

**LAW** *pavilion*

---

**ELECTRONIC**

**LAW REPORTS**

**ADWORK LTD**

**V.**

**NIGERIA AIRWAYS LTD**

**(1999)**

**LPELR-6494(CA)**

**COURT OF APPEAL**

**(LAGOS JUDICIAL DIVISION)**

**AFRIBANK (NIG.) PLC V. KUNLE OSISANYA**  
**CITATION: (1999) LPELR-6494(CA)**

---



**In The Court of Appeal**  
**(Ilorin Judicial Division)**

On Monday, the 22nd day of November, 1999

**Suit No: CA/IL/12/99**

**Before Their Lordships**

OLUDADE OLADAPO OBADINA  
PATRICK IBE AMAIZU  
WALTER SAMUEL NKANU  
ONNOGHEN

Justice, Court of Appeal  
Justice, Court of Appeal  
Justice, Court of Appeal

**Between**

AFRIBANK (NIG.) PLC

**Appellants**

**And**

KUNLE OSISANYA

**Respondents**

**RATIO DECIDENDI**

- WORDS AND PHRASES - "A GROUND OF APPEAL":** Definition of "a ground of appeal"

"In the case of Ladejo Onifade v. Alhaji Alini Olayiwola (1990) 11 SCNJ 10; (1990) 7 NWLR (Pt.161) 130 a ground of appeal is defined as any wrong decision, resolution, inference, or step taken by the court below, which in the contention of an appellant is wrong."Per AMAIZU, J.C.A.(P. 20, paras. E-F) - [read in context](#)

**2 LABOUR LAW - ACTION FOR WRONGFUL TERMINATION OF AN EMPLOYMENT:** On whom rests the onus of proof in an action for wrongful termination of an employment

"It is settled law that in an action for wrongful termination of an employment the onus is always on a plaintiff to prove the terms of the agreement allegedly breached. It is from the terms of the agreement which is binding on both parties that a court would determine the terms of the contract between the parties and the rights of the parties thereto."Per AMAIZU, J.C.A.(P. 24, paras. C-E) - [read in context](#)

**3 APPEAL - APPEAL AS OF RIGHT:** When an appeal shall lie from the decision of a High Court to the Court of Appeal as of right

"Under Section 220 of the Constitution of the Federal Republic of Nigeria, 1979, an appeal lies from the decision of a High Court to this Court as of right where the ground of appeal

involves questions of law alone."Per AMAIZU, J.C.A.(P. 22, paras. A-B) - [read in context](#)

#### 4 **LABOUR LAW - CONTRACT OF EMPLOYMENT:** Construction of a contract of employment

"It has been accepted that in the construction of a contract of employment, apart from the relevant statutory provisions, any question as to the duration of employment, its terminability by notice, the length of notice required to determine it or the time at which notice to determine it may be given will depend on the intention of the parties either revealed in the express or implied terms of the contract or to be inferred from all the surrounding circumstances."Per AMAIZU, J.C.A.(Pp. 30-31, paras. F-A) - [read in context](#)

#### 5 **LABOUR LAW - DAMAGES FOR TERMINATION OF APPOINTMENT WITHOUT REQUISITE NOTICE:** Quantum of damages which can be considered to be natural or probable consequence of terminating an employment without the requisite notice

"The law is that a servant would be paid for the period he served his master and if he is dismissed as in this case, although wrongfully all he gets as damages is the amount he

would have earned if his appointment has been properly determined."Per AMAIZU, J.C.A.(P. 30, paras. C-D) - [read in context](#)

## **6 APPEAL - FRESH POINT ON APPEAL:**

Whether leave of Court is required before a fresh point can be raised on appeal

"I agree with the submission of the learned counsel for the respondent that leave of this court is required before a fresh point can be raised and argued before us, otherwise such a point is incompetent."Per AMAIZU, J.C.A.(P. 21, paras. A-B) - [read in context](#)

## **7 APPEAL - GROUND OF APPEAL:** Basis of a ground of appeal

"From the definition, it is trite that a ground of appeal must relate to the decision or judgment appealed against and should challenge the validity of the ratio in the judgment. Dr. Ogo Ella & Ors. v. Ella Agbo & anor (1993) 8 NWLR (Pt. 613) p. 139. Any ground of appeal therefore that is not based on an issue that was canvassed before the lower court should either be ignored or struck out. Bashir Kurfi v. Alhaji Hassan Mohammed & Ors. (1993) 2 NWLR (Pt.277) 602."Per AMAIZU, J.C.A.(Pp. 20-21, paras. F-A) - [read in context](#)

**8 LABOUR LAW - OFFICE OR EMPLOYMENT WITH STATUTORY FLAVOUR:** Effect of an office or employment with a statutory flavour

"When an office or employment has a statutory flavour in the sense that its conditions of service are provided for and protected by statute or regulations thereunder, any person holding that office or in that employment enjoys a special status over and above the ordinary master and servant relationship. In the matter of discipline of such a person, the procedure laid down by the applicable statute or regulations must be fully complied with. If materially contravened, any decision affecting the right or tenure of office of that person may be declared null and void in an appropriate proceeding. See *Bamgboye v. University of Ilorin* (1999) 10 NWLR (Pt. 622) 290 at 320; *Shitta-Bey v. Federal Public Service Commission* (1981) 1, SC 40 at 56; *Olaniyan v. University of Lagos* (No.2) (1985) 2 NWLR (Pt. 9) 599 at 613; *Eperokun v. University of Lagos* (1986) 4 NWLR (Pt. 34) 162 at 201; *Olatubosun v. N.I.S.E.R. Council* (1988) 3 NWLR (Pt. 80) 25 at 41."Per OBADINA, J.C.A.(P. 36, paras. C-G) - read in context

**9 CONTRACT - PRIVACY OF CONTRACT:** Principle of privity of contract

"The point has to be made however that the law generally is that a contract cannot be enforced by a person who is not a party to it even when the contract is made for the benefit of one of the parties and purports to give that party the right to sue on it."Per AMAIZU, J.C.A.(P. 25, paras. D-F) - [read in context](#)

**10 LABOUR LAW - PROOF OF WRONGFUL TERMINATION OF EMPLOYMENT:** What an employee who complains that his employment has been wrongfully terminated must prove

"The law is well settled that when an employee complains that his employment has been wrongfully terminated, that employee has the onus:- (a) to place before the court the terms and conditions of the contract of employment and (b) to prove in what manner the said terms were breached by the employer. The term of contract of service is the bedrock of any case where the issue of wrongful termination of employment calls for determination:- Amodu v. Amode (1990) 5 NWLR (Pt. 150) 356; Iwuchukwu v. Nwizu (1994) 7 NWLR (Pt. 357) 379 at 412. In Amodu v. Amode (supra) Agbaje, JSC who read the leading judgment observed at page 370 as follows:- " ...it appears clear to me that since it is the plaintiff's case that his dismissal by the defendants is not in

accordance with the terms and conditions of the contract of service between them it is for the plaintiff to plead and prove the conditions of service regulating the contract of service in question." To this, Wali, JSC added at 373:- "the term of the contract of service is the bedrock of the appellant's case." As the contract of service is the bedrock upon which an aggrieved employee must found his case, he succeeds or fails upon the terms thereof. Therefore, in a written or documented contract of service, the court will not look outside the terms stipulated or agreed therein in deciding the rights and obligations of the parties: See *Western Nigeria Development Corporation v. Abimbola* (1966) 4 NSCC 172 at 88. In that case, the Supreme Court held at page 94 of the report, "that the provisions of a written contract of service bind the parties thereto and that it was outside the province of the learned trial judge to look any where for terms of termination of the contract other than in the contract agreement." Per OBADINA, J.C.A.(Pp. 32-33, paras. C-D) - [read in context](#)

- 11 **LABOUR LAW - RE-INSTATEMENT OF A TERMINATED EMPLOYEE:** Whether a Trial Court in a private contract of employment can reinstate a terminated employee



"However, there is also the sub issue as to whether a Court can order reinstatement of a dismissed staff on a private contract of employment particularly where there is no express term in that contract to that effect. From the facts of this case it is clear that the contract of employment between the parties is that of personal service; it has no statutory flavour at all. There is also no evidence to show that it has any statutory flavour. I agree with the submission of learned counsel for the Appellant G.D. B Ayanbanji Esq. that a trial court cannot reinstate a dismissed staff in a private contract of employment except of course the contract agreement as between the parties expressly says so. It is not the business of the court to make a contract between parties but to give effect to what had been agreed upon by the parties themselves. It is trite law that you cannot force a willing servant on an unwilling employer. The trial court was therefore in error in treating the contract between the parties as that with statutory flavour and thereby treats that contract as continuous despite the dismissal until determined by the court in its judgment, eight years later."Per ONNOGHEN, J.C.A.(Pp. 38-39, paras. C-A) - [read in context](#)

## **12 LABOUR LAW - REMEDY FOR WRONGFUL TERMINATION OF EMPLOYMENT IN**

**ORDINARY CONTRACTS OF EMPLOYMENT:** Remedy an employee who is wrongfully terminated can get in ordinary contracts of employment where the terms provide for one month's notice before termination or salary in lieu thereof

"It is also the law that in ordinary contracts of employment where the terms provide for one month's notice before termination or salary in lieu thereof, the only remedy an employee who is wrongfully terminated can get is a month's salary in lieu of notice and any other legitimate entitlements due to him at the time the employment was brought to an end. See Francis Adesegun Katto v. C.B.N. (1999) 6 NWLR (Pt. 607) 390 at 406. See also Western Nigeria Development Corporation v. Abimbola (supra) which is very relevant to this case. In that case the plaintiff sued for wrongful dismissal, claiming for special and general damages. There had been some allegations of fraud against him. The trial judge awarded him a month's salary and also general damages on the basis of loss of prospects of continued employment for a dismissed employee etc. It was true that the dismissal was wrongful. On appeal to the Supreme Court, it was observed, per Ajegbo, JSC at page 174 as follows:- "The plaintiff was given a letter of appointment (Exhibit H) and paragraph 5 of the letter reads:- 'Your

employment may be terminated by the Board or yourself by giving one month's notice in writing or by giving one month's salary in lieu of such notice excepting in the case of dismissal for offence prejudicial to the interest of the Board.' The plaintiff's appointment was governed by the contract into which he entered at the time of his employment. If he had been given one month's notice before termination of his appointment he would have had no claim whatsoever on the corporation. But he was not given notice and he is entitled to one month's salary in the absence of notice. That is all he can get as damages; other matters that the judge considered are irrelevant." However, it was further explained by the Supreme Court in *Nigeria Produce Marketing Board v. Adewunmi* (1972) 7 NSCC 662, that apart from the salary in lieu of notice, the plaintiff would be paid other legitimate entitlements due to him at the time the employment was brought to an end. In this case, it is not in dispute that the terms and conditions of the contract of service between the appellant and the respondent provide for one month's notice before termination or one month's salary in lieu of notice. The learned trial Judge acknowledged in his judgment at page 208 of the record that the terms of the contract of employment between the parties provide for one month's notice before termination or salary in lieu

thereof, when he stated inter alia as follows:-  
"Thereafter, his contract of employment with the defendant is to be determined from tomorrow, 23/1/96, by payment to him of a month's salary in lieu of notice."Per OBADINA, J.C.A.(Pp. 33-35, paras. D-C) - [read in context](#)

**13 LABOUR LAW - TERMINATION OF APPOINTMENT:** Whether in all contract of employment, before an employee is sacked he must be given a fair hearing

"It is trite law that a contract of employment between a master and a servant may be subject to either statutory or common law rules. It is my view however that whether the contract has a statutory flavour or not, before an employee is sacked he must be given a fair hearing as enshrined in Section 33 of the Constitution of the Federal Republic of Nigeria, 1979. The intendment of the section is that where a body whether judicial or administrative, acts judicially in the sense that it is to determine the civil right and obligations of a person or find him guilty or liable of a fault, then, the person must be given a hearing before the issue can be properly determined. But this is not all there is to it. The hearing must observe all the implications and attributes of being fair. Alhaji Abdullahi Baba v. Nigerian Civil Aviation Training Centre, Zaria & Or. (1991) 5 NWLR

(Pt. 192) p. 388. In the case of *Kande v. Government of Federation of Malaya* (1962) AC 332 337, the Privy Council held- "If the right to be heard is to be a real right, which is worth anything, it must carry with it, a right in the accused man to know the case which is made against him. He must know what evidence has been given and what Statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them." *Nnaemeka-Agu, JSC*, (as he then was) in the case of *Federal Civil Service Commission v. Laoye* (1989) 2 NWLR (Pt. 106) 652 at 727 remarked in the same way that. "A person so accused is entitled to be confronted with his crimes, be told the nature and content of the case against him, be brought face to face with his accusers and their witnesses, be given the opportunity to test their veracity under the fire of cross-examination, to defend himself personally and with the assistance of a counsel of his choice, and to call such witnesses that he wishes to call to support his case- all these within a reasonable time and before a court or tribunal constituted in such a way as to ensure its fairness and impartiality." From Exh. 28, the minutes of the interview between the respondent and the Senior Staff Disciplinary Committee, it does not seem to me that the respondent was given a fair hearing. An employer though not bound to give reasons

for terminating the appointment of his employee; where the employer gives reason for the termination, the onus lies on the employer to establish that cause or reason. Professor Dupe Olatunbosun v. Nigerian institute of Social and Economic Research Council (1988) 1 NSCC 1025; (1988) 3 NWLR (Pt.80) 25."Per AMAIZU, J.C.A.(Pp. 26-27, paras. A-F) - [read in context](#)

**14 LABOUR LAW - TERMINATION OF CONTRACT OF SERVICE:** Effect of termination of a contract of service

"In an ordinary relationship like in this one and following the common law principle, a termination of a contract of service, even if unlawful brings to an end the relationship of master and servant. Chukwumah v. Shell Petroleum (1993) 4 WLR (Pt. 289) 512."Per AMAIZU, J.C.A.(Pp. 29-30, paras. F-A) - [read in context](#)

**15 LABOUR LAW - TERMINATION OF EMPLOYMENT:** Whether in a purely master and servant relationship devoid of any statutory flavour and in which the relationship is purely contractual, termination of employment by the employer can be wrongful

"In a purely master and servant relationship devoid of any statutory flavour and in which

the relationship is purely contractual, as in this case, termination of employment by the employer cannot be wrongful unless it is in breach of the terms and conditions of the contract. Notwithstanding that the employer gave a totally untenable reason for the termination, once he complies with the terms of the contract, there could be no breach of contract of employment. Katto v. C.B.N. (1999) 6 NWLR (Pt. 607) 390 at 414."Per OBADINA, J.C.A.(P. 35, paras. E-G) - [read in context](#)

**AMAIZU, J.C.A. (Delivering the Leading Judgment):**

A The respondent sued the appellant before an Ilorin High Court presided over by Olagunju, J. claiming the following reliefs

B "38(i) A declaration that the dismissal of the plaintiff from the services of the defendants as contained in letter reference No. OD/MEN/VOK/PERSONNEL/4835/87 of 12th October, 1987, is wrongful, unlawful, unconstitutional, null and void and of no effect whatsoever.

C (ii) A declaration that the decision of the defendant's Senior Staff Disciplinary Committee which culminated in the dismissal of the plaintiff is contrary to the principles of natural justice and a deliberate and calculated infraction of the plaintiff's right of fair hearing as contained in and prescribed

- by Section 33(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1979. And, therefore
- A** null and void and of no effect.
- (iii) A declaration that the employment of the plaintiff with the defendant is subsisting notwithstanding the said purported dismissal.
- B** (iv) An order commanding the defendant to reinstate the plaintiff to its service and to pay to the plaintiff his full salaries, entitlements, allowances and/or benefits from the date of his suspension and subsequently up to the date of judgment.
- C** (v) An order that the plaintiff is entitled to receive all the accrued dividends, bonuses or script issue or that will accrue in future in his 1,332 ordinary shares bought by the plaintiff herein at the rate of N1.00 per share being the plaintiffs equity share participation in the defendant's Bank. Letter dated 31/8/87 to the plaintiffs by the defendant and the
- D** plaintiffs share warrant will be founded upon at the trial of the suit.
- E** (vi) Alternatively, the plaintiff claims from the defendant the sum of N176,602 (One Hundred and
- F** Seventy-Six Thousand, Six Hundred and Two Naira only) being special damages for his wrongful dismissal from the services of the defendant.
- Particulars of Special Damages:
- Pleadings were filed and exchanged by the parties.
- G** At the hearing, the respondent (as the plaintiff) gave evidence for himself and called no witness. The appellant (as the defendant) called three senior officials in its establishment to give evidence.



Briefly, the respondent's case is that he was employed by the appellant, a banking company incorporated under the laws of Nigeria on 25th May, 1983, as an executive trainee (see Exh, 1), He resumed duty on 4/7/83 (Exh, 2), He was posted to the appellant's branch office at Ilorin.

There, he worked in various sections of the establishment. His appointment was later confirmed (Exh. 3). By letter dated 16th December, 1985, (Exh, 25) he was promoted to the post of Pro-Manager. The promotion took effect from 1st January, 1986, Everything appeared to have gone well with the respondent till sometime in 1987, when things began to go wrong. His problem started with a petition (Exh. 4), against him by International Bank for West Africa (IBWA) arm of the local branch of the National Union of Banks, Insurance and Financial Institutions Employee (NUBIFIE).

The petition was later withdrawn (Exh, 22), Despite the withdrawal of the petition, he was interviewed by the appellant's inspectors on it, queried by the branch manager (Exh, 20), and finally invited to appear before the appellant's Senior Staff Disciplinary Committee (Exh, 23) in Lagos, On 21st August, 1987, he was suspended from duty with immediate effect (Exh, 19), On 12th October, 1987, he was summarily dismissed (Exh, 24) from the service of the appellant, "for involvement in fraudulent malpractices." Finally, the respondent claimed that he was not given an opportunity to cross-examine his accusers and did not have a fair

hearing.

A On the other hand, the appellant's case is that the respondent was dismissed in accordance with the terms of his employment. He was given a fair hearing.

B The learned trial Judge after listening to the evidence and submissions made by counsel for the parties, in a considered judgment delivered on 22nd January, 1996, gave judgment for the respondent. The appellant was dissatisfied with the judgment. It has appealed to this Court. It initially  
C filed three grounds of appeal. Later, with leave of this Court, it filed altogether eight grounds of appeal.

D The parties through their counsel and in accordance with the rules of this Court filed and exchanged Briefs of Argument wherein they identified questions for determination arising from the grounds of appeal.

E The appellant identified the following questions-

F "1. Can a trial court in a private contract of employment reinstate and thereafter on its volition terminate the contract of employment between the parties to a case before it'?

2. What is the nature of the order that a trial court can make if it holds that a dismissal is illegal?

G 3. What is the status of a judgment sum awarded by a trial court not being mathematically ascertainable'?"

The respondent also formulated three issues in his Brief of Argument. The issues so formulated, although differently worded are identical in

substance. It does seem to me that the first two issues formulated by the appellant adequately took care of the respondent's issues, I shall therefore base my judgment on the appellant's issues 1 and 2.

I observe however that the respondent incorporated in his brief of argument a Notice of Preliminary Objection. The notice reads-

"Take Notice that the respondent herein named intends at the hearing of this appeal to rely upon the following preliminary objections, notice whereof is hereby given you viz .

1. That grounds 3 and 8 of the Amended Notice and Grounds of Appeal dated 24th October, 1997, raise fresh issues which were not raised at the Court below without the leave of court, sought or obtained and, as such, the said grounds are incompetent.

2. Grounds 2, 5, 6 and 7 as well as their particulars are repetitive and argumentative."

I should point out that it is necessary first to consider the preliminary objection. This is because, if the respondent is right in challenging the grounds of appeal same will be struck out including the issue or issues formulated therefrom. It is to be noted that the learned counsel for the respondent sought for and was granted leave to argue the preliminary objection.

Arguing the preliminary objection, the learned counsel for the respondent contended that grounds 3 and 8 of the notice of appeal are not borne out by the record of proceedings as the issues were not

raised at the trial, and, consequently the trial judge did not make any finding on them. He referred to *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156 at 199. The learned counsel further submitted that the mere fact that the appellant obtained the leave to file and argue additional grounds of appeal does not clothe the appellant with the authority to argue such issues that were not pleaded or canvassed in the lower court, in this Court. He cited the following cases *Yusuf v. U.B.N.* (1996) SCNJ 213; (1996) 6 NWLR (Pt.457) 632 and *Tenico Engineering & Co. v. S.B.N Ltd.* (1995) 5 NWLR (Pt. 397) 607 at 618. Finally, the learned counsel contended that ground 2, 5, 6 and 7 are incompetent as the appellant raised in more than one ground the same/similar complaint. The grounds, he further contended, were argumentative. He referred to Order 3 Rule 2(4) of the Court of Appeal Rules, 1981, as amended. He also cited the cases of *Anie v. Ugagbe* (1995) 6 NWLR (Pt.402) 425 and *Overseas Construction Co. Ltd. v. Creek Enterprises Ltd.* (1985) 3 NWLR (Pt. 13) 407. It is further his submission that as the three issues formulated by the appellant were distilled from the said grounds, the appeal should be dismissed.

In his reply, the learned counsel for the appellant submitted that grounds 3 and 8 of the Amended Notice and Grounds of Appeal are on issues which arose from the judgment of the court below. He submitted that ground 3 is covered by the provisions of Section 220(1) (a) & (b) of the 1979 Constitution of the Federal Republic of Nigeria. The

learned counsel observed that the respondent claimed against the Senior Staff Disciplinary Committee in paragraph 38 of the Amended Statement of Claim. He further submitted that the Senior Staff Disciplinary Committee should have been made a party in the suit. He referred to the case of *Abinabina v. Enyinmadu* (1953) 12 WACA 171. It is his view that he did not require leave of this Court to raise the issues in the light of the above.

Referring to ground 8, the learned counsel observed that the ground is in respect of a passage of the judgment which is the subject of this appeal. Consequently, he further submitted leave of court is not required to file and argue it. He submitted that the complaints against grounds 2, 5, 6 and 7 are misconceived in that the grounds were attacks on parts of the judgment of the lower court. He urged the court to hold that the grounds are competent, and, hear the appeal on its merit. In the case of *Ladejo Onifade v. Alhaji Alini Olayiwola* (1990) 11 SCNJ 10; (1990) 7 NWLR (Pt.161) 130 a ground of appeal is defined as any wrong decision, resolution, inference, or step taken by the court below, which in the contention of an appellant is wrong. From the definition, it is trite that a ground of appeal must relate to the decision or judgment appealed against and should challenge the validity of the ratio in the judgment. *Dr. Ogo Ella & Ors. v. Ella Agbo & anor* (1993) 8 NWLR (Pt. 613) p. 139. Any ground of appeal therefore that is not based on an issue that was canvassed before

A

the lower count should either be ignored or struck out. Bashir Kurfi v. Alhaji Hassan Mohammed & Ors. (1993) 2 NWLR (Pt.277) 602. I agree with the submission of the learned counsel for the respondent that leave of this court is required before a fresh point can be raised and argued before us, otherwise such a point is incompetent.

B

C

The objection to grounds 3 and 8 of the Amended Notice and Grounds of Appeal is based on the fact that they are not borne out by the record of proceedings. In my view, a careful look at the record of proceedings shows that the objection is misplaced.

D

E

F

In paragraph 38(1) of the Amended Statement of Claim the respondent sought for a declaration that the decision of appellant's Senior Staff Disciplinary Committee which culminated in the dismissal of the respondent is contrary to the principles of natural justice. At the trial, the respondent and DW 1 gave copious evidence of the part played by the said Senior Staff Disciplinary Committee in the dismissal of the respondent. The learned trial Judge in a considered judgment held that the decision of Senior Staff Disciplinary Committee on which the appellant acted in dismissing the respondent is null and void. Ground 3 is therefore very much tied to the judgment.

G

With respect to ground 8, what was attacked is a passage in the judgment being appealed against. It is to be noted that the present appeal is against the whole judgment. In my view, any part of the judgment may be made a ground of appeal.

A The complaints against grounds 2, 5, 6 and 7 also cannot stand. This is because the grounds were on law.

B Under Section 220 of the Constitution of the Federal Republic of Nigeria, 1979, an appeal lies from the decision of a High Court to this Court as of right where the ground of appeal involves questions of law alone.

C In the present case, the appellant -  
(1) Quoted the passages in the judgment where the error in law is alleged to have occurred;  
(2) Specified the nature of the error; and  
(3) Finally gave substantial particulars of the alleged errors.

D In the light of the above, it is my considered view, that the objection has no merit.

E Accordingly, it is overruled.

F I now proceed to deal with the arguments of counsel on the issues. Both parties adopted and relied on their respective briefs of argument. On issue one, Ayabanji Esq. of counsel, submitted that the lower court should not have re-instated the respondent for the period 12/10/87 to 22/2/96 - a period of more than 8 years. He observed that the contract of employment between the appellant and the respondent has no statutory flavour. In that case, he further argued, even if the dismissal of the respondent was wrongful, the dismissal should not have been declared null and void by the lower court. He cited Union Bank of Nigeria Ltd. v. Chukwunelo Charles Ogbob (1995) 2 SCNJ 1 at 16; (1995) 2 NWLR (Pt.380) 647. It is the learned counsel's view that the lower court should have

granted the respondent's damages for the wrongful dismissal.

- A** It is the learned counsel's contention also that under the law where a contract of employment is terminable on notice, the damages which can be considered to be natural or probable consequence
- B** of terminating the employment without the requisite notice, cannot be more than what the employee could have earned during the period of notice. He relied on *Mobil Oil (Nig.) Ltd. v. Abraham Akinfosile* (1969) 1 NMLR 217; *Nigerian Produce Marketing Board v. Adewunmi* (1972) 11 SC 111, *I.D.C. Ltd. v. Ajijala* (1976) 2 SC 115 at 129 and *Sufu Abibu v. Kanimu Binutu & Or.* (1988) 1 SCNJ 70; (1988) 1 NWLR (Pt.68) 57. Finally, the learned
- C** counsel argued that by the reinstatement, the lower court seriously eroded the right of an employer to hire and fire.
- D** In his reply, the learned SAN, Olanipekun Esq., of counsel, submitted that from the evidence adduced in the lower court, there was no basis for the purported dismissal of the respondent from the service of the appellant. This is more so, the
- E** learned SAN further submitted, as the appellant did not observe the cardinal principles of natural justice as enshrined in the Constitution of the Federal Republic of Nigeria, 1979. And further as the appellant did not follow the procedure laid down
- F** in the Main Collective Agreement (Exh. 29A). He contended that the trial Judge was right in holding that the appellant's dismissal was "unlawful, null and void". The learned SAN reminded the court
- G**



that the appellant acted on a petition against the respondent which was later withdrawn. He submitted that there is a clear distinction between declaring a dismissal invalid as in the present case, and, declaring it unlawful. He placed reliance on *Imaloame v. W.A.E.C.* (1992) 9 NWLR (Pt. 265) 303 and *U.T.C. v. Nwokoruku* (1993) 3 NWLR (Pt. 281) 295.

Finally, the learned SAN submitted that the learned trial Judge was aware that he could not impose a servant on an unwilling employer. Hence, the learned trial judge did not make an order that the respondent should be paid his wages till the time of his retirement.

It is settled law that in an action for wrongful termination of an employment the onus is always on a plaintiff to prove the terms of the agreement allegedly breached. It is from the terms of the agreement which is binding on both parties that a court would determine the terms of the contract between the parties and the rights of the parties thereto. It is because of this that Exhs. 1,3, 24, 25 and 29A are crucial to determining the terms of the contract of employment entered into between the appellant and the respondent.

Exhibit 1 is the letter of appointment. It states the salary and allowances to be paid to the respondent. Part of it reads -

"These conditions will be reviewed at the end of the probationary period when your appointment may be confirmed. Within this period, you will undergo a full year training programme to be organised by the

Bank."

A Exhibit 3 is the letter of confirmation of appointment. Apart from stating the respondent's new salary, it does not say anything about the condition of service.

B Exhibit 25, the letter of promotion is silent on the conditions of service of the respondent.

Exhibit 24 which is the letter of Summary Dismissal is also silent on the conditions of service.

C Exhibit 29A is the Main collective Agreement between The Nigeria Employers' Association of Banks, Insurance, and Allied Institutions. And the Association of Senior Staff of Banks, Insurance and Financial Institutions.

D I observe that both the appellant and the respondent relied on Exh. 29A as forming part of the contract between them. The trial judge seems also to be of that view.

E The point has to be made however that the law generally is that a contract cannot be enforced by a person who is not a party to it even when the contract is made for the benefit of one of the parties and purports to give that party the right to sue on it.

F There is no document that shows that Exh. 29A was adopted as forming part of the terms of employment. The failure therefore to act in strict compliance with Exh. 29A cannot be justiciable. Its enforcement lies therefore in negotiation between the Union and the Appellant. See Union Bank of Nigeria Ltd. v. E.E. Edet (1993) 4 NWLR (Pt. 287) p. 288. Having made the observation, it is my view

A that Exh. 29A is silent on the period of notice which is required to determine the contract of employment between the parties.

B It is trite law that a contract of employment between a master and a servant may be subject to either statutory or common law rules. It is my view  
C however that whether the contract has a statutory flavour or not, before an employee is sacked he must be given a fair hearing as enshrined in Section 33 of the Constitution of the Federal  
D Republic of Nigeria, 1979. The intendment of the section is that where a body whether judicial or administrative, acts judicially in the sense that it is to determine the civil right and obligations of a person or find him guilty or liable of a fault, then,  
E the person must be given a hearing before the issue can be properly determined. But this is not all there is to it. The hearing must observe all the implications and attributes of being fair. Alhaji Abdullahi Baba v. Nigerian Civil Aviation Training Centre, Zaria & Or. (1991) 5 NWLR (Pt. 192) p. 388.

F In the case of Kande v. Government of Federation of Malaya (1962) AC 332 337, the Privy Council held-

G "If the right to be heard is to be a real right, which is worth anything, it must carry with it, a right in the accused man to know the case which is made against him. He must know what evidence has been given and what Statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

A  
B  
C  
D  
E  
F  
G

Nnaemeka-Agu, JSC, (as he then was) in the case of Federal Civil Service Commission v. Laoye (1989) 2 NWLR (Pt. 106) 652 at 727 remarked in the same way that.

"A person so accused is entitled to be confronted with his crimes, be told the nature and content of the case against him, be brought face to face with his accusers and their witnesses, be given the opportunity to test their veracity under the fire of cross-examination, to defend himself personally and with the assistance of a counsel of his choice, and to call such witnesses that he wishes to call to support his case- all these within a reasonable time and before a court or tribunal constituted in such a way as to ensure its fairness and impartiality."

From Exh. 28, the minutes of the interview between the respondent and the Senior Staff Disciplinary Committee, it does not seem to me that the respondent was given a fair hearing.

An employer though not bound to give reasons for terminating the appointment of his employee; where the employer gives reason for the termination, the onus lies on the employer to establish that cause or reason. Professor Dupe Olatunbosun v. Nigerian institute of Social and Economic Research Council (1988) 1 NSCC 1025; (1988) 3 NWLR (Pt.80) 25.

In Exh. 24 which is the letter of Summary Dismissal the appellant stated the reason why the respondent was dismissed from its service. It reads" "You are hereby summarily dismissed for your involvement in fraudulent malpractices."

DW1 in her evidence testified in part as follows -

A "It is not always that people who are accused of fraud are recommended for prosecution. I agree that it is only where the Bank has counter proof of allegation against an employee that the matter is referred to the police for criminal prosecution. No, B the Committee did not recommend criminal prosecution against the plaintiff."

My understanding of the evidence is that the appellant admitted that it was not proved that the respondent was involved in fraudulent malpractices. Having made the above observation, C the question then is, is the learned trial Judge right in reinstating the respondent and thereafter terminates the contract between him and the D appellant? I answer the question in the negative. My reason will be given later.

On issue 2, the learned counsel for the appellant argued that when a court holds that a dismissal of E an employee in an ordinary contract of service without a statutory flavour is illegal, it connotes simply that the dismissal is wrongful. The remedy in such a case is a claim for damages and not a F declaration that the contract of employment subsists. He referred to the case of Union Bank of (Nig.) Ltd. v. Chukwunelo Charles Ogbob (1995) 2 SCNJ 1; (1995) 2 NWLR (Pt.380) 647 where Iguh, JSC said -

G "In my view, therefore, the court below rightly found from the particular facts of this case that the plaintiff was not entitled to an order of reinstatement he claimed but was in grave error

A when it proceeded to make awards for payment of emoluments to the plaintiff and convened his dismissal in issue to compulsory retirement, claims which the plaintiff did not ask for."

B He contended that the lower court fell into the same error when it proceeded to award the respondent salaries and benefits spanning over eight years, thus converting the dismissal to termination. He referred to other cases and urged the court to allow the appeal.

C In his reply, the learned Senior Advocate of Nigeria, of counsel, submitted that the learned trial Judge based his judgment on uncontradicted evidence of the respondent. In his view, the monetary reliefs granted the respondents are similar to special damages which the respondent claimed and proved. He referred to *Udegbumam v. F.C.D.A.* (1996) 5 NWLR (Pt. 449) 474 at 485, *A.G., Oyo State v. Fairlakes Hotels Ltd.* (No.2) (1985) 5 NWLR (Pt. 121) 255. He urged the court to dismiss the appeal.

D From the evidence adduced in the lower court, there was in existence, between the appellant and the respondent, a relationship of master and servant. The evidence further shows that the relationship of master and servant has no statutory flavour.

F  
G In an ordinary relationship like in this one and following the common law principle, a termination of a contract of service, even if unlawful brings to an end the relationship of master and servant. *Chukwumah v. Shell Petroleum* (1993) 4 WLR (Pt.

289) 512. The learned trial judge seems to appreciate this. This is evident from the following passage in his judgment.

A "However, I find the plaintiffs prayer for reinstatement to the defendant's employment a hard nut to crack for while I am aware of the

B prevailing judicial leaning against imposing an employee on an unwilling employer especially where, as in this case, the confidence between the two has sunk to a very low ebb with the allegation

C of dishonesty that has brought the plaintiff under a cloud"

D The court should not have proceeds to award the respondent his salary for over eight years. The law is that a servant would be paid for the period he served his master and if he is dismissed as in this case, although wrongfully all he gets as damages is the amount he would have earned if his appointment has been properly determined. I have

E earlier in this judgment referred to Exh. 1, Letter of Appointment, Exh. 3, the Letter of Confirmation of Appointment, Exh. 25, the Letter of Promotion and Exh. 29A, the Main Collective Agreement. I

F observed that the exhibits are silent as to the respondent's conditions of service. It has been accepted that in the construction of a contract of employment, apart from the relevant statutory provisions, any question as to the duration of

G employment, its terminability by notice, the length of notice required to determine it or the time at which notice to determine it may be given will depend on the intention of the parties either

revealed in the express or implied terms of the contract or to be inferred from all the surrounding circumstances.

A

In the present case it is not clearly stated in the relevant documents the period of notice required to determine the contract of service between the appellant and the respondent. The respondent claimed that it was a month's notice. The learned trial judge accepted it. As there was no appeal on the issue, I also accept that the period of notice that is required to determine the contract is a month's notice.

B

C

D

E

F

G

Finally, it is clear from the analysis of the facts leading to the dismissal of the respondent that the dismissal is unlawful. In the light of this, the correct order for the court to have made is that the respondent is to be paid all his salaries and entitlements up to the date of his dismissal. Thereafter he is to be paid a month's salary and entitlements in lieu of notice. This is because a court will not compel an unwilling master to keep in his employment a willing servant. In the circumstance, I find merit in this appeal. I allow the appeal and set aside the judgment of the lower court. In its place it is hereby ordered that respondent is to be paid all his salaries and entitlements up to 12th October, 1987, the date of his dismissal and thereafter a month's salary in lieu of notice. I make no order as to costs.

**OBADINA, J.C.A.:** I have had the opportunity of reading in advance the lead judgment of my



learned brother, Amaizu, JCA, just delivered. I agree with his reasoning and conclusion that this appeal be allowed. I only wish to contribute by way of emphasis on one or two issues raised in the appeal.

The first issue raised by the appellant in his brief of argument reads as follows:-

"Can a trial court in a private contract of employment re-instate and thereafter on its own volition terminate the contract of employment between parties to a case before it?."

The law is well settled that when an employee complains that his employment has been wrongfully terminated, that employee has the onus:-

(a) to place before the court the terms and conditions of the contract of employment and

(b) to prove in what manner the said terms were breached by the employer. The term of contract of service is the bedrock of any case where the issue of wrongful termination of employment calls for determination:- *Amodu v. Amode* (1990) 5 NWLR (Pt. 150) 356; *Iwuchukwu v. Nwizu* (1994) 7 NWLR (Pt. 357) 379 at 412.

In *Amodu v. Amode* (supra) Agbaje, JSC who read the leading judgment observed at page 370 as follows:-

"...it appears clear to me that since it is the plaintiff's case that his dismissal by the defendants is not in accordance with the terms and conditions of the contract of service between them it is for the plaintiff to plead and prove the conditions of service regulating the contract of service in question."

To this, Wali, JSC added at 373:-

"the term of the contract of service is the bedrock of the appellant's case."

As the contract of service is the bedrock upon which an aggrieved employee must found his case, he succeeds or fails upon the terms thereof.

Therefore, in a written or documented contract of service, the court will not look outside the terms stipulated or agreed therein in deciding the rights and obligations of the parties: See *Western Nigeria Development Corporation v. Abimbola* (1966) 4 NSCC 172 at 88. In that case, the Supreme Court held at page 94 of the report, "that the provisions of a written contract of service bind the parties thereto and that it was outside the province of the learned trial judge to look any where for terms of termination of the contract other than in the contract agreement."

It is also the law that in ordinary contracts of employment where the terms provide for one month's notice before termination or salary in lieu thereof, the only remedy an employee who is wrongfully terminated can get is a month's salary in lieu of notice and any other legitimate entitlements due to him at the time the employment was brought to an end. See *Francis Adesegun Katto v. C.B.N.* (1999) 6 NWLR (Pt. 607) 390 at 406. See also *Western Nigeria Development Corporation v. Abimbola* (supra) which is very relevant to this case. In that case the plaintiff sued for wrongful dismissal, claiming for special and general damages. There had been some allegations

A  
B  
C  
D  
E  
F  
G

of fraud against him. The trial judge awarded him a month's salary and also general damages on the basis of loss of prospects of continued employment for a dismissed employee etc. It was true that the dismissal was wrongful. On appeal to the Supreme Court, it was observed, per Ajegbo, JSC at page 174 as follows:-

"The plaintiff was given a letter of appointment (Exhibit H) and paragraph 5 of the letter reads:- 'Your employment may be terminated by the Board or yourself by giving one month's notice in writing or by giving one month's salary in lieu of such notice excepting in the case of dismissal for offence prejudicial to the interest of the Board.'

The plaintiff's appointment was governed by the contract into which he entered at the time of his employment. If he had been given one month's notice before termination of his appointment he would have had no claim whatsoever on the corporation. But he was not given notice and he is entitled to one month's salary in the absence of notice. That is all he can get as damages; other matters that the judge considered are irrelevant."

However, it was further explained by the Supreme Court in *Nigeria Produce Marketing Board v. Adewunmi* (1972) 7 NSCC 662, that apart from the salary in lieu of notice, the plaintiff would be paid other legitimate entitlements due to him at the time the employment was brought to an end. In this case, it is not in dispute that the terms and conditions of the contract of service between the appellant and the respondent provide for one

A  
B  
C  
D  
E  
F  
G

month's notice before termination or one month's salary in lieu of notice. The learned trial Judge acknowledged in his judgment at page 208 of the record that the terms of the contract of employment between the parties provide for one month's notice before termination or salary in lieu thereof, when he stated inter alia as follows:-

"Thereafter, his contract of employment with the defendant is to be determined from tomorrow, 23/1/96, by payment to him of a month's salary in lieu of notice."

Since the terms of their contract provide for the length of notice to be given in order to terminate the contract, the only remedy the respondent can get is a month's salary in lieu of notice and any other legitimate entitlements due to him as at 12th of October, 1987, when his employment was terminated. It is irrelevant that the reason given for the termination was unjustifiable and unsustainable. In a purely master and servant relationship devoid of any statutory flavour and in which the relationship is purely contractual, as in this case, termination of employment by the employer cannot be wrongful unless it is in breach of the terms and conditions of the contract. Notwithstanding that the employer gave a totally untenable reason for the termination, once he complies with the terms of the contract, there could be no breach of contract of employment. Katto v. C.B.N. (1999) 6 NWLR (Pt. 607) 390 at 414.

The law is well settled that where a contract of employment is terminable on notice, and the

A employee is not given the requisite notice, what the employee could have earned during the period of the notice is the damages that the employee can get. *I.D.C. v. Ajijala* (1976) 2 SC 115 at 119 - 120; *Mobil Oil Nigeria Limited v. Abraham Akinfosile* (1969) 1 NMLR 217.

B In the circumstances of this case, I think it was wrong of the learned trial judge to have declared null and void the termination of appointment arising from the ordinary master and servant relationship.

C When an office or employment has a statutory flavour in the sense that its conditions of service are provided for and protected by statute or regulations thereunder, any person holding that office or in that employment enjoys a special status over and above the ordinary master and servant relationship. In the matter of discipline of such a person, the procedure laid down by the applicable statute or regulations must be fully complied with.

E If materially contravened, any decision affecting the right or tenure of office of that person may be declared null and void in an appropriate proceeding. See *Bamgboye v. University of Ilorin* (1999) 10 NWLR (Pt. 622) 290 at 320; *Shitta-Bey v. Federal Public Service Commission* (1981) 1, SC 40 at 56; *Olaniyan v. University of Lagos* (No.2) (1985) 2 NWLR (Pt. 9) 599 at 613; *Eperokun v. University of Lagos* (1986) 4 NWLR (Pt. 34) 162 at 201; *Olatubosun v. N.I.S.E.R. Council* (1988) 3 NWLR (Pt. 80) 25 at 41.

In the present case on appeal, there is no evidence that the terms and conditions of service of the

contract of employment between the appellant and the respondent are provided by a statute or regulations made under a statute. Therefore the learned trial judge could not have rightly declared the termination of appointment of the respondent null and void as he did. Consequently, the judge was wrong when he declared the dismissal of the respondent null and void and said that the respondent was deemed to still be in the appellant's employment till the date of judgment, namely, 22/1/96, when the respondent was entitled to just a month's salary in lieu of notice with effect from the date of his dismissal, 12th October, 1987. The effect of the learned trial judge's order is that he reinstated the respondent to his office from 12/10/87 to the date of judgment, 22/1/96. It is only in termination or dismissal from an employment with statutory flavour that an order for nullity can issue. In ordinary contract of master and servant, the termination or dismissal can only be wrongful in the sense that the terms of the contract have not been complied with. In such a case the quantum of damages will be what the employee would have earned if proper notice had been given, and if there is no provision for notice, what the employee could have earned if reasonable notice was given. What constitutes reasonable notice depends on the nature of the employment, the status of the employee and the length of service the employee has put in the service. - See *Bamgboye v. University of Ilorin* (1999) (supra). I therefore hold that there is merit in the appeal

and allow it. I abide by the consequential orders made by my learned brother, Amaizu, JCA.

A

**ONNOGHEN, J.C.A.:** I have read in advance the judgment delivered by my learned brother P.I. Amaizu, JCA.

B

The main issue in this appeal is that of quantum of damages where a court finds that the dismissal or termination of contract of employment of an employee is illegal.

C

However, there is also the sub issue as to whether a Court can order reinstatement of a dismissed staff on a private contract of employment particularly where there is no express term in that contract to that effect.

D

From the facts of this case it is clear that the contract of employment between the parties is that of personal service; it has no statutory flavour at all. There is also no evidence to show that it has any statutory flavour.

E

I agree with the submission of learned counsel for the Appellant G.D. B Ayanbanji Esq. that a trial court cannot reinstate a dismissed staff in a private contract of employment except of course the contract agreement as between the parties expressly says so. It is not the business of the court to make a contract between parties but to give effect to what had been agreed upon by the parties themselves. It is trite law that you cannot force a willing servant on an unwilling employer. The trial court was therefore in error in treating the contract between the parties as that with statutory flavour

F

G

and thereby treats that contract as continuous despite the dismissal until determined by the court in its judgment, eight years later.

A

On the issue of quantum of damages it is a true principle of law that where a contract of employment is terminable on notice, the damages which can be considered to be the natural or probable consequence of terminating the employment without the requisite notice cannot be more than what the employee could have earned during the period of the notice. See the Supreme Court's decision in Mobil Oil Nig. Ltd. v. Abraham Akinfosile (1969) 1 NMLR 217.

B

C

At page 207 line 15 of the record, the learned trial Judge found as follows:

D

"However, justice of this case will be met by an order terminating the parties' employment contract with effect from 23/1/96 by payment to the plaintiff of one month's salary in lieu of a month's notice which on his own admission he is entitled to under the contract of employment with the defendant and I so order.

E

F

G

This is a clear admission by the Respondent and the trial court that the Respondent is entitled to a month's salary in lieu of notice. The funny thing about the finding of the court as to the effective date of termination of the employment of the Respondent is that it is to take effect a day after the judgment of the court. The Judgment was delivered on 22/1/96 but termination was to be effective from 23/1/96.

It is my considered opinion that having found as a



- A fact that the Respondent's employment is determinable by one month's notice or payment of a month's salary in lieu of notice that notice or payment in lieu thereof can only take effect from the time of the purported dismissal or termination, definitely not later as held by the trial Judge.
- B For these and other reasons ably marshalled in the lead judgment, I agree that this appeal be allowed and is hereby allowed.
- C Judgment of the lower court in suit No. KWS/329/87 is hereby set aside. I abide by the consequential orders made in the lead judgment including that on cost.
- Appeal allowed.

### **Appearances**

G. D. Ayabanji, Esq

**For Appellants**

Chief Olanipekun, SAN (with him, **For**  
Dele Ogundele, Esq.)

**Respondents**

# LAW pavilion



POWERED BY:

