

SAMSON BABATUNDE OLAREWAJU
V.
AFRIBANK NIGERIA PLC
SUPREME COURT OF NIGERIA.

S.C.109/96

ADOLPHUS GODWIN KARIBI-WHYTE, I.S.C.(Presided)

EMANUELOBIOMAOGWUEGBU, J.S.C.

ANTHONY IKECHUKWUIGUH, J.S.C.

ALOYSIUS IYORGYER KATSINA-ALU, LS.C. (Read the Leading Judgment)

EMMAUEL OLAYINKA AYOOLA, J.S.C.

FRIDAY, 13TM JULY, 2001.

BANKING LAW - Offences - Banking malpractice, operational irregularity and dishonest practices - Whether constitute offences known to criminal law - Servant charged therewith - Whether need be prosecuted in court before he can be dismissed.

CONTRACT - Contract of employment - Terms of- Where written and express - Bindingness of on parties.

CONTRACT - Contract of service - Specific performance of -Whether court can order.

CRIMINAL LAW AND PROCEDURE - Offences Banking malpractice, operational irregularity and dishonest practices -Whether constitute offences known to criminal law - Servant charged therewith - Whether need be prosecuted in court before he can be dismissed.

EVIDENCE - Proof- Fact pleaded on which no evidence is lead- How treated

JUDGMENT AND ORDER - Specific performance - Contract Of; service - Specific performance of- Whether court can order.

MASTER AND SERVANT- Contract of employment - Categories of.

MASTER AND SERVANT- Contract of employment - Terms of-Where written and express - Bindingness of on parties.

MASTER AND SERVANT- Contract of service- Specific performance of- Whether court can order.

MASTER AND SERVANT - Dismissal of employee - Where based on allegation of crime - Whether prosecution of employee in a court of law a sine qua non for summary dismissal.

MASTER AND SERVANT- Dismissal of employee - Where based on allegation of crime against servant - Duty on employer before dismissing employee.

MASTER AND SERVANT- Termination of employment - Reason therefor - Whether master under obligation to give.

MASTER AND SERVANT- Termination of employment - Where based on misconduct of servant - Whether servant must be heard in his defence before he can be lawfully terminated.

MASTER AND SERVANT - Termination of employment - Where wrongful - Remedy available therefor - Whether and when employer can be compelled to re-instate servant

PRACTICE AND PROCEDURE- Pleading - Fact pleaded on which no evidence is led - How treated.

WORDS AND PHRASES - "Irregularity" - Meaning of.

WORDS AND PHRASES "Malpractice" - Meaning of.

Issues:

1. Whether the acts of the appellant constituting operational banking malpractices, operational banking irregularities and dishonest practices are synonymous with "fraud" in its strict criminal sense.
2. Even if the appellant committed "fraud" in its strict sense, whether the respondent was not at liberty to dismiss him in view of the contents of Exhibits "W" and "Y".
3. Whether the collective agreement, Exhibit "W", was binding on the parties.

Facts:

The appellant was an employee of the respondent who was employed on 12/1/82 and rose to the rank of a Deputy Manager. In November 1992 by letter dated 17/11/92 the appellant was suspended from duty on some allegations of fraud, embezzlement of money and sundry allegations. Before the suspension, however, he was queried in writing and he answered. He subsequently appeared before the Senior Staff Disciplinary Committee of the respondent. The Committee submitted its report. The respondent lodged a complaint to the Police which in turn arrested the appellant and others. The Police intimated that at the end of the investigation they would prosecute them. By a further letter dated 11/3/93, the appellant was dismissed. The appellant then filed an action at the High Court, " Maiduguri against the respondent seeking, inter alia, a declaration that the respondent's letter dated 11/3/93 is incompetent, illegal, void and of no affect whatsoever; an order that the appellant be reinstated by the respondent; and an order that the respondent pay to the appellant all arrears of salaries and entitlement due to the purported dismissal.

The appellant claimed that the suspension and dismissal are in flagrant departure from the provisions of the "Main Collective Agreement" between the Nigerian Employers Association of Banks, Insurance and Financial Institutions and the Association of Senior Staff of Banks, Insurance and Financial Houses. He contended that although he was suspended from duty by the respondent pending final investigation of an allegation of operational malpractices, the outcome of the investigation was not communicated to him.

The respondent, on the other hand, pleaded that the appellant' was queried, suspended and thereafter dismissed for operational banking malpractices, dishonest practices, and fraud committed by him. The respondent averred that the appellant signed cash debit: advices which were over and above his cash authorised limit as a" openly Branch Manager and which led to a loss of over three million naira to the respondent.

The letter of dismissal of 11/3/93 did not state any reason for the dismissal of the appellant.

At the conclusion of the trial, the court held that the respondent was wrong to have dismissed the appellant without first having the appellant arraigned and have his guilt established in a court of law. It therefore declared the dismissal of the appellant a nullity and ordered that the appellant be re-instated and that his salaries and arrears of his salaries be paid to him.

The respondent's appeal to the Court of Appeal was allowed and the judgment and orders of the trial court were set aside. The dismissal of the respondent was held valid and subsisting.

Dissatisfied, the appellant appealed to the Supreme Court.

Held (Unanimously dismissing the appeal):

1. On Duty on employer before dismissing employee for commission of crime - Where a person is accused of a criminal offence, he must first be tried in a court of law where the complaints against him will be examined in public and where he will get a fair hearing as set out in the Constitution. Where the dismissal of a servant is based on a criminal charge or allegation,

such allegation must first be proved before the dismissal can stand. In the instant case, Exhibit "D", the letter of dismissal, did not contain any reasons for the dismissal of the appellant. The letter did not make any allegations of a criminal nature against the appellant. [Olaniyan v. University of Lagos (1985) 1 NWLR (Pt.9) 599; referred to; Garba v. University of Maiduguri (1986) 1 NWLR (Pt.18) 550; Anakism v. U.B.N. Ltd (1994) 1 NWLR (Pt.322) 557 distinguished.] (Pp.703-704, paras. H-D)

2. *On Categories of contracts of employment -*

Generally, employments fall into three categories, viz:

- (a) **master and servant;**
- (b) **where a servant holds an office at pleasure;**
- (c) **employment that is governed by statute.**

[*Olaniyan v. University of Lagos (1985) 2 NWLR (Pt.9) 599 referred to.*] (P.705, paras.

B-C)

3. *On Whether master under obligation to give reason for termination of employment –*

In a master and servant class of employment, the master is under no obligation to give reasons for terminating the appointment of his servant. The master can terminate the contract with his servant at any time and for any reason or for no reason. In the instant case, no reason was given for the dismissal of the appellant. (Pp. 705, paras. A, D, 716, paras. D-E)

4. *On Whether servant must be heard in his defence before he can be lawfully terminated –*

In a pure case of master and servant, a servant's appointment can lawfully be terminated without first telling him what is alleged against him and hearing his defence or explanation. Similarly, a servant in this class of employment can lawfully be dismissed without observing the principles of natural justice. So, the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence. It depends on whether the facts emerging at the trial prove breach of contract. (P. 705, paras. E-G)

5. *On Whether prosecution before a court of law a sine qua non for summary dismissal of servant for crime –*

It is not necessary, nor is it a requirement under section 33 of the 1979 Constitution, that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality. Where employee has been found guilty by a disciplinary] committee to have committed a gross misconduct bordering on criminality, the master has a choice either to exercise his or its discretion in favour of prosecuting the erring servant or dismissing him summarily. In other words, prosecution before a court of law, in the circumstances, is not

a sine qual non for summary dismissal. [Yusuf v. UBN Ltd. (1996)-6 NWLR (Pt.457) 632 referred to.] (Pp.714-715,' paras.F-B)

6. *On Whether banking malpractice irregularity and dishonest practices constitute criminal offences –*

"Irregularity" and "malpractice" do not constitute. Offences known to our criminal law. Thus, banking malpractice irregularities and dishonest practices for which the appellant was accused and dismissed do not constitute any offence known to law to warrant the respondent initiating criminal prosecutions in respect of against the appellant before he could be dismissed from his employment.(P. 704, paras.E-F)

7. *On What constitutes "irregularity" –*

"Irregularity" means a rough place or bump on an even surface; an instance of action, behaviour, etc not conforming to rules or regulation. (P. 704, para. G)

8. *On What constitutes "malpractice" –*

Malpractice is an evil or improper practice; a professional misconduct; a treatment falling short of reasonable skill or care; an illegal attempt of a person in position of trust to benefit himself at the loss of others. (P 704, para.H)

9. *On Whether court can order specific performance of a contract of service -*

Under a master and servant class of employment, there cannot be specific performance of a contract of service. (P 705, para.D)

10. *On Remedy available for wrongful termination of employment -*

Where a master terminates the contract with his servant in a manner not warranted or provided by the contract, he must pay damages for breach of contract. The remedy is in damages. The court cannot compel an unwilling employer to re-instate a servant he has dismissed. The exception is in cases where the employment is especially protected by statute. In such cases, the employee who is unlawfully dismissed may be re-instated to his position. [Olaniyan v. University of Lagos (1985) 2 NWLR (Pt.9) 599; Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40 referred to.](Pp.705, paras.D-E; 716, paras.E-G)

11. *On Bindingness on parties of written and express terms of employment -*

Where the terms of an employment are written and express, the parties are bound by the agreement. In the instant case, there were pleaded and tendered in evidence the Senior Staff "Main Collective Agreement" and its addendum as Exhibits "W" and "Y". The parties are bound by the agreements. Therefore, the issue to be resolved is strictly whether the summary dismissal of the appellant is in keeping with the contract between them.fPp.772, para,C;714, para.F; 715, paras.B-C)

Facts pleaded in respect of which no evidence is led go to no issue. In this case, although the respondent pleaded "fraud" in its statement of defence, no evidence was led on "fraud" (P.704, paras.E-F)

Nigerian Cases Referred to in the Judgment:

Anakism v. U.B.N. Ltd (1994) 1 NWLR (Pt.322) 557

Garba v. University of Maiduguri (1986) 1 NWLR (Pt.18) 550

Honika Sawmill Nig. Ltd, v. Hoff (1994) 2 NWLR (Pt.326) 252

Olaniyan v. University of Lagos (1985) 1 NWLR (R.9) 599

Shitta-Bey v. Federal Public Service Commission (1981) 1 SC40

Yusuf v. UBN Ltd. (1996) 6 NWLR (Pt.457) 632

Foreign Case Referred to in the Judgment:

Ridge v. Baldwin (1964) A.C. 40

Book Referred to in the Judgment:

Chambers 20th Century Dictionary, 1983 Edition, pp. 667 762.

Appeal:

This was an appeal against the decision of the Court of Appeal which allowed the respondent's appeal and set aside the judgment and orders of the High Court. The Supreme Court, in a unanimous decision, dismissed the appeal.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Adolphus Godwin Karibi-Whyte, J.S.C. (Presided); Emanuel Obioma Ogwuegbu, J.S.C.; Anthony Ikechukwu Ighu, J.S.C.; Aloysisius Iyorgyer Katsina-Alu, J.S.C.(Read the Leading Judgment); Emmauel Olayinka Ayoola, J.S.C.
Appeal No.: S. C./109/96

Date of Judgment: Friday, 13th July, 2001

Names of Counsel: Yusuf O. Alii, SAN (with him, S.A. Oke, Esq.) -for the Appellant

J.K. Gadzama, SAN (with him, A.O. Chukwurah Esq. and Nana Wathanafa (Miss)) -for the Respondent.

Court of Appeal:

Division of the Court of Appeal from which the Appeal was brought: Court of Appeal, Jos.

Names of Justices that sat on the appeal: George Adesola Oguntade, J.C.A..(Presided); Adrian Chukwuemeka OrahJ.C.A. Mohammed Saifullahi Muntaka-Coomassie, J.C.A.(Read the Leading Judgment)

Appeal No.: CA/J/M9/95

Date of Judgment: Thursday, 18th April, 1996

Names of Counsel: J.K. Gadzama -for the Appellant
A.A. Airadion -for the Respondent

High Court:

Name of the High Court: High Court, Maiduguri

Name of the Judge: Kolo, C.J.

Suit No: M/67/93

Date of Judgment: Thursday, 22nd September, 1994

Names of Counsel: T. Sambo -for the Plaintiff

J.K. Gadzama -for the Defendant

Counsel:

Yusuf Alii, SAN (with him, S.A. Oke, Esq.) -for the Appellant

J.K. Gadzama, SAN (with him, A.O. Chukwurah Esq. and Nana Wathanafa (Miss)) -for the Respondent.

KATSINA-ALU, J.S.C. (*Delivering the Leading Judgment*):

The plaintiff Samson Babatunde Olarewaju brought this action at the High Court of Justice Maiduguri presided over by Kolo, C.J. In the action he claimed the following reliefs:

- (a) Determination that the defendant's letter dated 11 March, 1993 addressed to the plaintiff titled 'dismissal' is incompetent, illegal, void and of no effect whatsoever.
- (b) That the defendant be ordered to reinstate the plaintiff to his former post.
- (c) That the defendant be ordered to pay all arrears of salaries and entitlement due to the purported dismissal.
- (d) That he be promoted to bring him at par with his mates.
- (e) An injunction restraining the defendant from dismissing the plaintiff without just cause.
- (f) The cost of the suit.
- (g) In the alternative to paragraph (b) payment of the sum of six hundred thousand Naira (N600,000.00) only as general damages to the plaintiff by the defendant for wrongful dismissal of the plaintiff from the service of the defendant on or about the 11th March, 1993"

I would like to observe that after the plaintiff had closed his case and the defendant opened its own, the plaintiff amended his statement of claim on 15th December 1993 by adding paragraph "g" as appeared above. I would observe also that the plaintiff did not give or lead further evidence as regards sub-paragraph "g" after the amendment was granted.

At the end of the trial, the learned Chief Judge in a reserved judgment found in favour of the plaintiff. The learned C.J. concluded thus:

"It is my view, therefore, that the plaintiff's employers made a serious mistake and took a calculated risk when they ventured to dismiss the plaintiff without first having the plaintiff arraigned for the serious offences of fraud and have his guilt established in a law court. Such dismissal in my view cannot stand the test of the time as it is a nullity. I also declare the dismissal of the plaintiff a nullity and consequently a judgment for the plaintiff with costs. I assessed the costs at N 1,000.00 (One thousand Naira) in favour of the plaintiff against the defendant bank."

The learned C.J. proceeded to make the following orders:-

1. I order that the plaintiff be re-instated by the defendant bank forthwith.
2. I order that his salary be restored and the arrears of his salaries from the date of the dismissal to the date of this judgment be paid forthwith.
3. This judgment notwithstanding the defendant bank is free to revive the issue of criminal prosecution and urge the Police to prosecute all those suspected of the alleged fraud, in respect of the said sum of 3 million Naira."

The defendant was dissatisfied with the said decision of the High Court. It appealed to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the judgment and orders of the trial court. It declared:

"The appeal is meritorious and is hereby allowed. The summary dismissal of the respondent is valid and subsisting as it is justified. The respondent's claim stands dismissed."

Aggrieved by the decision of the Court of Appeal, the plaintiff has appealed to this court upon nine grounds of appeal. The plaintiff shall hereinafter be referred to as the "appellant" and the defendant shall be referred to as the "respondent".

The appellant formulated six issues for determination in this appeal. These read:

- “1. Whether the failure of the Court of Appeal to consider at all the submissions of the appellant's counsel in the brief filed on behalf of the appellant before the court below did not lead to a breach of his right to a fair hearing and led to a miscarriage of justice.
2. Whether the dismissal of the appellant was done in accordance with the agreement between the parties and the rules of natural justice to have entitled the court below to disagree with the trial court that the dismissal of the appellant was not done in accordance with the law.
3. Whether the Court of Appeal was obliged to consider and decide on points that were not decided by the trial court that is whether the Court of Appeal could decide on purely academic and hypothetical issues that did not arise from the judgment of the trial court.
4. Whether the allegations of fraudulent practices, banking irregularities and other serious allegations made against the appellant by the respondent are such matter that can be dealt with domestically when the allegations either singly or taken together import commission of criminal offences cognisable under Nigerian penal laws and whether the respondent abandoned the allegation's of fraudulent practices levied against the appellant.
5. Whether the Court of Appeal was right to have disallowed the order of reinstatement of the appellant once the trial court came to the conclusion that the dismissal was null, void and when there would be nothing to sustain the continued dismissal of the appellant.
6. Whether the court below could base its decision on the collective agreement made between a trade union, and the respondent when the appellant was not a party thereto nor was it shown that the agreement was made for his benefit. For its part, the respondent raised three issues for **determination**.

These read as follows:

- A. Whether the several acts of appellant constituting operational banking malpractices, operational banking irregularities and dishonest practices are synonymous with "fraud" in its strict criminal sense.
- B. In the alternative that the appellant committed "fraud" in its strict sense, whether the respondent was not at liberty to dismiss him in view of the contents of Exhibits "C", "W" and "Y".
- C. Whether the collective agreement Exhibit "W" was binding on the parties.

I prefer the issues formulated by the respondent. They are not verbose and they go straight to the issue in controversy. I shall therefore consider this appeal on the basis of the respondent's issues, which will be treated together.

The relevant facts are these. The appellant was an employee of the respondent. He was employed on 12th January, 1982. He rose to the rank of a Deputy Manager.

In November 1992 he was suspended from duty on some allegations of fraud, embezzlement of money and sundry allegations. Before suspension however the appellant was queried in writing. He answered the query. He subsequently appeared before the senior staff disciplinary committee of the respondent. The committee submitted its report to the Management of the respondent. By a letter dated 11th March, 1993 the appellant was dismissed. The appellant went to court and instituted this action against the respondent at the Maiduguri High Court, claiming the relief earlier on set out.

Issues A, B and C.

Issue A poses the question whether the several acts of the appellant constituting operational banking malpractices, operational banking irregularities and dishonest practices are synonymous with "fraud" in its strict criminal sense. It was argued for the appellant that the various allegations made against him in the pleadings of the respondent and evidence led by its witnesses, constitute offences under sections 308, 310, 311, 314, 315, 323, 324, 325 and 362 of the Penal Code. It was said that the appellant could be prosecuted under any of these sections of the Penal Code law applicable to Borno State.

DW1, DW2, DW3, DW4, and DW5, it was pointed out, were unanimous in their testimonies that the acts for which the appellant was dismissed led to a loss of over 3 million Naira to the respondent. The respondent in its pleadings described the acts as "fraudulent." To underscore the nature of the allegations, it complained to the Police which in turn arrested the appellant and others. The Police intimated that at the end of the investigation they would prosecute them.

It was the submission of the appellant that in this kind of setting, the respondent should have stayed all actions until after the completion of the criminal prosecution of the appellant. What the respondent did amounted to putting the cart before the horse.

It was also submitted that the dismissal of the appellant while criminal investigations were going on, on the allegations, was clearly ultra vires the respondent and therefore unconstitutional. For this submission counsel for the appellant relied on the cases of Garba v. F.C.S.C (1988) 1 NWLR (Pt.71) 449. It was argued that the commission of crime was not only in issue in this case. It was also the cornerstone of the defence of the respondent. It was the reason that led to the dismissal of the appellant.

For the respondent, it was conceded that the respondent as defendant at the High Court, pleaded among others "fraud" in its statement of defence. That notwithstanding, no evidence was led on fraud. It is trite law that facts pleaded in respect of which no evidence was led go to no issue. The case of Honika Sawmill Nig. Ltd. v. Hoff (1994) 2 NWLR (Pt.326) 252.

The respondent, however, had in addition pleaded operational banking malpractices and dishonest practices committed by the appellant. The respondent argued that it led evidence which conclusively proved the commission of operational malpractices and dishonest practices by the appellant. See the evidence of D.W1, D.W.2, D.W3, DW4 and DW5.

It was said that on the evidence before the court, it will be seen that the actions of the appellant while in the employment of the respondent could be referred to as operational banking malpractices, operational banking irregularities, operational banking deficiencies or dishonest banking practices. The fact that one calls them fraudulent acts does not envisage "fraud" as conceived in criminal law. It was argued that the respondent did not allege commission of a particular criminal offence known to law by the appellant.

It is now settled law that where a person is accused of a criminal offence, he must first be tried in a court of law where the COB plaints against him will be examined in public and where he will get a fair hearing as set out in the Constitution. Where the dismissal of a servant is based on a criminal charge or allegation, such allegation must first be proved before the dismissal can stand. See University of Maiduguri (1986) 1 NWLR (Pt.18) 550; University of Lagos (1985) 2 NWLR (Pt.9) 599.

In the instant case, Exhibit "D", the letter of dismissal, did contain any reasons for the dismissal of the appellant. Put simply the letter did not make any allegations of a criminal nature against the appellant. The cases of Garba v. University of Maiduguri (*supra*) and Anakism v. U.B.N. Ltd. (1994) 1 NWLR (Pt.322) 557 relied upon by the appellant and the trial court are not relevant to the circumstances of the present case. They are distinguishable from it. In Garba's case a particular criminal offence known to law was committed while none was committed in the instant case. In Anakism's case, there were no such written and express terms of employments as in the present case that gives the respondent a discretion to either dismiss before or after criminal prosecution.

On the evidence before the trial court, the appellant was clearly guilty of banking malpractices, irregularities and dishonest practices. But these do not constitute any offence known to law. And although the respondent pleaded "fraud" in its statement of defence, no evidence was led on "fraud". The position of the law is clear. Facts pleaded in respect of which no evidence was led go to no issue.

On the other hand "irregularity" and "malpractice" do not constitute offences known to our criminal law. These have been defined at pages 762 and 667 of the Chambers' 20th century dictionary 1983 edition respectively as follows:

"irregularity" a rough place or bump on an even surface; an instance of action, behaviour, etc not conforming to rules or regulation." and

"malpractice" an evil or improper practice; professional misconduct; treatment falling short of reasonable skill or care; illegal attempt of a person in position of trust to benefit himself at others loss."

In any event the appellant was not accused of irregularity or malpractice in his letter of dismissal. The letter did not state any reason for his removal. In master and servant class of employment, master is under no obligation to give reasons for terminating the appointment of his servant.

Generally employments fall into three categories, viz;

- (a) master and servant;
- (b) A servant holds an office at pleasure;
- (c) employment that is governed by statute.

See Ridge v. Baldwin (1964) A.C. 40 per Lord Reid; Olaniyan v. University of Lagos (1985) 2 NWLR (Pt.9) 599. Both parties agree that the present case does not fall within the third class. It is not a case where the tenure of office of the servant is governed by statute.

It is also common ground that the present case is one of master and servant.

The law regarding master and servant is not in doubt. Under this class of employment there cannot be specific performance of a contract of service. The master has the power to terminate the contract with his servant at any time and for any reason or for none. . However, if the master does terminate the contract in a manner not warranted or provided by the contract, he must pay damages for breach of contract. So as Lord Reid said in Ridge v. Baldwin (*supra*):

"So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract."

What this means is this. In this class of cases an officer's appointment can lawfully be terminated without first telling him what is alleged against him and hearing his defence or explanation. Similarly an officer in this class can lawfully be dismissed without observing the principles of natural justice.

I shall now attempt to relate the facts of the present case to the contract governing the parties. The appellant as plaintiff pleaded in paragraphs 3, 4, 5, 6 and 7 of the amended statement of claim as follows:

- "3. The plaintiff's employment with the defendant is governed by the regulations and procedural agreement as well as the Main Collective Agreement between the Nigerian Employer's Association of Banks, Insurance and Financial Institution, terms and conditions of service as incorporated in Part II (section 1) of the said collective agreement.
- 4. The plaintiff had since his confirmation of appointment been promoted, trained, transferred and/or served in various branches of the defendant, the Maiduguri branch; inclusive as his last place of posting.
- 5. The defendant by its letter dated 17 November, 1992 suspended the plaintiff from duty and by a further letter dated 11th March, 1993 dismissed the plaintiff from its; employment in flagrant departure from the provisions of the said collective agreement. Both letters of suspension and dismissal shall be relied upon at the trial of this suit.
- 6. The plaintiff states that although he was suspended from duty by the defendant pending final investigation of operational malpractices the outcome of the investigations were not communicated to him up to the time of filing this suit.
- 7. The plaintiff will contend at the trial of this Suit that his dismissal is void, incompetent and unconstitutional."

In reply to the plaintiff's averments, the defendant pleaded in para-' graphs 2, 2^B, 2^C, 2^F, 2^G, 2^H, 3, 5 and 7 of the further amended statement of defence as follows:

- 2. The defendant admits the averment in paragraph 5 of the plaintiff's statement of claim only to the extent that the employment relationship was governed by the terms and conditions contained in the 'MAIN COLLECTIVE AGREEMENT' between the Nigerian Employers Association of Banks, Insurance and Allied Institutions and Association of Senior Staff of Banks, Insurance and Financial Houses. This main collective agreement is hereby pleaded. The plaintiff is put to the strictest proof of other allegations contained in paragraph 5 of the statement of claim.
- 2A. That the defendant was formerly known and called International Bank for West Africa Limited (IBWA).
- 2B. The defendant avers that by an internal General Memorandum No. 157 dated IS"1 October, 1991 addressed to all Senior Staff and copied to all Board members, Management staff, Area Managers and Branch Manager of the defendant the Senior Assistant General Manager of the defendant (Mr. Charles Ugboko) communicated the new agreement reached on summary dismissal. The memo is hereby pleaded and shall be relied upon at the trial of this case.

- 2D. The defendant further avers that consequent upon the issuance of the query and the reply referred to in paragraph 2C above, the plaintiff was suspended from duty. The defendant's letters both dated 16th and 7th January, 1992 suspending the plaintiff from duty are hereby pleaded and shall be relied upon at the trial of this case. The plaintiff is hereby given notice to produce the original copy of the query letter at the trial of the case.
- 2E. The defendant further avers that the cash debt advices Nos. 2964 and 2685 dated 21/5/91 No. 4845 dated 297 7/91 No. 0271 dated 2/3/91 and No. 1276 dated 20/11/90 signed by the plaintiff which were over and above this cash authorised limit are hereby pleaded and shall be relied upon at the trial of this case.
- 2F. The defendant avers that the report of the senior staff disciplinary Committee dated 16th and 17th November, 1992 which investigated the Auno fraud is hereby pleaded and shall be relied upon at the trial of this case.
- 2G. The defendant avers that further to paragraph 2(D) above, the plaintiff was downgraded in rank after his suspension. The defendant's letter downgrading the plaintiff dated 10th January, 1993 is hereby pleaded and shall be relied upon at the trial of this case. The plaintiff is hereby given notice to produce the original copy of the letter at the trial of this case.
- 2H. The defendant avers that on or about the 15th May, 1992 the Maiduguri branch of the defendant communicated to all its staff by way of an internal mail the authorised cash limits for the branch as regards all staff of the branch and the Auno sub-branch. The said internal mail numbered 001 and dated 15th May, 1992 was signed by the then Branch Manager Y.I. Jahun and the plaintiff himself. The said mail will be relied upon at the hearing of this case. The plaintiff is hereby given notice to produce his original copy at the trial of this case.
3. The defendant denies the averment contained in paragraph 6 of the plaintiff's statement of claim and states that the plaintiff was duly communicated with the decisions and outcome of the investigations and deliberations of the defendant's disciplinary committee which directly indicted the plaintiff of perpetration of the fraud. All correspondences, letters and documents that exchanged between the parties are hereby pleaded, particularly;
- (a) Letter ref. NTU 03/11J/J AO/299/92 dated 6th July, 1992 addressed to the plaintiff, (b) Letter dated 14th July, 1992 addressed to the plaintiff (c) Letter ref: NCA/03/AU/SCO333/92 dated 17th November, 1992 addressed to the plaintiff, (d) Letter ref. CU/DES/OFO/IRSO/0529 dated 11th March, 1993 addressed to the plaintiff. The defendant hereby gives the plaintiff notice to produce all original copies of the aforesaid letters written to him.
4. The defendant denies the averments contained in paragraphs?, 8 and 9 of the statement of claim and puts the plaintiff to the strictest proof of the allegation contained therein.
5. The defendant states that the plaintiff was duly interviewed by the investigative panel set up to investigate the said fraudulent transactions and he was accorded an opportunity of defending himself and the outcome of the investigation was duly and effectively communicated to the plaintiff.

6. The defendant further states that it was consequent upon the findings of the senior staff disciplinary committee that the plaintiff's employment was terminated.
7. The defendant states that all opportunities were given to the plaintiff to defend himself and he unsatisfactorily failed to offer reasonable explanations as regards the commission of the irregularities and fraud.

At the trial the defendant called evidence to justify the dismissal of the plaintiff. DW4 Simeon Chinedinma Okeraofor testified at p. 21 of the record thus:

The plaintiff was a staff of the bank. He was a senior staff up to 1993 when he was dismissed from the services. He was the Deputy Branch Manager.

There was operational mal-practices at our Auno sub-branch which is supervised by Maiduguri main branch. The bank lost a lot of money as a result of the mal-practices. Many informal advices were signed without being backed by the necessary instrument i.e.: cheque. Transactions were carried out when the customers in question have no money in their accounts.

By internal advices I mean debts and credits. It is a transaction between the sub-branch and the main branch. The plaintiff signed some debit advices which were above his limits. His limit is N15, 000. The branch manager and his deputy supervise the Auno sub-branch. There were five advices that were signed in excess. Out of the five one was signed by the plaintiff alone while the remaining four were signed by the plaintiff and the supervisor at Auno. I know the plaintiff's signature and anywhere I see his signature I can identify. I worked at Maiduguri for 10 years. I worked up to December 1990. The plaintiff was at the Maiduguri branch when I was working at Maiduguri. There are four advices out of the five I have been mentioning. One was missing. It is an advice for N145, 000. It was dated 2nd March, 1992. It is the advice signed by the plaintiff alone. We searched for the original of the advice dated 2nd March 1992 but could not locate it. If I see a copy of the advice in question I can identify. This is the copy of the advice which is missing.

DW4 continued as follows:

"The limitation of N15, 000 is in connection with issuance of cheque. On advice he has no limit. The cheques he authorised are in the bank. In the cheques he authorised he exceeded his limit. An advice can be accepted or rejected. Any document signed by the plaintiff is binding on the bank. For white copies of Exhibit Y1-Y6 were sent to Lagos for computer system. The Maiduguri branch sent the whole ones for computer system.

The dismissal letter was signed by Mr. D.B.Sosu, Senior Principal Manager Personnel and by Charles Ugboko Deputy General Manager. Human Resource Manager, Charles Ugboko was a member of the committee which investigated the involvement of the plaintiff in the financial mal-practices. All the members, was in the committee are staff of the defendant. Each vited to defend himself in the absence of the other, plaintiff was not taken to court. In 1993 he was not taken to court. He was dismissed for signing customer's cheques when there is no sufficient fund. The accounts are bad. I worked with the plaintiff before and I am familiar with his handwriting. A staff of the branch filled in the forms and he signed the forms. Some were terminated some were dismissed and some were con'l firmed. The Auno branch had a manager. He is a junior staff and whatever action he is going to take must be approved by either the manager or his deputy. The Deputy Manager is answerable to the Manager. If the sub-branch wants to withdraw money from the main branch it would have to be through advice. This cannot-be possible

without the signature of the authorised officer. The authorised officers are the Manager and his' deputy. The Manager of the sub-branch who raises the advice would sign one portion while the Manager of the main branch or in his absence his deputy would sign; the other portion. When the main branch raises advice on Auno branch the Head of the particular department that raised the advice would sign and the Manager or his deputy would sign the other portion. Exhibit Y1, Y2, Y3 and Y5 emanated from Maiduguri main branch to Auno sub-branch. Exhibit Y4 originated from Auno to Maiduguri main branch. The advices honoured. Money was released. The one which bears only one signature is Exhibit Y4 which emanated from Auno to Maiduguri. The document was signed by the plaintiff and the amount involved is N226, 200. It was supposed to have been signed by the Auno branch manager. He can sign up to that amount in the absence of the manager. The rest exhibits namely: Y1, Y2 and Y3 were signed by Haruna Yakubu and countersigned by the plaintiff. Exhibit Y2 was signed by one other officer and countersigned by the plaintiff. Haruna Yakubu is an authorised signatory. The person who signed Exhibit Y2 is a signatory.

The advices as they are were in order. Exhibit Y4 is not in order. Drafts were issued to the customers. The customers who withdraw cash from the main branch were not having money in their accounts at Auno. A cheque drawn by Auno customer of sub-branch would first of all be approved by the sub-branch manager but before money is released it has to be signed by a manager as his deputy. The Manager has no limit on accounts that have money. On customers account money would only be withdrawn through issuance of cheques and approval of the same. Mallam Yahaya Jahun was the Manager. There are many advices involved. The total amount involved in that branch was about N3.2 million.

DW3 Baba Mohammed Rufai was the Branch Manager of the respondent bank. After giving evidence-in-chief this witness was s" recalled. He testified as follows:

"I testified for the defence on 1/3/94. I am a branch manager and being a branch manager I am the representative of the management. The Manager has no limit. He can sign any amount where there is money in the account. Where there is no money in the account the manager can only lend out up to N25, 000.00. Where here is money in the account the Deputy Manager is limited to N45, 000.00. Where there is no money it is only the Manager who can decide this. Deputy Manager has no power on this matter. The limitation changes from time to time. In May 1992 the Manager has no limit while his deputy is limited to N15, 000. Where there is no money the Deputy Manger has no power. I do not know the limitation in 1990 but it could not be higher than that of 1992.

Auno branch is a sub-branch. It is not possible to register an inter branch advice without the same being supported by a cheques or teller. In the instant case the cheques which accompanied the advices in question were destroyed as they were signed by Abdul-Wahab1' while the advices were counter-signed by the plaintiff He counter signed and he also disbursed the money. It is clear to me from the evidence led by the respondent that -I the appellant committed banking malpractices, irregularities and m dishonest banking practices. The question to be resolved however is whether the contract of service empowered the respondent to dismiss any servant who is guilty of malpractices, irregularities, and; dishonest practices.

In this regard it is imperative to examine the provisions of Exhibit "Y" tendered at the trial by the appellant. I must point out here that the respondent equally tendered a copy as Exhibit "C". The said Exhibit "Y" (or "C") is an addendum to the senior staff main

collective agreement tendered and marked as Exhibit "W" which is not exhaustive. Both Exhibits "Y" and "C" read as follows:

"International Bank for West Africa Ltd.

AFRIBANK

IBWA

General Memorandum

18th October, 1991

GENERAL MEMORANDUM NO- 159

PERSONNEL N0.32

TO: ALL SENIOR STAFF

SUBJECT: SENIOR STAFF COLLECTIVE AGREEMENT.

This is to inform all Senior Staff that on the intervention of the industrial arbitration panel, an agreement has now been reached on the subject "summary dismissal" which previously was not agreed upon as evident on page 9 of the revised Senior Staff collective agreement. For easy reference, and based on the industrial arbitration panel award, we reproduced below what shall now come under the dispute part II (section 1) Article 4 (iv) of the main collective agreement between NEALI AND ASSBIFI. This should now be regarded as part of the Senior Staff main collective agreement.

PART II (SECTION 1)

ARTICLE 4 (IV) SUMMARY DISMISSAL

- a. An employee may be summarily dismissed for certain acts of gross misconduct. Such acts include proven case of:
 - i. Theft, fraud, dishonesty, defalcation and irregular practices in respect of cash, vouchers, records, returns on customer's account and foreign exchange transactions;
 - ii. wilful disobedience of a lawful order or serious negligence;
 - iii. drunkenness or taking drugs other than for medical reasons, rendering the employee unfit to carry out his or her duties,
 - iv. intentionally divulging confidential information in breach of any "declaration of secrecy."
 - v. conviction for a criminal offence;
 - vi. prolonged and/or frequent absence from work without leave or reasonable cause;
 - vii. fighting and assault or engaging in disorderly behaviour during working hours on office premises or within its immediate surroundings;
 - viii. deriving any benefit in the course of his official duties which places him in such a position that his personal interest and his duty to the employer or to any customer or the employer are in conflict;
 - ix. failure to report promptly any irregularity on the part of any other employee after having knowledge of such irregularity;
 - x. abusive or insulting language or behaviour to any client which is prejudicially to the business interests of the employer; and
 - xi. any other offences which may be agreed upon between the association and the Union from time to time,

- b. Where an offence has been committed which merits summary dismissal but where the member company does not exercise its prerogative of dismissal "a first and last" or a "second and last" warning letter may be issued and the fact that the warning is a final one will be made clear in the letter.
- c. Before either summary dismissal or warning letter is effected, the employee shall be given a written query and afforded the opportunity of defending himself in writing except where the employee has absconded.

AFRIBANK NIGERIA LIMITED

CHARLES UGBOKO

S AGM (HUMAN RESOURCES MGT. T.R.G.)

CC: MANAGING DIRECTOR

EXECUTIVE DIRECTORS

DEPUTY GENERAL MANAGER

SNR. ASST. GEN. MANAGERS

ASS. GEN. MANAGER

SNR. PRINCIPAL MANAGERS

BRANCH MANAGERS."

It will be observed from the contents of Exhibits "Y" and "C" that there are 11 categories of grounds pursuant to which any member of staff can be summarily dismissed by the respondent. The one relevant in the present case is category (i). It seems to me clear that the actions or conduct of the appellant could constitute (i) fraud, or (ii) dishonesty or (iii) irregular practices in respect of cash, vouchers, records, returns on customer's account and foreign exchange transactions.

We must bear in mind that the present case is one of master and servant with written and express terms of employment. Where therefore an employee has been found guilty by a disciplinary committee of any of the gross-misconducts highlighted above, the master has a choice - either to exercise his or its discretion in favour of prosecuting the erring servant or dismissing him summarily as in the instant case. In other words prosecution before a court of law, in the circumstances, is not a sine qua non for summary dismissal. This court in the case of Alhaji Yusuf v. Union Bank of Nigeria Ltd. [1996] 6 NWLR (Pt. 457) 632; (1996) Delta State Law Report (Pt. I) 31 per Wali, J.S.C. held thus:

"It is not necessary, nor is it a requirement under section 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality, I may go further to say that the provisions of 33 (supra) have no application to the facts of this case."

As I have already indicated, the parties are bound by the agreement i.e. the collective agreement which were both pleaded and tendered in evidence as Exhibits "W", "Y" and "C". The issue to be decided is strictly whether the summary dismissal of the appellant is in keeping with the contract between them. Exhibit "D" is the letter of dismissal dated 11th March 1993. It reads:

"CU/DBS/OFO/IRSW/0529/93

11th March, 1993

Mr. S.B. Olarewaju (3260 D)

Afribank Nigeria Plc,
Maiduguri Branch,
Maiduguri.

Dear Sir,

DISMISSAL

Please be informed that with immediate effect, your services with the Bank are no longer required. You are hereby DISMISSED.

You are requested to surrender all the Bank's property in your possession including your identity card and unused cheque leaves to the Manager (Maiduguri branch). Also clear the balance in your account '35' before your final departure.

Your indebtedness to Afribank Nigeria Plc as at February, 1993 will be communicated to you.

Yours faithfully,
Afnbank Nigeria Plc
(SGD)

D.B. SOSU
UGBOKO

SENIOR PRINCIPAL MANAGER
GENERAL MANAGER
(PERSONNEL)
RESOURCES MANAGE

(SGD)
CHARLES

DEPUTY

(HUMAN

CC: CHIEF INSPECTOR

SAGM (NORTH WEST & ABUJA)
AREA MANAGER (NORTH WEST) KADUNA
MANAGER (MAIDUGURI BRANCH)
HEAD - PERSONNEL SERVICES
"- MANPOWER PLANNING & DEVELOPMENT
"- COMPUTER UNIT."

No reason was given for the dismissal of the appellant. As I staff earlier on in the course of this judgment, the master can terminate the contract with his servant at any time and for any reason or for none. The letter of dismissal did not allege the commission of crimes known to our law against the appellant and for which he was dismissed. The court cannot go outside the letters of Exhibit "D"

But if the master terminates the contract with his servant in manner not warranted by the contract, he must pay damages for breach of contract. The remedy is in damages. The court cannot compel an unwilling employer to re-instate a servant it has dismissed. The exception to the general rule is in cases where the employment is especially protected by statute. In such cases the employee who is unlawfully dismissed may be re-instated to his position. See Olaniyan v. University of Lagos (supra); Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40.

Finally, I must stress that the present case is not one governed by statute. It does not therefore fall within the class of cases such as J Shitta-Bey v. Federal Public Service

Commission (1981) 1 SC40; Olaniyan v. University of Lagos supra. Further discussion hereon contracts governed by statute will serve no useful purpose.

In the result, this appeal fails and is dismissed. I affirm the decision of the Court of Appeal given on 18th April 1996. The respondent is entitled to costs which I assess at N10, 000.00

KARIBI-WHYTE, J.S.C.: I had the privilege of reading the judgment just delivered by my learned brother Katsina-Alu, J.S.C. I agree "with the reasoning and conclusion that this appeal should be dismissed. I also will and hereby dismiss the appeal '

Appellant shall pay N10, 000 as costs to respondent.

OGWUEGBU, J.S.C.: I have had the privilege of a preview of the Judgment of my learned brother Katsina-Alu, J.S.C. I agree with £ his conclusion and reasoning by which he came to the conclusion. I agree that the appeal be dismissed with N10, 000.00 costs to the respondent.

IGUH, J.S.C.: I have had the privilege of reading in draft the judgment just delivered by my learned brother, Katsina-Alu, J.S.C. and ' I am in complete agreement with him that this appeal is without "substance and ought to be dismissed.

He has considered all the issues canvassed in this appeal in "great detail and I have nothing more to add. I abide by the order as to costs therein made.

AYOOLA, J.S.C.: For the reasons given in this judgment just de-livered by my learned brother, Katsina Alu, J.S.C., which I have had the privilege of reading, I too would dismiss this appeal with N10, 000.00 costs to the respondent.

Appeal dismissed.