 N.W.L.R. (Pt. 18) 550 at 583; *Sofekun v. Akinyemi* (1980) 5 - 7 S.C. 1; *F.C.S.C. v. Laoye* (1989) 2 N.W.L.R. (Pt. 106) 652; *Olaniyan v. University of*

Lagos (1985) 2 N.W.L.R. (Pt. 9) 599 and Bishi v. Judicial Service Commission (1991) 6 N.W.L.R. (Pt. 197) 331. Learned counsel observed that the only period the nature of employment becomes relevant is as to the consequence of a finding of wrongful dismissal. An employee enjoying statutory flavor in his employment can be reinstated, whereas for others, the court cannot impose an employee on an employer. On the authorities relied upon, learned counsel submitted that in the present case where the appellant's employer had given specific misconduct as the reason for the dismissal of the appellant, the dismissal cannot be justified in the absence of adequate opportunity offered to explain, justify or else defend the alleged misconduct; that since the respondent did not give the appellant his constitutional right of fair hearing before his dismissal, that dismissal cannot be allowed to stand, reiterated the learned counsel who urged the court to allow the appeal on this issue and set aside the order of dismissal as the case of Yusuf v. Union Bank of Nigeria Plc. (1996) 6 S.C.N.J. 203 at 214 relied upon by the respondent, is a mere obiter dictum in the absence of any issue of misconduct which bearded on criminal act in that case.

For the respondent however, it was argued that in recognizing that in the determination of whether the principles of natural justice have been complied with by a master in terminating/dismissing his servant from his employment, the court would first ascertain whether the contract of employment was one of mere master and servant relationship or one with statutory flavour; learned counsel pointed out that, that was exactly what was done by the court below in its judgment now on appeal; that the respondent having queried the appellant on the gross misconduct alleged against him to which he responded before the respondent took step to dismiss him, the respondent had complied with the requirement of giving the appellant a fair hearing in line with the decision of this Court in Alhaji Lasisi Yusuf v. Union Bank of Nigeria Ltd (1995) 6 N.W.L.R. (Pt. 457) 632 and Francis Arinze v. First Bank of Nigeria Ltd. (2004) 12 N.W.L.R. (Pt. 888) 663; that the circumstances that led to the dismissal of the appellant have been clearly established by the evidence on record duly accepted by the trial court and affirmed by the court below resulting in concurrent findings which this court cannot disturb unless special circumstances have been established by the appellant which

the appellant had failed to do. Pointing to the case of Alhaji Sokwo v. Joseph Kpongbo & Ors. (2008) 7 N.W.L.R. (Pt. 1088) 342 at 356, learned respondent counsel urged this court to dismiss the appeal.

In resolving this first issue for determination in this appeal, it is very important to observe that notwithstanding the manner in which the issue was framed in the appellant's brief and adopted by the respondent, the real issue having regard to the undisputed facts of this case is whether in the exercise of the respondent's right under the contract of employment to dismiss the appellant from its employment, the appellant was given a fair hearing in line with the requirement of Section 36(1) and (4) of the 1999 Constitution of the Federal Republic of Nigeria. It is indeed quite correct as asserted by the appellant in its arguments that the principle of natural justice as enshrined in the rules of natural justice, the common law and the Constitution of this Country is certainly not confined to the proceedings of Courts or Tribunals under Section 6(5) of the Constitution but to every situation wherever a person or authority is concerned in the determination of rights of another in such a manner that the version of the person against whom the determination is to be made, is an essential requirement of the process of determination. This is what was stated by this court in Aiyetan v. NIFOR (1987) 3 N.W.L.R. (Pt. 59) 48 at 75 - 76 and the other cases relied upon by the appellant at the court below and in its brief of argument in this Court. The question therefore is whether in the determination of the rights of the appellant under his contract of employment, the appellant was allowed to state his own version in his own defence on the allegations made against him in the letter of query before the respondent proceeded to suspend and later to dismiss him. The court below in the lead judgment had quite adequately addressed the question at pages 219 - 220 of the record where it said -

"I have no difficulty in holding that the principle established by the cases relied on by the plaintiff does not apply to the instant case. All the plaintiffs involved in each of those cases were public servants whose employment was governed by statutes or the civil service regulations, which make it inappropriate for the bodies empowered by law to discipline them to sit over criminal allegations. And since by

law such criminal allegations when raised ought to be shown to have been established, they must of necessity be laid before a Court or Tribunal of competent jurisdiction.

It is now well recognized that there are employment with special status or statutory flavor: See Shitta Bay v. Federal Civil Service Commission (1981) 1 S.C. 40 at 56; Olatunbosun v. NISER Counsel (1988) 3 N.W.L.R. (Pt. 80) 25 at 41. But outside those employment are others which under agreement or common law come within mere master and servant relationship. An employer is entitled in such employment to dismiss an employee for misconduct. Misconduct is of varying degree. It cannot now be disputed that in a mere master and servant relationship, the servant may obviously be dismissed for dishonesty or fraud in his employment: See Phillip v. Foxall (1872) L.R.. 7 Q. B. 666. The master does not have to report the matter to the Police let alone wait for prosecution to be done. He does not even have to reach a decision on the alleged crime; once he is satisfied that the servant has done something which is incompatible with the faithful discharge of his duty or has displayed conduct such that it would be injurious to the master's business to retain him, the master may dismiss the servant; See Maja v. Stocco (1968) All N.L.R. 141 at 151. The burden is on the master to justify the dismissal. See Arthur Walters v. Frank Harrison (1922) 4 N.L.R. 73."

The above quoted part of the judgment of the court below constitutes the gist of ground 3 of the appellant's grounds of appeal from which the first issue for determination now being resolved, was distilled. What the court below stated in that part of the judgment does not say anywhere that, that appellant whose employment was not clothed with statutory flavour was not entitled to fair hearing in the determination of his rights under the contract of employment, before his dismissal as conceived by the learned counsel to the appellant in his submission in support of this issue under consideration. All the court below was saying was that all the cases cited and relied upon by the appellant in support of his case before that court, were cases in which all the employees involved in the various acts of dismissal were employees clothed with statutory flavor unlike the appellant whose employment was under the common law, master and servant relationship. The court below was therefore right in saying that all those cases do not apply to the present case. I must, with very

great respect, fully endorse the above view. ***In any case, on the accepted general legal principles, an employee may be summarily dismissed without notice and without wages if he is guilty of gross misconduct.*** See *Boston Deep Sea Fishing Co. v. Ansell* (1888) 39 Ch. D339; *Babatunde Ajayi v. Texaco Nigeria Ltd. & Ors.* (1987) 3 N.W.L.R. (Pt. 62) 577. ***And gross misconduct has been identified as a conduct that is of a grave and weighty character as to undermine the confidence which should exist between an employee and he employer. So, too (sic, also) working against the deep interest of the employer amounts to gross misconduct entitling an employer to summarily dismiss the employee.*** See *Ridge v. Baldwin* (1953) 2 All ER 66 at 71 and *Olaniyan v. University of Lagos* (1985) 2 N.W.L.R. (Pt. 9) 599. ***To warrant a summary dismissal, it suffices that the conduct of the employee, as in the present case, is of such grave and weighty character as to undermine the relationship of confidence which should exist between the employer and employee as found by the trial court and affirmed by the court below.*** See *Teliat Sule v. Nigerian Cotton Board* (1985) 2 N.W.L.R. (Pt. 5) 17.

On the complaint of the appellant that he was not given his right of fair hearing by the respondent before his dismissal, the evidence on record and the findings of the trial court and the court below have clearly answered the question. The learned trial Judge in his judgment at page 86 of the record after consideration of the evidence before him came to the conclusion that -

“The defendant has been able to prove that serious breaches of its regulations by the plaintiff and the plaintiff’s reply to the query not being satisfactory, the plaintiff was suspended and eventually dismissed.”

The court below agreed with the above findings at page 218 when it said -

“The above findings of fact are to the effect that -

- 1. There are serious breaches committed by the plaintiffs;*
- 2. The defendant queried the plaintiff for them;*
- 3. The plaintiff’s reply was found by the defendant to be unsatisfactory;*
- 4. The plaintiff was suspended then dismissed as a result; and*
- 5. The defendant discharged the onus on it to prove acts of*

gross misconduct by the plaintiff in support of the dismissal in court."

It is quite plain therefore that the appellant was in fact dismissed for serious breaches of the respondent's regulations in his application for foreign exchange found to have been irregularly made and not for having committed offences of forgery on foreign exchange malpractices as asserted by the appellant. Since the appellant was clearly given fair hearing by the respondent before his dismissal, his complaint of denial of fair hearing or breach of his right of fair hearing under the 1999 Constitution in section 36 thereof as raised under this issue has no basis whatsoever.

The second issue is whether or not the Justices of the Court of Appeal were correct when they held that the appellant did not challenge the definite findings of fact by the trial court. Learned counsel to the appellant referred to ground 4 of the appellant's grounds of appeal and issue 2 upon which the appellant's appeal was heard at the court below, the findings of the trial court which were affirmed by the court below in its judgment and argued that what the court below referred to as breaches committed by the appellant are in fact criminal allegation of forgery and foreign exchange malpractices; that the allegation against the appellant being criminal in nature, the onus of proof is beyond reasonable doubt as required by section 138(1) of the Evidence Act and several cases including *Nwobodo v. Onoh* (1983) 10 S.C. 42 at 49; that in the present case where the respondent alleged that the appellant forged the signature of Mr. B. U. Ajaegbu its Balogun Branch Manager on 'FORM A' No. 177070 and thereby involved himself in foreign exchange malpractices, the respondent was required by law to have proved the allegation beyond reasonable doubt to justify the dismissal of the appellant, particularly when the Balogun Branch Manager of the respondent whose signature was alleged to have been forged, was not called to give evidence at the trial court. On the onus of the appellant required in this appeal being one on concurrent findings of fact of the two courts below, learned appellant's counsel urged this court to interfere with the findings as not to do so, will occasion a miscarriage of justice on the appellant relying on the case of *Oluboduna & 4 Ors. v. Lawan & Anor.* (2008) 6-7 S.C. (Pt. 1) 1 at 28 - 29.

On this second issue for determination, the stand of the re-

spondent is that the specific findings of fact made by the trial court in its judgment were isolated and listed in the respondent's brief of argument on which the appeal was heard at the court below at pages 200 - 202 of the record of appeal and that the appellant's notice of appeal at pages 88 - 92, does not contain a single ground of appeal
 B challenging those findings of fact. Learned counsel observed that by merely quoting passages from the judgment of the trial court with accompanying particulars complaining that the appellant's acts of gross misconduct amounted to criminal offences for which the appellant
 C must have been prosecuted prior to his dismissal, does not show any ground of appeal challenging specific findings of fact by the trial court and as such the court below was right in its finding to that effect having regard to the cases of *Sule v. Nigeria Cotton Board* (1985) 2 N.W.L.R. (Pt. 5) 17 at 24 and *Omnia Nigeria Ltd. v. Dyktrade Ltd.*
 D (2007) 15 N.W.L.R. (Pt. 1058) 576 at 617.

***It is quite clear from the record of this appeal that the specific findings of fact by the trial court in contention in this issue include the fact that there were serious breaches of the respondent's rules and regulations by the appellant; that the
 E appellant was duly queried for the breaches by the respondent; that the appellant's reply to the query had failed to exonerate him from the alleged breaches of the respondent's regulations and finally that the trial court was satisfied that the
 F respondent had discharged the onus on it in proving acts of gross misconduct justifying its action in dismissing the appellant. The complaint of the appellant in the present issue is that what the court below termed as breaches committed by the appellant are in fact criminal allegation of forgery and for-
 G eign exchange malpractices for which the appellant ought to have been charged to court and prosecuted before proceeding with his dismissal. Unfortunately for the appellant, this is not the present position of the law governing disputes between master and servant in the interpretation of contracts of em-
 H ployment. The correct position of the law is stated by this court in the case of Francis C. Arinze v. First Bank of Nigeria Ltd. (2004) 12 N.W.L.R. (Pt. 888) 663 at 673 where Belgore JSC later CJN said -***

"This is a simple case of employee and employer not covered

by statutory rules as in *Federal Civil Service Commission & Others v. J. O. Laoye* (1989) 2 NWLR (Pt. 106) 652 or *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550. The latter case has had many irrelevant references as holding that once a crime is detected the employer cannot dismiss an employee unless he is tried and convicted first. This is unfortunately an erroneous interpretation of that judgment. In statutory employment, as in private employment, the employer can dismiss in all cases of gross misconduct. In this case, the appellant was found guilty of insubordination and fraudulent claim of money; he claimed overtime allowance when he in fact was never on duty to work during the normal office hours. He claimed refund for a treatment in hospital which never took place; he in this instance forged a doctor's certificate, I find no merit in this appeal."

Applying this decision to which I am no doubt bound, to the present case which is virtually on all fours with the present case where the appellant was also dismissed for gross-misconduct arising from his gross violation of the foreign exchange regulation to remit foreign exchange abroad to his wife. I am of the view that it was not necessary for the respondent to have waited for the prosecution of the appellant for the criminal offences disclosed in his various acts of gross misconduct, before taking steps to deal with him by appropriate dismissal. In other words, it is no longer the law that where an employee commits acts of gross-misconduct against his employer which acts also disclose criminal offences under any law, the employer has to wait for the outcome of the prosecution of the employee for such criminal offences before proceeding to discipline the employee under the contract of service or employment.

Finally, I am also not unaware that the present appeal is against the concurrent findings of fact by the two courts below. Ordinarily, this court will not interfere to reverse concurrent findings of fact by the trial High Court and the Court of Appeal unless such decisions are perverse, not supported by evidence or had occasioned a miscarriage of justice. Thus, on the concurrent findings of fact in the instant case that the appellant was guilty of gross-misconduct in the discharge of his duties as employee of the respondent in consequence of which

he was dismissed, such dismissal is clearly justified in law in spite of the fact that the acts of gross-misconduct committed by the appellant also disclosed criminal offences for which the appellant was not tried and convicted before his dismissal.

There is therefore no reason whatsoever to disturb those decisions. See *Ogundipe v. Awe & Ors.* (1988) 1 N.W.L.R. (Pt. 68) 118 at 125.

This appeal which is devoid of merit is hereby dismissed. The decision of the trial court as affirmed by the court below is hereby further affirmed.

I am not making any order on costs.

MUNTAKA-COOMASSIE JSC

The plaintiffs' case all along has been simple and straight forward. His employer, African Continental Bank Limited wrote the plaintiff Mr. P. C. Mike-Eze thus:-

"We regret to inform you that the Board at its meeting held on Thursday and Friday, 3rd and 4th of November, 1988 respectively, decided to dismiss you from the service of the bank (sic) for gross misconduct. Accordingly, you are dismissed with immediate effect. By your dismissal, you have forfeited all rights and privileges that might have accrued to you by virtue of your employment..."

The plaintiff as a result of this letter (Exhibit F) sent to him dated the 19/12/1988 sued the defendant for wrongful dismissal from the defendant's service. The plaintiff claims a declaration that the said exhibit F (letter of dismissal) is unlawful, null and void and also claimed damages for breach of contract of employment. The plaintiff was actually dismissed by the defendant pursuant to a query served on him dated 3rd day of May, 1988, it is now exhibit C; his reply to the query is now exhibit D. He emphatically denied allegations of committing forgery and foreign exchange malpractices. After his total denial of the allegations and prior to his dismissal, the plaintiff was never arraigned before any Tribunal or court of law in respect of the allegations contained in exhibit C.

At the hearing, after the evidence and exhibits were received and tendered and addressed by the learned counsel to the parties, judgment was delivered in favour of the defendant on the 24th day

of April, 1992, wherein the plaintiff's claim was dismissed by Mrs. Akinsanya J. of the High Court of Lagos. She concluded that "the dismissal of the plaintiff was an appropriate measure. I therefore dismiss the plaintiff's claim with N350,000 costs to the defendant."

Dissatisfied with the judgment of the trial court, the plaintiff unsuccessfully appealed to the Court of Appeal Lagos Division and filed notice of appeal containing five grounds of appeal. Two issues were formulated and filed by the appellant bordering on lack of fair hearing and insufficient evaluation of the evidence by the trial court. B

In the lower court after a thorough consideration of the record of proceedings and submissions of counsel in their respective addresses the learned Justices dismissed the appeal of the plaintiff and upheld the judgment of the trial Court. The plaintiff, now appellant, further appealed to this court on the following grounds. The three grounds of appeal without their respective particulars are reproduced hereunder:- C D

Ground One

The learned Justices of the Court of Appeal erred in law, when they held that the appellant herein did not challenge the definitive findings of fact by the trial Judge that the appellant forged the alleged signature and made the remittance in question irregularly. E

Ground Two

The learned Justices of the Court of Appeal erred in law when they held as follows:

"It ought to be remarked as rightly pointed out in the respondent's brief that the plaintiff has not challenged the definitive findings of fact by the lower Court that he forged the alleged signature and made the remittance in question irregularly. This is so notwithstanding the omnibus ground of appeal filed and issue 2 formulated from it the plaintiff has in no way shown that there is no evidence which if accepted would support the said findings or that the inference drawn or conclusion reached by the trial Judge based on the accepted evidence cannot be justified". F G

Ground Three

The learned Justices of the Court of Appeal misdirected themselves in law and thereby came to the wrong conclusion when they held as follows;- H

"I have no difficulty in holding that the principle established by

the cases relied on by the plaintiff does not apply to the instant case. All the plaintiffs involved in each of those cases were public servants, whose employment was governed by statutes or the Civil Service Regulations which make it inappropriate for the bodies empowered by law to discipline them to sit over criminal allegations. And since by
 B *law, such criminal allegations when raised ought to be shown to have been established, they must of necessity be laid before a Court or tribunal of competent jurisdiction.*

It is now well recognised that there are employment with special status or statutory flavour: See Shitta-Bey V. Federal Civil Service
 C *Commission (1981) 1 SC 40 at 56; Olatunbosun V. NISER Council (1988) 4 NWLR (Pt. 80) 25 at 41. But outside those employment are others which under agreement or common law come within mere master and servant relationship. An employer is entitled in such em-*
 D *ployment to dismiss an employee for misconduct. Misconduct is of varying degrees. It cannot now be disputed that in a mere master and servant relationship, the servant may obviously be dismissed for dishonesty or fraud in his employment. See Phillip V. Foxall (1872) L.R. 7 Q. B. 666. The master does not have to report the matter to*
 E *the police, let alone wait for prosecution to be done. He does not even have to reach a decision on the alleged crime; once he is satisfied that the servant has done something which is incompatible with the faithful discharge of his duty or has displayed conduct such that it*
 F *would be injurious to the master's business to retain him, the master may dismiss the servant. See Maja V. Stocco (1-968) all NLR 141 at 151".*

Two issues were formulated by Mr. Oyebanji learned counsel for the appellant herein as follows:-

G **ISSUE I**

Whether or not, the learned Justices of the Court of Appeal were correct when they held that it is the determination of whether the contract of employment sued on by the appellant was one of mere master and servant, or one protected by statute that will re-

H solve the issue of fair hearing necessitating trial before dismissal (formulated from ground 3).

ISSUE II

Whether or not, the Justices of the Court of Appeal were correct when they held that the appellant did not challenge the definite

findings of fact by the trial court (formulated from grounds 1 & 2).

The respondent, the Spring Bank Plc, filed the respondent's brief on 19/4/2011 and filed a notice of preliminary objection against the notice of appeal. It was fully discussed in their respondent's brief. The position taken by the respondent is that there are two concurrent decisions by the two lower Courts. B

The reply brief of the appellant filed on 4/5/11 responded to the preliminary objection filed by the respondent. He urged us, among other things, to dismiss same against the plaintiff/appellant in dismissing the plaintiff's case in its entirety. Since, according to the learned counsel for the respondent, there was nothing in place to show that the said findings are perverse to warrant any interference by this court, this court should affirm the judgment of the court below and to dismiss this appeal. C

The appellant's counsel submitted finally that the Supreme Court D does not form the habit of disturbing the concurrent findings of facts unless and until those decisions are shown to be perverse or not supported by evidence - Yusuf & 2 Ors V. Toluhi (2008) 6 - 7 SC (Pt. 1) 164.

He further submitted that by the appellant's analysis of issue E one and two the Supreme Court is invited to interfere with the concurrent finding of facts by the two lower courts and allow the appeal.

I have had the benefit of reading, in draft, the lead judgment rendered by my learned brother, Mahmud Mohammed, JSC. My F learned brother has dealt exhaustively and painstakingly with the issues calling for our attention and determination in this appeal. I am now comfortable when the following cases were competently analyzed and resolved by his Lordship Mahmud JSC:-

- a. Tesi Opebiyi V. Shittu Oshoboja (1976) 9 - 10 SC 193 G
- b. Garba V. University of Maiduguri (1986) 1 NWLR (Pt. 18) page 550/583
- c. Olatunbosun V. NISER (1983) 3 NWLR (Pt. 80) p. 25; and
- d. Yusuf and Ors V. Toluhi (2008) 6 - 7 SC (Pt. 1) 164.

I therefore have nothing more to add. I adopt his Lordship's H reasoning and conclusions as mine and accordingly, dismiss both the appeal and preliminary objection. No order as to costs.

FABIYI JSC

I have had a preview of the judgment just delivered by learned brother, Mahmud Mohammed, JSC. I agree with the lucid reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and certainly deserves to be dismissed.

B The relationship of the parties herein is one of master and servant. The appellant was found to have violated the foreign exchange regulation for which the respondent could be sanctioned by the Central Bank of Nigeria. The appellant was served with a query which he answered. His explanation was not satisfactory to exculpate him of gross-misconduct. The respondent then checked out the appellant from its establishment. The trial court found that the step taken against the respondent was in order. The court below gave its stamp of approval to the stance taken by the trial court.

D I cannot see my way clear in tampering with the balance decisions of the two courts below. This case is not one that is imbued with statutory flavour as in *Shitta Bay v. Federal Civil Service Commission* (1981) 1 SC 40 and *Olatunbosun v. NISER* (1988) 3 NWLR (Pt. 80) 25 at 41. And where dishonesty is established against the appellant, E as herein, he can be dismissed without a formal report to the police talk less of waiting for any prosecution to be done. It does not even have to reach a decision on an alleged crime. The respondent only needed to establish gross-misconduct which it did. See: *Yusuf v. Union Bank of Nigeria Ltd.* (1996) 6 NWLR (Pt. 457) 632 and *Francis Arinze v. First Bank of Nigeria Ltd.* (2004) 12 NWLR (Pt. 888) 663. F

The circumstances which led to the dismissal of the appellant established by evidence as duly accepted by the trial Court was affirmed by the court below. Such concurrent findings have not been G shown to be perverse. I shall not interfere with same. See: *Kale v. Coker* (1982) 12 SC 252; *Fajemirokun v. C. B. (Nig.) Ltd.* (2009) 5 NWLR (Pt. 1135) 588 at 599.

For the above reasons and more especially the elaborate ones contained in the lead judgment, I too feel that the appeal should be H dismissed. I order accordingly. I abide by all consequential orders therein contained as well as the view on costs.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft, the judgment delivered by my learned brother, Mahmud Mohammed JSC. I agree with it and would dismiss the appeal for the reasons which his Lordship has given. The grievance of the appellant is that his dismissal was wrong because he was not given a fair hearing. That is to say he was not prosecuted in a Court of Law before he was dismissed. In cases of dismissal, the fundamental consideration is to examine the contract of employment and see if it is:

- (a) Master Servant; or one;
- (b) Protected by Statute or Special Status.

Now, to determine whether the dismissal of an employee was correct or wrong, the terms of employment of the aggrieved employee must be examined to see whether the correct procedure was followed. Where there is departure from the prescribed procedure or a violation of the elementary rules of natural justice, then the dismissal is unlawful. See: *Olaniyan v University of Lagos* (1985) 3 N.W.L.R. (Pt. 9) p. 599, *Adedeji v Police Service Commission* (1968) N.M.L.R P. 102, *Nwobosi v A.C.B. Ltd.* (1995) 6 NWLR (Pt. 404) p. 677.

The appellant as plaintiff sued in the Lagos High Court for a declaration that his dismissal on the 19th day of December, 1988, was unlawful, irregular, null and void. He asked to be paid salary/allowance up to December, 1998, when he would retire at the age of fifty five years. He was in employment for twenty one years before he was dismissed.

The appellant was accused of making irregular foreign exchange payment on the forged signature of one Mr. B. U. Ajaegbu, a branch Manager of the respondent bank. He was given a query (exhibit C) and he replied (exhibit D). His reply was found to be unsatisfactory, and so he was dismissed for gross misconduct. The contract of employment was essentially a written contract of service.

The learned trial Judge quite rightly in my view said:

".... I find that the defendant has been able to prove serious breaches of its regulations by the plaintiff and the plaintiff's reply to the query not being satisfactory, the plaintiff was suspended and eventually dismissed by exhibit F."

The court of appeal agreed with the above reasoning and con-

clusion of the learned trial Judge. In this appeal, learned counsel for the appellant is saying that since the appellant was accused of a crime, the crime must first be tried in a court before it can be considered in disciplinary proceedings.

The appellant was dismissed for wanton disobedience to his employer's directives and for course of conduct prejudicial to respondents business.

The cases relied on by learned counsel for the appellant, i.e., cases governed by Statute or the Civil Service Regulations, to wit: *Denloye v Medical Disciplinary Committee* (1968) All NLR P. 306, *Federal Civil Service Commission v Laoye* (1989) 2 NWLR (Pt. 1106) P. 652.

To mention a few, are cases where the employment is governed by Statutes or the Civil Service Regulations. If any of the employees in such cases are to be disciplined for criminal offence, the contract of employment makes it clear that criminal allegations must be heard by a court before it can be said the allegation is established.

The appellant's contract of employment is a written contract of service, a master servant relationship. In such relationships, a master can dismiss an employee for misconduct, and an employee can be dismissed for fraud or dishonesty. See: *Phillip v Foxall* (1872) L.R. & O. B. p. 666.

In such cases, the master does not have to report the matter to the police and wait for the conclusion of a subsequent criminal trial before he dismisses the errant employee. The master can proceed to dismiss the employee, once the master is satisfied that the employee did something against the interest of the master. Where the dismissal is found to be wrong, the employee is entitled to damages. But in contracts of employment with statutory flavor, the employee is entitled to reinstatement.

Where as in this case, the respondent accused the appellant of misconduct, the accusation must be justified. See: *Ajayi v. Texaco Nig. Ltd.* (1987) 3 NWLR (Pt. 62) P. 577.

The appellant was given a query, (exhibit C). He responded in (exhibit D). This response was not satisfactory. The respondent was satisfied that there was a serious breach of its regulations by the appellant. Giving a query and a response satisfies the elementary requirements of fair hearing, and it is in accordance with the contract of

employment freely entered into by the appellant. The respondent justified the allegation of misconduct in the circumstances.

This is a clear case of employee and employer not governed by Statute, Civil Service Rules or one of Special Status. The appellant at no time in the court of appeal or this court challenged the definitive findings of fact by the trial court that he forged the signature of the branch Manager of the respondent and made the remittance in question irregularly.

It is obvious that there is no merit in this appeal.

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