**ADEDAPO ADENIRAN**

**v.**

**NATIONAL ELECTRIC POWER AUTHORITY**

COURT OF APPEAL, ILORIN JUDICIAL DIVISION]

12TH DAY OF JULY. 2001

CA/IL/117/99

**LEX (2001) - CA/IL/117/99**

OTHER CITATIONS

2PLR/2001/15 (CA)

47 WRN 145

**BEFORE THEIR LORDSHIPS**

MURITALA AREMU OKUNOLA, JCA (Presided)

PATRICK IBE AMAIZU, JCA (Delivered the leading judgment)

SAMUEL WALTER NKANU ONNOGHEN, JCA

**ORIGINATING COURT(S)**

ILORIN HIGH COURT (Ibiwoye J., Presiding)

**REPRESENTATION**

T.O.S. GBADEYAN Esq., with LARA ALUKO & LAWRENCE OPOOLA Esq. - for the appellant

R.A. LAWAL RABANA Esq., with ADEDAYO ADEDEJI Esq., & LOLA AKANDE - for the respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT – Fair hearing – Employee heard as a witness when investigating an allegation against him – Whether satisfy the requirement of fair hearing.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT – Fair hearing – Employee’s appointment terminated without complying with same – effect of.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT – Termination of employment – Employment protected by statute and employment governed by contract – Procedure for termination.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT – Wrongful termination of employment – Onus of proving the terms and conditions of the contract between the parties – On whom lies.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT – Wrongful dismissal – Measure of damages for same.

**PRACTICE AND PROCEDURE ISSUES**

PLEADINGS:– Documents – Where relevant and arises from pleaded facts – Whether required to be specifically pleaded.

PLEADINGS:– Object of – Unpleaded facts – Effect of.

**MAIN JUDGMENT**

**PATRICK IBE AMAIZU, JCA.** (Delivering the leading judgment):-

The plaintiff now the appellant sued the defendant now the respondent before an Ilorin High Court presided over by Ibiwoye J., claiming the following reliefs-

“1. A declaration that the defendant’s letter dated 23rd June, 1992, by which the plaintiff was dismissed from the service of the defendant is illegal, unlawful, null and void and of no effect whatsoever.

2. An order compelling the defendant to withdraw the said letter dated 23rd June, 1992, by which the defendant purported to have dismissed the plaintiff from the service of the plaintiff.

3. An order compelling the defendant to reinstate the plaintiff to his position as an employee of the defendant.

4. An order compelling the defendant to pay all the plaintiff’s unpaid salaries and entitlements from July, 1992 to the date/ month of judgment and to effect his promotion accordingly as he may be entitled.

5. In the alternative to paragraphs 3 & 4, the plaintiff claims the sum of N1,000,000.00 as special and general damages for loss and injury caused to the plaintiff as a result of the dismissal ...etc.”

Pleadings were filed and exchanged by the parties. The appellant amended his pleadings once. The trial proceeded on the appellant’s amended statement of claim and the respondent’s statement of defence. At the hearing, the appellant gave evidence for himself but called no witness. The respondent called two witnesses. They were officials in the respondent’s establishment.

Briefly, the facts which led to the appeal, so far as they are material to the question which calls for our determination are – the appellant was employed by the respondent on a temporary basis as a substation attendant (exhibit 1). His temporary appointment was later confirmed, exhibit 2. The respondent appeared to be satisfied with the way he performed his duties that it promoted him two times during the relevant period. The last promotion was to the post of distribution superintendent. He was, by that promotion a senior staff on salary grade level 09. He was also awarded a ten years merit award certificate. His last station was Offa.

According to the appellant, his trouble in the establishment started when he was posted to Offa. His superior officer, who was at Ilorin as a district manager, was not happy with him. He gave him two queries. The last of the two queries was in respect of 3 missing R.M.U.S. (Ring Main Units) at Offa sub-station. He replied the query but thereafter was invited to appear before a committee set up to investigate the case of the 3 missing RMUS. After his appearance before the committee, he was interdicted, exhibited 7. Later he was dismissed from service, exhibit 8.

He was thereafter arrested by the police and arraigned before a Chief Magistrate at Ilorin for stealing the 3 missing RMUS. He was discharged by the Chief Magistrate on a no case submission as no prima facie case was made out against him.

The respondent’s case is not very different from the above except that DW2, who was the appellant’s predecessor in office claimed that he handed the 3 missing RMUS to the appellant. It is common ground however that -

(1) the 3 missing R.M.U.S. were not listed in the handing over note exhibit 7 which DW2 gave to the appellant.

(2) as a senior staff in the establishment the appellant’s conditions of service were regulated by exhibits 12 & 12a.

The lower court after listening to the evidence of the parties and their witnesses and after going through the written submissions of the learned counsel in a considered judgment delivered on 4th of December, 1996, gave judgment for the respondent. The judgment reads in part as follows

“Bearing all these in mind, it seems that the action of the defendant dismissing the plaintiff is properly in order. The plaintiff was well aware of these provisions in exhibits 12 and 12a right from the inception of his taking up appointment with the defendant

………………………...................

On the whole I have come to the irresistible conclusion that the plaintiff’s claims fail and are hereby dismissed.”

The appellant was dissatisfied with the judgment. He has appealed to this court. At first, he filed seven grounds of appeal. Later, with leave of this court, he amended the notice and grounds of appeal.

The parties through their counsel, and in accordance with the rules of the court, filed and exchanged briefs of argument wherein they identified questions for determination arising from the grounds of appeal. The appellant identified the following questions for determination

3.01 Whether or not the Ad hoc committee set up by the defendant or the defendant itself had power to entertain the criminal allegation against the plaintiff/appellant.

3.02 Whether or not the respondent herein or any of its agencies observed the principle of fair hearing before proceeding to adjudge the plaintiff/appellant guilty of the criminal allegation.

3.03 Whether or not, the trial court wrongly admitted exhibit DI and whether the appellant’s case can be dismissed basically upon such unpleaded exhibit D1 (report of Ad hoc committee).

3.04 Whether the decision of the trial court premised on unevaluated evidence and especially on provisions of the conditions of service entered into by the parties is justiciable and well founded.

The respondent also formulated three issues which but for framing and the language used, boil to the last three issues formulated by the appellant. It does seem to me that this appeal can be disposed of on the last three issues formulated by the appellant viz issues nos. 3.02, 3.03 & 3.04. 1 will treat issues 3.02 & 3.04 together.

The learned counsel for the parties adopted their briefs before us. They also cited additional authorities. Gbadeyan Esq., of counsel, urged the court to allow the appeal. On the other hand, Lawal Rabana Esq. , urged the court to dismiss the appeal as lacking in merit. The respondent incorporated in his brief a notice of preliminary objection. It reads -

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

1. That issue No. 1 in the appellant’s brief of argument does not arise from any ground of appeal and is therefore incompetent.

2. That issues Nos. 1, 2 & 3 in the appellant’s brief of argument purportedly arise from the same grounds of appeal and are therefore incompetent”.

It does seem to me that the objection was cured by the appellant’s amendment to the notice of appeal and the issues formulated for determination as contained in the new paragraph 3 of the appellant’s brief of argument. In any case, issue one is not relevant for the determination of this appeal, so the objection has been overtaken by events. I now deal with issues 3.02 & 3.04 in the appellant’s brief of argument.

In dealing with the above issues, Gbadeyan Esq., of counsel referred to the provisions of section 33 of the 1979 Constitution of the Federal Republic of Nigeria. He submitted that the fundamental principle of fair hearing provides that a man cannot be condemned without his being heard. It is his view that this principle is applied in all cases in which a decision is to be taken affecting the rights and duties of an individual whether it is in a judicial or quasi judicial or even in purely administrative proceedings. He cited the following cases Oyeyemi v. Commissioner for Local Government (1992) 2 NWLR (Pt. 226) 661; Deduwa v. Okorodudu (1976) 10 S.C. 329 at 347; Adigun v. A.G. of Oyo State (1987) 1 NWLR (Pt. 53) 678.

The learned counsel submitted that the issue of breach of “fair hearing” provisions under the Constitution is very fundamental in any proceeding. It goes to the root of any decision taken which affects the rights of an individual. He further contended that the non compliance renders such judicial quasi judicial, or administrative decision incompetent, invalid, a nullity & therefore ineffective. He relied on-

Head of Federal Military Government v. Public Service Commission of Mid West & Or. (1974) 11 S.C. 79; Hart v. Military Governor of Rivers State & Ors. (1976) 11 S.C. 211; Ridge v. Baldwin (1964) A.C. 40.

In the view of the learned counsel, no matter how beautifully decided an issue before an Administrative Panel of Enquiry may be, the decision will be of no consequence if the principle of fair hearing is denied a party in the proceeding. He referred to the cases of - Adedeji v. Police Service Commission (1967) 1 All NLR 67; Oyeyemi v. Commissioner of Local Government (1992) 2 NWLR (Pt 226) 661.

The learned counsel then emphasised the fact that a party should not be denied the right to cross-examine witnesses who testify against him. He referred to the observation of Oputa J.C.A. in the case of Garba v. University of Maiduguri (1986) 1 NWLR (Part 18) 550 that

“… the person accused should know what is alleged against him. He should be present when any evidence against him is tendered and he should be given a fair opportunity to correct or contradict such evidence. How else is this done if it be not by cross examination.”

He also cited - Olatunbosun v. NISER Council (1988) 3 NWLR (Pt. 80) 25. The learned counsel observed that the appellant was invited to appear before the committee as a witness. He referred to exhibit 13, the letter of invitation. He further observed that it was evidence given in the proceeding in which he appeared as a witness that was used to determine his guilt. In the learned counsel’s view, the requirement of fair hearing was not complied with. He cited the case of- Aiyetan v. NIFOR (1987) 3 NWLR (Pt. 59) 48.

It is the view of the learned counsel that the learned trial Judge did not evaluate the evidence adduced before him. It is further his view, that in that case, this court can evaluate the evidence. This, according to the learned counsel, is more so as the bulk of the said evidence is documentary. He submitted that the learned trial Judge was wrong to have treated the conditions of service existing between the parties as a “sacrosant document”. He contended that the conditions of service did not spell out the “fate of any subscriber to it but merely prescribes procedure to be adopted in case of termination of an existing contract of employment or dismissal of the servant”. He urged the court to set aside the decision of the lower court.

In his reply, Adediji Esq, of counsel referred to the allegation of denial of fair hearing to the appellant. It is his view that the issue of fair-hearing did not arise from any of the seven grounds of appeal filed by the appellant. He contended that none of the grounds complained of the breach of fair hearing. He identified ground one as the only ground that indirectly referred to fair hearing. He also referred to the amended statement of claim. He observed that the appellant did not aver that any action of the respondent was unconstitutional for being in breach of fair hearing.

The learned counsel referred to the procedure followed by the committee appointed to look into the case of the missing 3 RMUS and also to the evidence adduced before the said committee. He contended that exhibit DI shows that the appellant was afforded the opportunity to state his case in respect of the missing 3 RMUS. It is the learned counsel’s view that the appellant was given a fair hearing. He cited the case of:-

Osakwe v. Nigerian Paper Mill Ltd. (1998) 7 SCNJ 222 at 231. He contended that the committee appointed by the respondent was merely exploring or investigating the facts related to the missing RMUS and was not conducting a trial. In that case, according to the learned counsel, the issue of fair hearing in terms of section 33 of the 1979 Constitution of Nigeria did not arise. He cited Alhaji Abdullahi Baba v. Nigeria Civil Aviation Training Centre, Zaria & Ors. (1991) 7 S.C.N.J. I at p. 29.

The learned counsel relied also on exhibit 13, the letter of invitation to the appellant to appear before the committee and, exhibit D1, the report of the Ad hoc committee, to show that the appellant was not tried before the Ad hoc committee. It is the contention of the learned counsel that exhibits 12 & 12A govern the conditions of service of the appellant. According to him, they are written contracts between the appellant and the respondent. He contended further that the parties’ actions must be confined to the contents of the two exhibits. He referred to the case of - O.O. Layade v. Panalpina World Transport Nig. Ltd (1996) 7 SCNJ I at pp. 14 & 15.

He submitted that the respondent in arriving at a decision to dismiss the appellant followed the procedure laid down in exhibits 12 & 12A. The learned counsel observed that as the contract of employment between the parties is without statutory flavour, the court should not order the re-instatement of the appellant for it will amount to forcing a willing employee on an unwilling employer. He cited

1. S. O. Ilodibe v. Nigeria Cement Company Ltd. (1997) 7 SCNJ 77 page 89.

2. P. C. Imoloame v. WAEC (1992) 11112 SCNJ 121 at 136

3. Union Bank of Nig. v. C. C. Ogboh (1995) 2 O 1 at 16.

Finally the learned counsel submitted that the lower court evaluated the oral and documentary evidence before it, and came to the right decision. He urged the court to dismiss the appeal. He relied on -

Oji v. Ndu (1993) 1 NVLR (Pt. 268) p. 245

Adegbite v. Ogunfaolu (1990) NWLR (Pt. 146) 578

Mogaji v. Odofin (1978) 4 S.C. 91.

Nwankpu v. Ewulu (1995) 7 NWLR (Pt. 407) 269 at 288 - 289.

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 are 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 exhibits 12 and 12a are crucial in determining the terms of the contract entered into between the appellant and the respondent. I pause here to observe that the booklet with the heading “Conditions of Service 1978 edition” is not marked. The other booklet, which I presume is the revised version of the 1978 edition is marked exhibit 12. The two are more or less the same. I intend to use exhibit 12.

Section 4 thereof deals with - “Conduct of Disciplinary Proceedings: Serious Misconduct”. Paragraph 34.01 thereof reads -

“General

If the nature of the alleged misconduct is such to warrant dismissal, the following procedure shall be followed

1. The employee shall be notified in writing of the grounds upon which it is intended to dismiss him, and he shall be given a full opportunity to exculpate himself.

2. The matter shall be investigated by the level of management empowered in the delegation of authorities register to deal with the case.

3. If any witnesses are called to give evidence the employee shall be entitled to be present, and to put questions to the witnesses.

4. No documentary evidence shall be used against the employee unless he has previously been supplied with a copy thereof or given access thereto.

5. - - - - - - -

6. - - - - - - - .”

The point has to be made that the above procedure forms part of the terms of employment of the appellant. In that case, this court has to decide whether from the evidence adduced in the lower court, it can be said that the Ad hoc committee followed the procedure. See the case of Dr. G. S. Obo v. Commissioner for Education, Bendel State & Ors. (1993) 2 NWLR (Part 273) 46.

The evidence of DWI who was the secretary to the committee that looked into the case of the missing 3 RMUS reads in part as follows

“During the proceeding of the panel those concerned were called in one by one. I cannot remember when the plaintiff was called but it is contained in the report.”

The above evidence comes from the respondent’s witnesses. It is obvious from that evidence that the panel did not follow the procedure laid down in exhibit 12. 1 observe however, that the totality of the evidence in lower court justified the procedure followed by the committee. This fact is clearly brought out by exhibit 13, the letter sent to the appellant by the committee to appear before it. It reads

“Invitation to appear before an Ad hoc committee to testify on the case of missing 3 No. RMUS at 2 x 7.5 MVA/33/11 KV injection sub station at Offa”.

In other words, the appellant appeared as a witness and not as a suspect before the committee. In that case, in accordance with our legal system, the appellant, as a witness could not be found guilty of the matter being inquired into by the committee. Consequently, he should not have been recommended for any punishment. He may however, as a witness be found guilty of perjury, if he lied before the committee. But the committee in its report recommended as follows -

“In the light of the above established facts he is deeply involved in the removal and disposal of the RMUS. Hence the panel is recommending his outright dismissal from the service of the authority.”

The letter of dismissal - exhibit 8, issued to the appellant is sequel to the above recommendation. it reads-

“Dismissal

Management has considered the recommendations of the Ad hoc disciplinary committee that investigated the case of the alleged missing RMUS at 2 x 7.5 MVA sub station in Offa undertaking. Ilorin district and is satisfied that your action was prejudicial to discipline and proper administration of the authority.

- - - - - - - -

Consequently, you are hereby dismissed from the service of the authority with immediate effect.”

It is my view, that if the respondent was to rely on the recommendation of the committee in determining the employment of the appellant, it was necessary that the appellant should have been given fair hearing. It is also my view that fair hearing in this case, does not mean calling the appellant as a witness before the committee. It means more than that.

There is a yawning gulf between hearing a man as a witness, in an administrative inquiry and hearing him in defence of his good name and his career. In the latter case the man should know what and what were alleged against him and he must be given a fair opportunity to contradict such evidence. How else can this be achieved, if not by cross-examination. As Oputa J.S.C. (as he then was) put it in the case of Garba & Ors. v. The University of Maiduguri (1986) NSCC p. 245

“It follows that the panel must not hear evidence or receive representations behind their back.”

But the committee did just that in the present suit. It is necessary to mention that it is not for this court to inquire into whether the evidence adduced behind the appellant did work to his prejudice. What matters is that he was not given the opportunity to confront his accusers.

I now deal with the effect of non-compliance with the provisions of fair hearing as enshrined in the constitution. From the evidence adduced by both parties including the documents tendered, there was in existence between the appellant and the respondent a relationship of master and servant. The evidence further shows that the said relationship of master and servant has no statutory backing. In the case of the Union Bank of Nigeria Ltd. v. Chukwuelo Charles Ogboh (1995) 2 NWLR (Pt. 379) p. 647 at 664, the Supreme Court as per Belgore J.S.C. has this to say about such relationship:-

“Except in employment governed by statute wherein the procedures for employment and discipline (including dismissal) of an employee are clearly spelt out, any other employment outside the statute is governed by the terms under which the parties agreed to be master and servant. Employment with statutory backing must be terminated in the way and manner prescribed by the statute and any other manner of termination, inconsistent with the relevant statute is null and void and of no effect.

In other cases governed only by agreement of the parties and not by statute, removal by way of termination of appointment of dismissal will be in the form agreed to: any other form connotes only wrongful termination or dismissal but not to declare such dismissal null and void: the only remedy is a claim for damages for that wrongful dismissal. This is based on the notion that no servant can be imposed by the court on unwilling master even where the master’s behaviour is wrong”.

From the above pronouncement of the apex court, the dismissal of the appellant in contravention of the contract of service between the parties - exhibit 12 is wrongful. It is observed that a servant would only be paid for the period he served his master and if he is dismissed as in this case, wrongfully, all he gets is the amount he would have earned if his appointment has been properly determined. I have carefully gone through exhibit 12, it is not stated the period of notice required to terminate the appellant’s appointment. In my view, having regard to the appellant’s position in the establishment and his length of service, three months notice is enough. This is moreso as he is expected under exhibit 12 to give the respondent 3 months when he is about to retire, for pension purposes.

The appellant claimed in paragraph 5 of his statement of claim, “damages for loss and injury caused to the plaintiff as a result of the dismissal”. In the light of my above, the correct order for the lower court to have made is that the appellant is to be paid all his salaries, entitlements up to the date of his dismissal. Thereafter he is to be paid three months salary and entitlements in lieu of notice. He is also to be paid his pension and gratuity if he is so entitled in accordance with chapter 14 of exhibit 12.

The second and last issue was “whether or not the trial court, to dismiss the appellant’s case can basically rely upon an unpleaded exhibit DI (Ad hoc committee’s report). The object of pleading is to fix the issues for trial accurately and to appraise the other side of the case which it would meet and thus afford it the opportunity to call evidence to controvert such evidence. J. D. Idahosa & Or. v. D. N. Oronsaye (1959) 1 NSCC p. 136. It is because of this, that facts that are not pleaded, cannot be given in evidence.

In the present case, the respondent in paragraphs 5, 6, & 7 pleaded as follows

“5. The defendant avers that an Ad hoc committee was constituted to look into the issue of missing RMUS at Offa Injection sub station and plaintiff was invited to appear before the committee to explain his role.

6. The defendant avers that the constitution of the Ad hoc committee was in accordance with the provisions of the defendant’s condition of service to which the plaintiff was bound.

7. The defendant avers that the plaintiff was given fair hearing by the Ad hoc committee but the plaintiff failed to give a satisfactory account of his role on the missing RMUS.”

The above pleaded facts are self-explanatory. It is trite that where facts in support of a document are pleaded, the document itself, need not be pleaded.

Odunsi v. Bamgbala (1995) 1 NWLR (Part 374) 641 at 647. I agree entirely therefore with the submission of Adediji Esq, of counsel that a document that is relevant and arises from pleaded facts need not be specifically pleaded before it could be admitted in evidence. This point is articulated by Iguh J.S.C. in the case of Allied Bank of Nigeria Ltd. v. Jonas Akubueze (1997) 6 S.C.N.J. 116 at 140, where it was held that

“It ought not to be over-stressed that documentary evidence, to be admissible in evidence, needs not be specifically pleaded, so long as the relevant facts and not the evidence by which such a document is covered are pleaded”.

The answer to the above issue is in the affirmative because of the foregoing reasons. For the foregoing reasons, I find merit in the appeal. I allow the appeal in part, and set aside the judgment of the lower court. In its place, it is hereby ordered that the appellant is to be paid his salaries and entitlements up to 23rd June, 1992, the date of his dismissal and thereafter three months salary in lieu of notice. The appellant is to be paid his pension and gratuity if he is so entitled by his length of service.

I award N10,000.00 cost in favour of the appellant.

**MURITALA AREMU OKUNOLA, JCA.:**

I have had the benefit of reading in draft the lead judgment just read by my learned brother Amaizu JCA. My learned brother had covered all the issues raised in this appeal. I agree with his reasoning and conclusion that the appeal is meritorious and should be allowed. I too allow the appeal in part.

I abide by the consequential orders made in the lead judgment including the order made as to costs.

**WALTER SAMUEL NKANU ONNOGHEN, J.C.A.:**

I have had the advantage of reading in draft the lead judgment of my learned brother Amaizu J.C.A., just delivered. I agree with his reasoning and conclusion that there are merits in this appeal which should be allowed.

Both parties are agreed that the Ring Main Unit also known as RMU is an equipment which weighs more than 100 kilogramms and that it was never included in the handing over notes to the appellant. Despite this important fact the appellant was held liable by an Ad hoc committee of the respondent for the theft of 3 RMU; unlawful and unjustifiable sale or disposal of the 3 RMUS and criminal conversion of the money realised from their disposal, and recommended the dismissal of the appellant. The question is why should the appellant be punished for a theft of equipments which were never handed over to him for custody etc. particularly when there is no eye witness account testifying to the fact that the appellant was seen stealing the equipments. If those equipments were intended to be taken care of by the appellant as being part of the equipments of the respondent they ought to have been included in the handing over notes.

On the issue of fair hearing as regards the proceedings of the Ad hoc committee, the Supreme Court in Garba v. University of Maiduguri (1986) 1 NWLR (pt.18) 550 state the position of the law per Oputa J.S.C. as follows:

“It is my humble view that fair hearing implies much more than hearing the appellants testifying before the Disciplinary Investigation Panel, it implies much more than summoning the appellants before the panel. It implies more than staff or students testifying before the panel behind the backs of the appellants; it implies much more than the appellants being given a chance to explain their side of the story.

To constitute fair hearing whether it is before the regular courts or before tribunals and boards of inquiry the person accused should know what is alleged against him. He should be present when every evidence against him is tendered and he should be given a fair opportunity to correct or contradict such evidence. How else is this done if it be not by cross examination.”

From a long line of authorities on the issue and the evidence before the court it is very clear that the appellant was not given a fair hearing before being recommended for dismissal. That being the case, it is my view that the action of the respondents in dismissing the appellant based on a recommendation that is in breach of the rules of natural justice cannot stand. As it is usually said in common parlance you cannot put something on nothing and expect it to stand; it will surely fall to the ground. For these and other reasons contained in the said lead judgment of my learned brother Amaizu J.C.A., I too allow the appeal and abide by the consequential orders made therein including the order on cost.

Appeal allowed.