



DISMISSAL OF AN EMPLOYEE ON GROUNDS OF MISCONDUCT FOR WHICH A SENTENCE HAS BEEN IMPOSED AND SERVED: DOUBLE JEOPARDY?



Mr. Kola Ayetoro (“*Kola*”) was the Head, Marketing Department at Tatafo Inc. (“*Tatafo*”). Kola was a hardworking young man who made giant strides in marketing Tatafo’s products to customers, home and abroad. During the course of his employment, there were certain indications that Kola mismanaged funds. Although Tatafo recorded ground breaking doubling in sales on several occasions, internal audits of Tatafo’s accounts revealed shortage of funds in the sales recorded.

Tatafo also received several reports from other staff in Kola’s department of inconsistencies in sales report. An investigation was opened into the activities of Kola, and it was revealed that Kola had “stolen” an estimated ₦5.5 billion from the coffers of Tatafo. Having received the investigation reports, Kola was confronted with the allegations against him at a disciplinary meeting convened for that purpose. Kola was afforded an opportunity to have legal representation at the hearing wherein he denied all allegations made against him. However, the evidence against Kola were so damning that Tatafo had no choice than to summarily dismiss him, as well as make a formal complaint to the Wakanda Police Division.

Further to the formal complaint, the Police conducted an independent investigation into the allegations and decided to prefer a charge against Kola at the High Court. Upon conclusion of trial, the High Court found Kola guilty and sentenced him to imprisonment for three (3) years. Aggrieved by Tatafo’s decision to dismiss him from its employ, Kola sought legal advice from a law firm, and was informed that the dismissal decision was wrongful and that it amounted to double jeopardy that Kola had subsequently served a prison term, and that Kola could sue for reinstatement.

The National Industrial Court of Nigeria (NICN) per Hon. Justice B.B. Kanyip, PhD (President, NICN), considered a similar scenario that played out in the recent case of *Ogiri Nimiye Henry v. Nigerian Airforce*¹.

¹ Unreported Suit No. NICN/ABJ/185/2018, judgment delivered on July 14, 2021.

FACTS OF THE CASE



Ogiyi Nimiye Henry (“Ogiyi”) was a member of the Nigerian Airforce (Airforce). Whilst on duty at the Sani Abacha Barracks, he was involved in a robbery incidence outside the barracks. Ogiyi was subsequently arrested by the Military Intelligence (Air Force and Navy) for allegedly robbing civilians outside the barracks. He was then charged before the Court Martial for the offences of failure to perform military duty and escaping from lawful custody. Upon a conviction at the Court Martial, he was

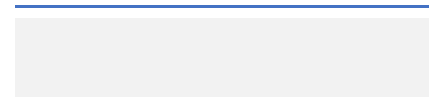
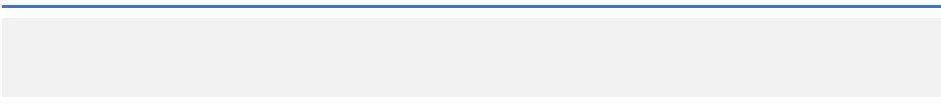
immediately dismissed from the service of the Airforce for allegedly escaping from lawful custody. Further to his conviction by the Court Martial, the Airforce handed Ogiyi over to the Nigeria Police for prosecution for the offence of armed robbery. Ogiyi was charged to court by the Police for committing the offense of armed robbery; however, he was discharged for failure of the police to diligently prosecute the case.

Ogiyi, having been discharged, brought an action against the Airforce claiming amongst other reliefs a declaration that his dismissal by the Airforce was wrongful and that his arrest and remand in prison custody at the instance of the Airforce was in breach of his fundamental human rights.

DECISION OF THE COURT

The court pointed out that the fulcrum of Ogiyi’s case was that his dismissal by the Airforce was wrongful and that he wants reinstatement or retirement and payment of backlog of salaries. The court found that Ogiyi failed to put before the court materials sufficient for the court to reach a finding in his favour, having failed to plead his terms of service and show how the Airforce breached those terms.

The court then went ahead to determine whether or not it amounted to double jeopardy that Ogiyi was dismissed after he had served a prison term. Ogiyi’s argument was that it was double jeopardy to dismiss him when he had already served a prison sentence. The court in overruling this argument stated that employment law had never treated as double jeopardy the dismissal of an employee on grounds of misconduct for which an imprisonment had been imposed. In other words, the fact that an employee has been investigated, adjudged guilty, and sentenced by a court of competent jurisdiction does not derogate from the right of the company to summarily dismiss that employee on the same set of facts.



COMMENTS

It is not uncommon for employees who have been summarily dismissed on allegation of involvement in criminal activities to file a complaint at the National Industrial Court claiming wrongful termination. Most times, the employees' claims are based on the ground that since the allegation of crime against them had not been proved before a competent court, the employer cannot dismiss them in the circumstance. However, in recent decisions, the NICN has pointed out that the foregoing argument invariably derives from the old dispensation as evinced by case law



authorities such as ***Bishi v. The Judicial Service Commission***.² The old dispensation was to the effect that where a criminal offence is alleged against an employee, he must first be prosecuted for the offence before disciplinary measures are taken against him. This line of argument has been declared old-fashioned by the NICN on several occasions.³ The new dispensation is that an employer can dismiss an employee where the accusation against such employee is of gross misconduct involving dishonesty bordering on criminality; and in such a case, it is not required under section 36 (1) of the Constitution that the employee must first be tried in a court of law.⁴

The case under review has further expanded the scope of the law. In addition to the employer's right to immediately dismiss an employee for gross misconduct bordering on criminality, it will not amount to double jeopardy where the same employee serves a criminal sentence in addition to such dismissal after the company's internal administrative measures. However, it is essential to stress that those administrative measures must be in line with the terms and conditions of the employee's contract of employment.

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² (1991) 6 NWLR (Pt. 197) 331 CA.

³ See *Ata Poly v. Maina* (2005) 10 NWLR (PT. 934) 487 CA; *UBA v. Mrs. Doreen Nkolika Oranuba* (2013) LPELR-20692(CA).

⁴ *Arinze v. First Bank (Nig.) Ltd.* (2000) 1 NWLR 9PT. 639) 78 CA.