**FRANK GBOBOH**

**V**

**BRITISH AIRWAYS PLC.**

COURT OF APPEAL (LAGOS DIVISION)

CA/L/411/2011

11TH DAY OF MARCH 2016

**LEX (2016) - CA/L/411/2011**

OTHER CITATIONS

2PLR/2017/140 (CA

**BEFORE THEIR LORDSHIP**

CHINWE EUGENIA IYIZOBA, JCA (Presided)

YARGATA BYENCHIT NIMPAR, JCA (Read the Lead Judgment)

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO, JCA

**BETWEEN**

FRANK GBOBOH - Appellant

AND

BRITISH AIRWAY PLC - Respondent

**ORIGINATING COURT**

HIGH COURT OF LAGOS (K. O. Alogba, J., Presiding)

**REPRESENTATION/LAWYERS**

D. A. AWOSIKA - with JENNIFER APPAH - for the Appellant.

B. A. SODOPO - for the Respondent.

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

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT - CONTRACT OF EMPLOYMENT:- Determinants of – Whether statute or common law.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT - TERMINATION OF MASTER SERVANT RELATIONSHIP:- Right of a master to hire and fire – Legal basis of

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT - UNWILLING MASTER:- Imposing or foisting an employee on - Propriety of.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT - WRONGFUL DISMISSAL:- Action for - Party claiming entitlement for period of pendency of his claim - Attitude of the court thereto.

EMPLOYMENT AND LABOUR LAW - MASTER AND SERVANT - WRONGFUL TERMINATION OF EMPLOYMENT:- Remedy for - Connotation of - Claim for - Measure of damages awarded therein

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - CROSS APPEAL - Dismissal of the main appeal – Whether the cross appeal would be affected thereby.

APPEAL - CROSS APPEAL - Nature of - Right of parties to a suit to institute.

APPEAL - CROSS APPEAL AND VARIATION OF JUDGMENT – Distinction between.

JUDGMENT AND ORDERS - CONSEQUENTIAL ORDERS OF COURT - Aim of.

JUDGMENT AND ORDERS - JUDGMENT - Variation of judgment and cross appeal - Distinction between.

JURISDICTION - ISSUE OF - Fundamental effect of on proceedings of court.

JURISDICTION - ISSUE OF - Need to resolve once raised.

JURISDICTION - JURISDICTION OF COURT TO HEAR A MATTER - Criteria for.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant was an employee of the respondent as an Account Officer II. The respondent on discovery that the appellant had participated in the opening of an account in the name of the United Nations and issued tickets to the same accounts to the tune of $88,304.00 (Eighty-Eight Thousand Dollars Three Hundred and Four Cents) which money the respondent could not recover, handed him over to the police for prosecution. Criminal charges was filed against him at the Magistrates’ Court. However, before the determination of the suit, the respondent terminated his employment. The Magistrates’ Court found for the appellant; discharged him of the criminal charges.

The appellant instituted an action by way of originating summons to determine some questions arising from the relationship between him and the respondent. The court however, ordered parties to file pleadings to determine the matter. The trial court at the end of trial, found for the appellant granting him his entitlements up to the date of his discharge of the criminal charges filed against him.

Dissatisfied, the appellant appealed to the Court of Appeal questioning the right of the trial court to suo motu terminate his employment. The respondent filed a cross appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment in favour of the Appellant, granting him his entitlements up to the date of his discharge of the criminal charges filed against him. Dissatisfied, the Appellant appealed to the Court of Appeal, questioning the right of the trial court to suo motu terminate his employment.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

a. Having set aside the dismissal letter exhibit C9 and having regard to the circumstances of this case, whether the learned trial judge was right to have proceeded suo motu to terminate the appellant’s employment?

b. If the answer to the above is in the negative, what is the appropriate consequential order the learned trial judge ought to have made in the circumstances?

*BY RESPONDENT:*

“Whether the court below, having set aside the appellant’s dismissal by the respondent, ought to have granted a declaration that the appellant’s employment still subsists and awarded in favour of the appellant, salaries, allowances and benefits from the date of his dismissal till judgment”

*AS ADOPTED BY COURT:*

[The Court adopted the issues formulated by the Appellant].

**MAIN JUDGMENT**

**NIMPAR JCA** (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the judgment of the High Court of Lagos delivered on 30 September 2010 presided over by Hon. Justice K. O. Alogba wherein judgment was entered in favour of the appellant only to the extent of payment of the appellant’s salary and other entitlements up to the date of his discharge from a criminal charge.

Aggrieved by the said decision, the appellant filed a notice of appeal dated 13 May 2013 on 14 May 2013 setting out four (4) grounds of appeal.

The brief facts surrounding this appeal are simply that the appellant was an employee of the respondent, an Account Officer II at the time material to this appeal. In the course of his employment, he participated in the opening of a corporate credit account in the name of United Nations which resulted in the issues of tickets to the tune of $88, 304. 00 (eighty-eight thousand three hundred and four dollars). The cost of the tickets could not be recovered by the respondent. Consequently, the respondent reported the matter to the police which instituted criminal charges against the appellant at a Magistrates’ Court. The Magistrates’ Court discharged the appellant of the criminal charges against him but in the course of the trial, the respondent terminated the employment of the appellant. Thereafter, the appellant by way of an originating summons approached the lower court for the determination of some questions arising from the relationship between the parties but the trial court ordered pleadings and by a writ of summons filed 19 March 2003, the appellant sought for some declaratory reliefs challenging his dismissal from service during the pendency of a suit. The claim was denied and the matter went to trial. At the end, the trial court entered judgment in favour of the appellant only in terms of his entitlements up to the date of his discharge from the criminal charges. The appellant is now contending that based on the judgment, the court had terminated his employment suo motu thus, this appeal. There is a cross-appeal by the respondent.

The appellant filed his appellant’s brief dated 12 September 2013 filed on 18 September 2013, a reply brief dated 14 September 2015 filed on the same day but deemed on 29 September 2015. There is also a cross-respondent’s brief filed on 14 September 2015 deemed properly filed on 29 September 2015.

The respondent filed a notice of cross-appeal setting out three (3) grounds of appeal and a respondent/cross-appellant’s brief both dated 4 May 2015 filed on 5 May 2015 and deemed on 7 May 2015. The cross appellant’s reply brief dated 23 September 2015 was filed on 28 September 2015, deemed on 29 May 2015 and a list of additional authorities filed on 9 February 2016. All the briefs were adopted at the hearing of the appeal. The main appeal shall be considered first before attention shall go to the cross-appeal.

The appellant formulated two (2) issues for determination as follows:

a. Having set aside the dismissal letter exhibit C9 and having regard to the circumstances of this case, whether the learned trial judge was right to have proceeded suo motu to terminate the appellant’s employment?

b. If the answer to the above is in the negative, what is the appropriate consequential order the learned trial judge ought to have made in the circumstances?

The respondent /cross-appellant formulated one issue for the main appeal and two (2) others for the cross-appeal. The sole issue for the main appeal goes thus:

“Whether the court below, having set aside the appellant’s dismissal by the respondent, ought to have granted a declaration that the appellant’s employment still subsists and awarded in favour of the appellant, salaries, allowances and benefits from the date of his dismissal till judgment”

Both sides proffered arguments in respect of the positions taken. I shall adopt the issues distilled by the appellant for determination in this appeal and they shall be taken together.

It is the contention of the appellant that though the learned trial judge was right to have declared the dismissal of the appellant from the respondent’s employment unlawfully, the court ought to have put the parties back to where they were before the issuance of the dismissal letter. That having set aside the dismissal, the dismissal lacks credibility, never existed and cannot be acted upon. Appellant submitted that the trial court was wrong to have unilaterally terminated the appellant’s appointment and ordered payment of two (2) months’ salary in lieu of two (2) months’ notice when no such prayer was made to that effect. Further stated that courts must refrain from raising issues suo motu, referred to Hambe v. Hueze (2001) FWLR (Pt. 42) 1, (2001) 4 NWLR (Pt. 703) 372 at 388; Abbas v. Solomon (2001) FWLR (Pt. 67) 847, (2001) 15 NWLR (Pt. 735) 144; Korede v. Adedokun (2001) FWLR (Pt. 65) 421, (2001) 15 NWLR (Pt. 736) 483 at 497; George v. UBA (1972) 8/9 SC 264.

The appellant further submitted that in the event that this court finds that the lower court ought not to have on its own motion terminated the employment of the appellant, then the appellant’s entitlement ought to be paid up till the day of judgment not limiting such benefits only to the date he was discharged in charge No. F/250/96.

Though the respondent’s contended the decision of the trial court in setting aside the appellant’s dismissal in its cross appeal, it however responded to the issues raised by the appellant’s main appeal in its respondent’s brief. The respondent submitted that an employment contract particularly that of master and servant comes to an end once determined in any manner by either of the parties, referred to Olanrewaju v. Afribank Plc (2001) FWLR (Pt. 72) 2008, (2001) 13 NWLR (Pt. 731) 691 at 705. It further stated that the remedy of an aggrieved servant who has been wrongfully dismissed is in damages, reinstatement not an option, referring to the following cases in proof of its submissions; Texaco Nigeria Plc. v. Kehinde (2001) 6 NWLR (Pt. 708) 224 at 242, (2002) FWLR (Pt. 94) 143; Francis v. Municipal Councillors of Kualar Lumpur (1962) 3 All ER 633 at 637; Ekunola v. C.B.N. (2013) All FWLR (Pt. 703) 1861, (2013) 15 NWLR (Pt. 1377) 224. The respondent further submits that an award of emoluments for a period subsequent to the date of the dismissal amounts to reinstatement, cited the case of Olatubosun v. NISER Council (1988) 3 NWLR (Pt. 80) 25 and that since the appellant did not claim damages resulting from wrongful dismissal at the court below, he is not entitled to same.

In reply to the submissions of the respondent, the appellant stated that the legal effect of setting aside the appellant’s dismissal is that the dismissal was never made and all act(s) of the purported replacement are unlawful and of no effect, cited Okafor v. Attorney-General, Anambra (1991) 6 NWLR (Pt. 200) 659.

Resolution The contention here arise from the fact that the appellant was dismissed while facing criminal trial and when he was on suspension. He was later discharged by the court. The challenge to the dismissal was upheld and set aside but benefits were awarded up and until the date he was discharged from the criminal trial. The lower court also awarded two (2) months’ salary in lieu of notice as per the contract of service consequently terminating the employment of the appellant. The relationship between the parties was simply that of master/servant and as such the determination of the relationship is dependent on the contract between the parties. The claim of the appellant before the lower court was that there was an unlawful dismissal which is to say that the contract between the parties was not adhered to in dismissing the appellant. The letter of employment and conditions of service are exhibits C2, C3 and C4. The lower court found the dismissal wrongful and set it aside. The contention of the appellant is that when the court terminated the relationship it ought to have awarded damages up to the time of judgment instead of the date of discharge from the criminal trial. He relied on exhibit C5 where the respondent had said thus:

“As the matter is of a serious nature and has become a case, you will be placed on suspension, with pay, pending the determination of the case ...”

The respondent acted before the end of the case which made the termination wrongful. I agree with the lower court that the respondent was wrong in dismissing the appellant during the pendency of the criminal trial. In bringing to end the contract of service, did the trial judge err? The law is settled on wrongful termination of employment, see Union Bank of (Nig.) Ltd v. Ogboh (1995) 2 NWLR (Pt. 380) 647 where the court held thus:

“The law is settled that in a master/servant relationship, the termination of employment in a manner that is inconsistent with the terms of employment/agreement connotes only wrongful termination of employment or dismissal.”

The remedy available to a servant wrongly terminated is also settled in law. The apex court in Osisanya v. Afribank Nigeria Plc. (2007) All FWLR (Pt. 360) 1480, (2007) 6 NWLR (Pt. 1031) 565 held thus:

“It need be stressed and this has long been settled, that in master and servant relationship, a dismissal of an employee by the employer, cannot be declared null and void and of no effect whatsoever. The remedy as is settled is an award of damages, where the termination or dismissal, held to be wrongful.” See also Osakwe v. Nigerian Paper Mill Ltd (1998) 7 SCNJ 222 and Katto v. Central Bank of Nigeria (1999) 6 NWLR (Pt. 607) 390. The appellant cannot in law contend that there was no dismissal at all. There was in fact, a dismissal but it was wrongly done and not null and void as argued.

It is trite that there is no other remedy in wrongful dismissal in ordinary master/servant relationship other than damages. That has been crystallized beyond citing of authorities. It is also settled that reinstatement is not an option under the common law master /servant relationship. The court said so in clear terms in the case of Union Bank of (Nig.) Ltd v. Ogboh, where it held as follows:

“This is settled that a court cannot impose or foist an employee on an unwilling employer.”

It is not indeed the law that the court with all its coercive powers cannot force the employer to reabsorb an employee it is not willing to keep. The genesis of the relationship was a consensual contract and when the relationship goes sour, then it is best that it be terminated in the most civil and lawful manner.

In the light of the above, the lower court cannot declare the dismissal null and void and in fact there is no such declaration in the judgment as alleged by the appellant, the appellant cannot read into the judgment what the court did not say. The effect of setting aside the wrongful dismissal is not to reinstate the appellant but to allow the court determine the relationship according to the contract of employment and settled law of master/servant. In setting aside the unlawful dismissal of the appellant, the appellant cannot expect that by the order of court he is entitled to emoluments during the period of litigation after his dismissal. He is taken back to when the cause of action arose and when he was discharged from the criminal prosecution.

Furthermore, I do not agree with respondent that awarding salaries and other entitlements from date of termination to date of discharge from criminal prosecution is wrong, I am strengthened by the commitment of the respondent to place the appellant on suspension with pay until the criminal trial is over.

The same respondent who made this commitment turned around to breach it. Beyond that the matter was before a court of law, no party was at liberty to decide on the issue other than the court. Now, because the respondent has taken that position, the appellant can rightly fall back on that commitment in challenging the dismissal.

The respondent had the unfettered right to determine the relationship at any time with or without a reason, this is a right given to the respondent, see Ajayi v. Texaco Nigeria Plc. (1987) 3 NWLR (Pt. 62) 577 where it held as follows:

“In ordinary case of master and servant, as in the instant appeal, the master can terminate the contract with his servant at any time for good or for bad reasons or for none. The motive for exercising a right to terminate the contract of service of a servant does not render a valid exercise of that right ineffective.”

The facts in this appeal therefore support the findings of the trial court. The appellant was suspended with full salary pending the determination of the criminal trial, the respondent should not have acted before the end of trial. If not for that commitment, the award of salaries up until date of discharge would have been wrong. In this case, it is not wrong. The respondent should not have acted on the issue that it handed over to the court for determination.

The measure of damages awarded when an employment is wrongfully terminated is also settled in law, the apex court in the case of Osisanya v. Afribank Nigeria Plc. held as follows:

“There is, in my view, no doubt that the court below correctly stated and applied the applicable principle of law in master/servant relationship. In International Drilling Co. (Nig.) Ltd v. Moses Eyeimofe Ajijala (1979) 2 SC 64 at 73 - 74, this court per Obaseki A. G. JSC, said on the point: The principles of law governing the award of damages were stated recently by this court in :-

i. Western Nigeria Development Corporation v. Jimoh Abimbola (1966) NMLR 381 at 382; and

ii. Nigeria Produce Marketing Board v. A. I. Adewunmi (1972) 1 All NLR (Pt. 2) 870

In the latter case, we stated the law as follows at page 437:-

‘In a claim for unlawful dismissal, the measure of damages is prima facie the amount that the plaintiff would have earned had the employment continued according to contract. Where, however, the defendant, on giving the prescribed notice, has a right to terminate the contract before the end of the term, the damages awarded apart from other entitlements, should be limited to the amount which would have been earned by the plaintiff over the period of notice, bearing in mind that it is the duty of the plaintiff to minimize the damage which he sustains by the wrongful dismissal.’”

The period of notice in the contract of service is two (2) months and therefore, if the appellant was given two (2) months notice or paid 2 months’ salary in lieu of notice, he would have had nothing as damages. But since the appellant was not given the required notice, he is entitled to the 2 months salary in lieu of notice as rightly determined by the lower court.

Did the lower court suo motu raise the issue of damages after determining the contract between the parties? I agree with the appellant that generally, the court must refrain from awarding what was not claimed by a party. This matter is clearly a claim for wrongful dismissal under master/servant relationship. The duty of determining the nature of a contract of employment is generally governed by statute or under common law. Under common law, the court is empowered to lawfully put an end to the relationship. There are always implied terms in the contract of employment which are rooted in statute, custom, practice, public policy or common law which ensures that the court makes the appropriate order whether asked for or not. This is because the employee wrongly dismissed cannot be returned to employment and therefore the appropriate damages are awarded to also put an end to litigation.

The fact remains that the employment was terminated anyway, that was what led to the claim in the first place. Appellant stood dismissed, see the case of Ekunola v. C. B. N. (2013) 15 NWLR (Pt. 1377) 244 at 269. The only issue is that, it was not properly done and so the appellant cannot accuse the court of determining its employment and awarding damages. The lower court was on solid ground in doing so. The award of damages was consequential to the findings of the lower court, it was a necessary order to give effect to the findings made after hearing of parties. The purpose of a consequential order was given in the case of Awoniyi v. Regd. Trustees, AMORC (2000) FWLR (Pt. 25) 1592, (2000) 10 NWLR (Pt. 676) 522 as follows:

“A consequential order is an order founded on the claim of the successful party. In other words, a consequential order is one which is not merely incidental to a decision properly made, but one which is merely to give effect to the decision.”

The lower court awarded the appellant his salaries and entitlements up to February 1998 as per exhibit C13, the date of discharge from criminal trial and then two months’ salary in lieu of notice, the court held:

“Accordingly, I hold that the claimant is entitled to his salaries, allowances and benefits from November 1996 to 20 February 1998 when he was discharged.

It is only after that date it becomes open to the defendant to take any step it wished regarding his employment even despite such discharge.”

However, the appellant wants his entitlement for the period of the pendency of his claim for wrongful dismissal. No authority was cited for the preposition. The court in the case of Texaco Nigeria Plc. v. Kehinde (2001) 6 NWLR (Pt. 708) 224 at 242 held thus:

“The trial court awarded to the respondent, his salaries and other entitlements from the time of termination to judgment. The law is very clear on the point that a servant would only be paid for the period he served his master and if dismissed, as in this case, all he gets as damages is the amount he would have earned if his appointment had been properly determined. That is, the servant is to be paid his salaries and entitlements up to the date of his dismissal.”

The contention of the appellant therefore is flawed and cannot stand as the order made by the court is one to give effect to the findings made by the court. The contention is unfounded and is not backed by law, practice, custom or common law.

There is therefore no need to dissipate energy considering it.

Issues one and two are hereby resolved against the appellant. Accordingly therefore, this appeal lacks merit and is hereby dismissed. The judgement of the trial judge, Hon. Justice K. O. Alogba delivered on 30September 2010 is hereby affirmed. Cross-appeal

The respondent/cross-appellant via its respondent/crossappellant’s brief distilled two (2) issues for determination namely:

i. Whether the court below possessed the requisite jurisdiction to make orders setting the appellant/cross respondent’s dismissal by the cross-appellant/respondent and awarding two months’ salary in lieu of notice to the appellant/cross-respondent, when the latter did not seek such reliefs from the court below?

ii. Whether it was right for the court below to set aside the appellant/cross-respondents dismissal from the employment of the respondent/cross-appellant, having regard to the contractual nature of the appellant/cross-respondent’s employment with the respondent/cross -appellant?

The appellant/cross-respondent formulated a sole issue for determination as follows:

“Whether the decision of the learned trial judge in proceeding to set aside the dismissal letter of the cross-appellant having granted a declaration that the dismissal of the cross-appellant during the pendency of the charge in exhibit Cll wrongful notwithstanding the fact that the relationship between the cross appellant and the cross-respondent was that of master/servant relationship.”

I shall adopt the two (2) issues set out by the cross appellant.

Issue one

The cross-appellant/respondent contends that the trial court lacked the jurisdiction to set aside the cross-respondent’s dismissal and award two months’ salary in lieu of notice of the termination of the cross-respondent when the cross-respondent did not seek such reliefs. That the claim of the cross-respondent was a declaration that his dismissal was wrongful and of no effect. Cross-appellant submitted that where a party’s claim fails, the appropriate order to make is a dismissal of the claim and not to substitute a relief not claimed as a court cannot award a relief other than those specifically sought, referred to the following cases; Ukaegbu v. Nwololo (2009) All FWLR (Pt. 466) 1852, (2009) 3 NWLR (Pt. 1127) 194; Akinbobola v. Plisson Fisko (1991) 1 NWLR (Pt. 167) 270; Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126; Yusuf v. Adeyemi (2009) 15 NWLR (Pt. 1165) 616; I. B. B. Ind. Ltd v. Mutunci Co. (Nig.) Ltd (2012) 6 NWLR (Pt. 1297) 487; Eyigebe v. Iyaji (2013) All FWLR (Pt. 703) 1901, (2013) 11 NWLR (Pt. 1365) 407; U. B. N. Ltd v. Ogboh (1995) 2 NWLR (Pt. 380) 647.

In response, the cross-respondent submitted that the cross -appellant’s submission on the priority of determining the cross -appeal first should be discountenanced. He further submitted that while the cross-appellant is not challenging the findings of the lower court declaring his dismissal wrongful, the setting aside of the dismissal and the payment in lieu of two months’ notice is a consequential order mainly to give effect to the declaration of the wrongful dismissal of the cross-respondent.

That the trial court has inherent powers to make orders even when not sought where such orders are incidental to the prayers sought, relied on Akapo v. Hakeem Habeeb (1992) 6 NWLR (Pt. 247) 266; Garba v. FCSC (1988) 1 NWLR (Pt. 71) 449; Nigeria Ports Authority v. Abu Airadion Ajobi (2006) All FWLR (Pt. 330) 1006, (2006) 8 CLRN 1.

The cross-appellant in its reply submitted that it need not appeal against the decision that the dismissal is wrongful and unlawful to challenge the setting aside of the dismissal because an order setting aside a dismissal is not consequential to the order declaring the wrongful dismissal, referred to Garba v. FCSC at 470; Texaco Nigeria Plc. v. Kehinde (2001) 6 NWLR (Pt. 708) 224. It further submitted that courts do not set aside dismissal from employment where the employment is devoid of statutory flavour and that the cases cited by the cross-respondent in this respect are distinguishable from this case. Cross-appellant further stated that a cross-appeal is separate from the main appeal and issues arising therefrom can be determined in priority to those arising from the main appeal, cited Unity Bank Plc v. Bouari (2008) All FWLR (Pt. 416) 1825, (2008) 7 NWLR (Pt. 1086) 372; Taiga v. Moses Taiga (2012) All FWLR (Pt. 651) 1548; (2012) 10 NWLR (Pt. 1308) 219 in support of its submissions.

Resolution

The cross-appellant is challenging the jurisdiction of the court to make the orders it made. Jurisdiction is fundamental to the determination of any matter before a court. It is the life-wire of adjudication as held in the case of Chief Olabode George & Ors. v. Federal Republic of Nigeria (2010) LPELR – 4194 (CA), (2011) All FWLR (Pt. 587) 664 where Ogunbiyi JCA (as he then was) held thus:

“It is trite law that the issue of jurisdiction is very fundamental and hence the plethora of judicial pronouncements by the court of record allowing same to be raised at any stage of the proceedings even if, for the first time at the Supreme Court. Jurisdiction is therefore the life-wire of a proceeding without which no court either on its own or by consent of parties to a suit could clothe itself therewith. By its very nature, it is fundamental and goes to root of any case howsoever.”

I also agree with the cross-appellant that the issue of jurisdiction is important and when raised or challenged it must be resolved before going into other issues, see the case of N.N.P.C. v. Orhiowa Fayan (2013) All FWLR (Pt. 708) 836, (2013) LPELR - 20341 (SC).

As to the status of the cross-appeal, it has been described by the apex court in the case of Bob v. Akpan (2010) All FWLR (Pt. 501) 896, (2010) 17 NWLR (Pt. 1223) 421 in the following words:

“A cross-appeal is in fact, a separate and independent appeal and not an appendage to the main appeal. It can be initiated by any of the parties whether as plaintiff/appellant/defendant/respondent, once he is dissatisfied with any part of the decision of the court from which the cross-appeal stems.”

There is also a difference between variation of judgment and cross-appeal as explained by the apex court thus:

“In a respondents’ notice, a party seeks to retain the judgment appealed from but at the same time wants it varied. It cannot be used where a party wants a reversal of the judgment of the lower court, as this can only be done by way of an appeal or cross appeal”.

See Eze v. Obiefuna (1995) LPELR -1191 (SC).

Being a separate appeal therefore, the outcome of a cross appeal does not depend on the main appeal, see Olowu v. Abolore (1993) 5 NWLR (Pt. 293) 255 which held as follows:

“It is well stated that a cross-appeal is an appeal in its own right, and does not depend for its existence or survival on the substantive appeal. Hence, the dismissal of the substantive appeal does not affect the cross-appeal. The court by dismissing the substantive appeal becomes functus officio thereto.

The jurisdiction with respect to the cross-appeal is not affected.”

It is in the light of above, that the invitation to determine the cross-appeal first because it raises an issue of jurisdiction is misconceived and therefore untenable.

To determine jurisdiction, a court is guided by several factors, earlier settled in locus classicus case of Madukolu v. Nkemdilim (1962) 2 SCNLR 341 at 348 thus:

“A court of law is said to have requisite jurisdiction and competence to hear and determine a matter before it in the following instances:-

i. If it is properly constituted with respect to a number and qualification of its membership;

ii. The subject matter of the action is within its jurisdiction;

iii. The action is initiated by due process of law and

iv. Any condition precedent to the exercise of its jurisdiction has been fulfilled.”

The cross-appellant is not challenging the jurisdiction of the court on any of the elements listed above. The contention is that the court’s findings in setting aside a dismissal the court found was wrong. The argument is that the court had no jurisdiction to grant the reliefs. The claim of the cross-respondent before the trial court stated thus:

“1. A declaration that the purported dismissal of the plaintiff from the employment of the defendant vide the defendant letter to the plaintiff dated 12 November 1996 with Ref. No. HRADMN:96/Saoo/So is illegal, unlawful, irregular, null and void and of no effect, the dismissal having been effected during the pendency of an action in court in charge No. F/250/96 against the plaintiff in respect of which the said plaintiff had earlier been suspended with pay from the defendant’s employment.

2. A declaration that the plaintiff is still a lawful employee of the defendant who is entitled to full benefits, rights and privileges as per the plaintiff’s terms and conditions of service in the defendant’s company.

3. An order directing the defendant to pay to the plaintiff the sum of N1,044,302.50 (one million and forty-four thousand, three hundred and two naira and fifty kobo only) representing the plaintiff’s salaries, wages and allowances covering the period from November 1996 to September 1999 (the particulars of which are set out in the schedule attached herewith,

4. And a further order directing the defendant to pay the plaintiff the sum of N29,837.33 representing the plaintiff’s monthly salary and allowance from October 1999 until the date of judgment.

5. (as per paragraphs 17 and 18 of the statement of claim).

17. The plaintiff claims the sum of 21 % of interest per annum for the defendant of the sum adjudge against the said defendant until the whole outstanding sum is liquidated.

18. Whereupon the plaintiff claims as per its writ of summons and statement of claim”

The claim is a master/servant issue and the court has unfettered jurisdiction to determine whether the dismissal was proper or not. Setting aside a wrongful dismissal does not require any special jurisdiction separate from the general jurisdiction to determine claims of wrongful disengagement. The cross-appellant dwelt so much on the contractual nature of the relationship. It questioned the rationale of the lower court to find that the employer’s action was wrong and to award damages in favour of the cross-respondent in terms of salaries and entitlements during the period of criminal trial. The cross-appellant reported the matter to the police for investigation and that led to criminal charges against the cross respondent. Having taken that route, the cross appellant must be comfortable with its destination.

More so, the cross-respondent was discharged which further justified the finding of the lower court that the time for the cross appellant to wield its employer’s rod was after the cross respondent was discharged by the court from the criminal trial.

Besides, the cross-appellant had by its own singular act, committed itself not to do anything until the criminal trial was over. The arguments of the cross-appellant here would have weighed heavily if exhibit C5, the letter of suspension with pay pending the determination of the charge was not written. In my opinion, the jurisdiction of the court was not in any doubt because in master/servant cases, there are implied terms under which the common law gives the court the power to make appropriate orders in master/servant disputes. That cannot be equated with lack of jurisdiction.

The award of damages is consequential to the finding that the cross-appellant having committed itself to wait for the criminal trial should not have acted before the end of trial. That does not derogate from the fact that an employee has no restriction in determining a relationship with an employee under common law and the contract between the parties. The situation the cross appellant is now crying wolf was self inflicted and there is no way out for it. See the case of N.P.A. v. Ajobi (2006) 13 NWLR (Pt. 998) 477 per Katsina Alu. The cross-appellant can only disengage the cross-respondent at the end of the criminal trial.

The lower court had jurisdiction to make the award it made. It was a consequential order recognized by law. I resolve this issue against the cross-appellant.

Issue two

The cross- appellant submitted that the court below erred in setting aside the cross-respondent’s dismissal from the employment of the respondent. That the dismissal of an employee in a contractual employment cannot be set aside except an employment vested with statutory flavor but only capable of being declared wrongful and remedy is solely in damages and relied on Francis v. Municipal Councillors of Kualar Lumpur (1962) 3 All ER 633; Ridge v. Baldwin (1964) AC.40; Olanrewaju v. Afribank Plc (2001) 13 NWLR (Pt. 731) 691; Texaco Nigeria Plc. v. Kehinde (2001) 6 NWLR (Pt. 708) 224.

The cross-appellant further submitted that having failed to challenge the fact that the employment of the cross-respondent is of a contractual nature, the cross-respondent cannot resile from it, referred to Elochin (Nig.) Ltd v. Victor Mbadiwe (1986) ANLR 1. It also stated that setting aside the order of dismissal is tantamount to a dismissal, referred to N. I. I. A. v. Ayanfalu (2007) 2 NWLR (Pt. 1018) 246 and urged the court to set aside the order of the lower court for being inconsistent with the general principles of law.

Resolution

The reasoning behind the judgement of the trial court has been exhaustively reviewed under the main judgement. While it is agreed that the relationship between the parties was strictly contractual, it is all within the law of master/servant and not one that can exist outside the law. The resolution of issue one above gives further elucidation of the basis and grounds why the judgment appealed against has to stand. It cannot be faulted.

The lower court only altered the effective date of disengagement in terms of the damages accruable to the cross-respondent. It did not reinstate the cross-respondent. The contention of the cross-appellant is therefore flawed. All the cases cited and relied upon by the cross-appellant are based on a different set of facts, quite distinguishable and therefore inapplicable in a situation where the cross-appellant by its own act fixed the time when either the cross-appellant or cross-respondent can act under the contract. The contract was virtually stayed to allow for criminal trial and the cross-appellant cannot be heard to blow hot and cold in such circumstances. This issue is also resolved against the cross-appellant.

Consequently, the cross-appeal is hereby dismissed. The judgement of the trial judge, Hon. Justice K. O. Alogba delivered on 30 September 2010 is hereby affirmed. Each party to bear its cost.

**IYIZOBA JCA:**

I read before now, the judgment just delivered by my learned brother, Yargata Byenchit Nimpar JCA. I agree with the reasoning contained therein and the conclusions arrived thereat. My learned brother covered all the grounds. It is trite that a master can terminate a contract of employment, at any time for any reason or for no reason at all. If however the manner of termination is contrary to the contract of employment, he must pay damages for the wrongful termination. The remedy for wrongful termination in an ordinary contract of employment without statutory flavour is damages in lieu of notice. See Ibama v. Shell Petroleum Development Company of Nigeria Limited (2005) All FWLR (Pt. 287) 832, (2005) 17 NWLR (Pt. 9541 agree with the view) 364 where Onnoghen JSC held:

“Except in employment governed by statute wherein the procedure 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 or 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 an unwilling master even where the master’s behaviour is wrong. For this wrongful act, he is only liable in damages and nothing more.”

I agree with my learned brother that both the appeal and the cross-appeal are lacking in merit. I also dismiss them and affirm the judgment of the lower court delivered on 30 September 2010.

**OBASEKI-ADEJUMO JCA:**

I have had the preview of the judgment of my lord, Nimpar JCA just delivered. In the aforesaid judgment, his lordship has adequately dealt with all the issues submitted for the determination of the appeal and the crossappeal. I have nothing more useful to add.

For the same reasons and conclusion in the lead judgment, which I adopt as mine, I too dismiss both the appeal and cross appeal and affirm in its entirety the judgment of the lower court.

Appeal and cross-appeal dismissed