1

IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

BEFORE HIS LORDSHIP ..... HON. JUSTICE B.A. ADEJUMO, OFR (PRESIDENT, NATIONAL INDUSTRIAL COURT OF NIGERIA)

DATE: 11TH NOVEMBER, 2011 **SUIT NO. NIC/ABJ/13/2011**

BETWEEN:

MRS FOLARIN OREKA MAIYA ..... APPLICANT

AND

1. **THE INCORPORATED TRUSTEES OF CLINTON HEALTH ACESSS INITIATIVE, NIGERIA**
2. **CLINTON HEALTH ACCESS INITIATIVE, INC (U.S.A.)** } **RESPONDENTS**
3. **WILLIAM J. CLINTON FOUNDATION**

REPRESENTATION:

MR. KEHINDE OGUNWUMIJU ..... FOR THE CLAIMANT

NO REPRESENTATION FOR THE RESPONDENTS

JUDGEMENT

On 13th of May, 2011 the Applicant commenced this action by way of Originating Motion pursuant to the sections 34(1)(a), 42 and 254C(1)(d)(f) & (g) of the *Constitution of the Federal Republic of Nigeria, 1999* (*1999 Constitution*) as altered, Articles 2, 5, 15 & 19 of the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, CAP. A9, LFN, 2004 (African Charter) and under Order II of the *Fundamental Rights Enforcement Procedure Rules, 2009*.

The originating motion is supported by 2 Affidavits deposed to by the applicant and her husband, one Olarenwaju Maiye respectively. The Originating Motion is

also supported by a Written Address and 13 series of exhibits. All the processes in question were dated the 13th of May, 2011 and filed same date. The Respondents filed two Counter Affidavits deposed to by one Dr. Owens Wiwa (male) and Hajara Santali (female) and supported by exhibits A – E series on the 21st of June, 2011. The Counter Affidavits are also supported by a Written Address.

The Applicant asked for the following reliefs:

1. A declaration that the termination of Applicant's employment by the 1st Respondent simply because she was pregnant, the ratification of same by the 2nd & 3rd Respondents and the subsequent conduct of all the Respondents, constituted a violation of the Applicant's fundamental rights to Human Dignity and Freedom From Discrimination as guaranteed by sections 34 & 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5, 14, and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9, Laws of the Federation, 2004.
2. General damages of N40, 000000.00 (forty million naira only) against the Respondents jointly and severally for the violation of Applicant's rights as guaranteed under sections 34 & 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Articles 2, 5, 14 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, CAP. A9, Laws of the Federation of Nigeria, 2004.
3. The sum of N300, 000000.00 (Three hundred million naira) as aggravated and exemplary damages jointly and severally against the Respondents for the undeserved outrageous and unwarranted contempt, cruelty, insolence, malice, oppression, humiliation, molestation, embarrassment, degradation and inconveniences to which the Applicant was subjected to by the Respondent.

   AND for such further order(s) as the Honourable Court may deem fit to make in the circumstances of this case.

The applicant initially filed an Ex-Parte Application dated the 13th of June, 2011 and filed the same date asking for order of service outside jurisdiction. This Ex-Parte Application was however withdrawn on the 24th of May, 2011 when it came

up, and accordingly struck out. The Applicant also filed a Further Affidavit in Support of the Originating Summons on the 30th of June, 2011.

The Respondents moved their Motion on Notice dated the 21st day of June, 2011 and filed same date asking for extension of time to file 1ST – 3RD Respondents' Joint Counter Affidavits and to deem the Counter Affidavits as properly filed and served on the 11th of August, 2011 and it was granted. The Applicant also filed Applicant's Reply on Points of Law to the Respondents' Joint Written Address dated the 30th of June, 2011 on the same date. On the same date, the Applicant and the Respondents adopted their Written Addresses. They also made oral submissions in adumbration of their respective Written Addresses. The Applicant's Counsel also adopted his Reply on Points of Law to the Respondents' Joint Written Address the same date.

In his Written Address, the Applicant's Counsel, Mr. Kehinde Ogunwumiju, formulated a sole issue for determination of the case. The issue is "WHETHER OR NOT THE APPLICANT IS ENTITLED TO THE RELIEFS SOUGHT". Applicant's Counsel argued for the Applicant that the termination of the Applicant's employment simply because she was pregnant and the Respondents' subsequent conduct amounted to a breach of the Applicant's fundamental rights, and that as such the Applicant is entitled to general and exemplary damages. He submitted further that the Applicant is entitled to bring this suit in challenge of the alleged breach of her rights by virtue of sections 46 and 254C –(1)(d) & (g) of the *1999 Constitution* as altered.

He also argued that the Respondents have breached the fundamental rights of the Applicant under sections 34(1)(a), 42(1) of the *1999 Constitution* and Articles 2, 5, 15 and 19 of the *African Charter*. On this submission, he relied on the relevant portions of the Applicant's affidavit. He submitted that the contents of the affidavit in question showed clearly that there is overwhelming circumstantial evidence that the Applicant's employment was terminated solely because she was pregnant. He submitted that a case can be validly proved by circumstantial evidence. He cited *State v. Edobor* (1975) 8 – 11 SC 69, *Emeka v. State* (2001) 14 NWLR (Pt. 734) 666, *Aiguoreghuan v. State* (2004) 4 NWLR (Pt. 860) 367, *Akinmoju v. State* (1995) 7 NWLR (Pt.406) 367, *Ebenechi v. State* (2009) 6 NWLR (Pt. 1138) 431 at 443. He submitted further that the Court can rely on

circumstantial evidence to draw inferences. He cited *S.B.N. Ltd v. C.B.N.* (2009) 6NWLR (Pt. 1137) 237.

He submitted also that based on the fact that:

1. the Applicant was employed through a competitive process and found to be the best for the job;
2. she put in the best on the job;
3. she was never reprimanded or queried nor told that her job was not satisfactory;
4. She informed her immediate supervisor that she was pregnant and the said supervisor replied her by saying she would try her possible best to ensure she kept her job; and
5. a few hours after the reply from her immediate supervisor, and during which time her immediate supervisor had informed the Country Director of her pregnancy, her employment was determined; the irresistible conclusion to be reached is that the Respondents terminated the Applicant's appointment for the sole reason that she was pregnant.

He went further to submit that there is implied admission of the fact that the Applicant's employment was terminated because of her pregnancy as the Respondents refused to reply to the Applicant's emails (exhibits 7 – 10), accusing the Respondents that they sacked the Applicant because of her pregnancy, which they were bound by law to reply to. He relied on *Coop. Dev. Bank PLC v. Ekanem* (2009) 16 NWLR (Pt. 1168) 585, *CAP PLC v. Vital Investments Ltd.* (2006) 6 NWLR (Pt. 976) 220 and *Trade Bank Plc v. Chami* (2003) 13 NWLR (Pt. 836) 158 at 219, paras. E – G. On this issue of admission, he submitted further that because the Director of Human Resources in the United States replied to the email (exhibit 11) of the Applicant accusing the Respondents of discrimination and inhuman treatment in terminating her appointment, by saying he understood that the Applicant is frustrated, admission is proved. He cited *INEC v. Oshiomole* (Pt. 1132) 607 at 662 paras. B – D.

Applicant's Counsel submitted that because the 2nd & 3rd Respondents ratified the actions of the 1st Respondent by the 3rd Respondent personally issuing a pay-off Cheque to the Applicant and that as such the 1st Respondent is a mere agent of the 2nd and 3rd Respondents.

The Applicant's Counsel argued that the Applicant is entitled to general damages by relying on *Gari v. Sierafina (Nig.) Ltd* (2008) 2 NWLR (Pt. 1070) 1 at 19 paras. A –E. He also submitted that the Applicant is entitled to exemplary damages and he relied on *G.F.K.I (Nig.) Ltd v. NITEL Plc* (2009) 13 NWLR (Pt. 1164) 344 at 373 paras. E – F, also p.377 paras. C – D.

The Applicant's Counsel argued that aggravated and exemplary damages are awarded as a punitive measure and must therefore be high enough to serve as punishment. He supported this line of reasoning by saying the Respondents are very rich as shown in exhibit 13 attached to the Applicant's affidavit and can therefore afford the huge sum claimed. He further argued that the Court should observe international best practices in awarding exemplary damages as claimed based on the fact that the Respondents are an international NGO based in the US. He cited authorities to buttress the practice of the US on issue of discrimination – *Gentner & Stevenson v. Cheyney University of Pennsylvania* (Civil Action No. 94 – 7443), *Desert Palace Inc., Caesars Palace Hotel & Casino v. Catharina F. Costa* 539 U.S. (2003), *BarlingtonN. & S.F.R. Co. v. White* 05 U.S. 259, and *Amber Mccombs v. Meijer Inc.* 395 F. 3d 346.

In his oral submission, the Applicant's Counsel urged the Court to take this case serious and that the award of exemplary damages would serve as a warning to other companies to desist from maltreating Nigerians in like manner. He finally urged the Court to grant all the prayers of the Applicant.

The Counsel to the Respondents, Mr. Chris Umar, adopted his Written Address in Support of the 1st – 3rd Respondents' Counter Affidavit. The Respondents' Counsel indentified two issues for the just determination of this case; and they are:

1. **Taking into consideration the totality of the facts of both the Affidavit of the Applicant and the Counter Affidavit of the Respondents respectively and the contract of employment validly entered into by the parties whether the termination was lawful.**
2. **If the first issue is answered in the affirmative, can it be said then that the said termination amounted to a violation of the Applicant's rights or has Applicant made out a case of violation of her fundamental rights against the 1st, 2nd, and 3rd Respondents to entitle her to the reliefs claimed.**

He submitted in respect of the 1st issue that by virtue of Article 6 the Contract of Employment between the Applicant and the 1st Respondent that the 1st Respondent has a right to terminate the appointment of the Applicant. He submitted further that the 1st respondent acted lawfully within the context of the said Article 6 of the Contract of Employment by issuing the Applicant with one month salary in lieu of notice. He argued that the case was one of servant and master relationship, where he who hired could fire at will, provided the condition of hiring was observed. He cited the authorities of *L.C.R.I. v. Mohammed* (2005) 11 NWLR (Pt. 935), *Araromi Rubber Estates Ltd v. Orogun* (1999) 1 NWLR (Pt. 586) 302 CA, *Fakuade v. O.A.U.T.H.* (1993) 12 NWLR (Pt. 291) 47 SC, *Chukwuma v. Shell Petroleum Nig. Ltd* (1993) 4 NWLR (Pt. 269) 512, *Ekpeogeu v. Ashaka Cement Co. Plc* (1997) 6 NWLR (Pt. 508) 280, *Osianya v. Afribank (Nig.) Plc* (2007) 6 NWLR (Pt. 1031) 565, and *Akinfe v. UBA Plc* (2007) 10 NWLR (Pt. 1041) 185.

He submitted further that the employment was validly determined during the probationary period of 3 months as provided for in the contract. On this score he cited *Ihezukwu v. University of Jos* (1990) 3 NSCC 80. He argued further that the payment of one month salary in lieu of one month notice is in order and relied on *Dedman v. British Building & Engineering Appliances Ltd* (1994) 1 NWLR (Pt. 171). He argued that section 11(1) & (2)(a) of the *Labour Act* provided for just one day notice for a job of three months and that the 1st Respondent acted magnanimously by giving one month salary in lieu of notice.

He also tried to buttress his point by citing Article 8(2) of the *Termination of Employment at the Initiative of the Employer Convention No. 158 of 1982* to the effect that the Applicant having accepted the salary in lieu of notice had waived her right to complain. Further to the above, he argued that the Applicant did not protest within reasonable time against the termination of her appointment and as such she was deemed to have waived her right, and he relied on *Iloabachie v. Philips* (2000) 14 NWLR (Pt.787) 264 and *Military Administrator of Benue State v. Etegede* (2001) 7 NWLR (Pt. 300) 426. He said the Applicant acquiesced in the termination of her appointment by failing for almost a year (June, 2010 – May, 2011) after the termination to approach the Court, and he relied on *Morohunfola v. K.S.C.T.* (1990) 4 NWLR (Pt. 145) 506, *Adeniye v. Yaba College of Technology* (1993) 6 NWLR (1993) 6 NWLR (Pt. 300) 426 and *Ante v. University of Calabar* (2000) 3 NWLR (Pt. 700) 231. He urged the Court to uphold his submission as the Applicant has not in any place in her claims challenged the termination.

On issue No. 2 he started by arguing that the Applicant has not placed all necessary materials before the Court to enable her enforce her fundamental rights and that this omission is fatal to her case. He relied on *Oyewole Sunday v. Adamu Shehu* (1995) 8 NWLR (Pt. 414) 484 and *Dangote v. CSC Plateau State* (2001) 9 NWLR (Pt. 717) 132. He argued that the Applicant is only insinuating that her rights to human dignity and freedom from discrimination were breached as a result of the discussion she had with her colleague about her pregnancy. He submitted further that in nowhere in the letter terminating her appointment was the issue of her pregnancy mentioned as the motivating factor. He submitted that the Respondents have shown in their Counter Affidavits the incentives they provide in the workplace for women which cover pregnancy, and as such they cannot terminate a staff on account of being pregnant.

He submitted further that where an employment is terminated in accordance with the terms of the contract, the existence of motive does not convert it to a civil wrong. He relied on *Chukwuma v. Shell Petroleum Nig. Ltd* (1993) 4 NWLR (Pt. 289) 512, 537, 558, *Chukwu v. NITEL* (1996) 2 NWLR (Pt. 430) 290 & 299, *Calabar Cement Co. Ltd v. Daniel* (1999) 4 NWLR (Pt. 188) 750 & 788, *Ikezuonu v. Julius Berger Nig. Ltd.* (1979) 7 – 9 CCHCJ 56, and *Airewale v. Refrigeration Engineer & Contractors Ltd* (1980) 4 – 6 CCHCJ 1974.

He argued that the 1st Respondent is a separate legal personality distinct from the 2nd and 3rd Respondents irrespective of whether they laboured to bring it into existence. He argued that whatever relationship that existed between them is not as a result of the incorporation of the 1st Respondent. He relied on *Salomon v. Salomon & Co. Ltd* (1987) AC 22 at 51, *Trenco Nig. Ltd. V. African Real Estate Ltd* (1987) 1 LRN. 146 at 153, and *Marina Nomires Ltd v. Federal Board of Inland Revenue* (1986) 2 NWLR (Pt. 20) 48 at 61.

He submitted further that the Applicant wrote a letter of appeal to the 2nd Defendant (Respondent?) because she felt they had control over the 1st Respondent. She submitted that the 2nd and 3rd defendants (Respondents?) had no business whatsoever with the termination of the appointment of the Applicant and that the termination was done entirely by the 1st Defendant (Respondent?) who hired and fired the Applicant.

He argued also that the Applicant has not placed before the Court sufficient facts to establish her civil right, and that her right in this case emanated from contract and that she has waived the right by acquiescence; and that as such she has no locus. He relies on *Olagunju v. Yahaya* 3 NWLR (Pt. 542) 501 and *Okafor v. Asoh* (1999) 3 NWLR (Pt. 593) 35

He finally urged the Court to discountenance the application and claims of the Applicant.

The Applicant's Counsel in his Brief on Reply on Points of Law argued that all the authorities, statutes and common law principles relied upon by the Respondents to counter the Applicant's argument were totally irrelevant to the case at hand. And that in order to properly defend the action, the Respondent are expected to prove that they have not breached the Applicant's freedom from discrimination. He argued further that the right to freedom from discrimination guaranteed by section 42 of the *1999 Constitution* is unique in that unlike other fundamental rights in the Constitution there is no exception or limitation to the right: that is the right is absolute - see section 45 (1) of the *1999 Constitution.* The Respondents therefore cannot rely on the common law principles of master/servant relationship and the doctrine of waiver to defeat the Applicant's claims. On this issue he finally submitted that the master's right to terminate at will the employment of the servant is subject to the fundamental right of the servant. He relied on *L.C.R.I. v. Mohammed* (2005) 11 NWLR 9Pt. 935), *Akinfe v. U.B.A.* (2007) 10 NWLR (Pt. 1041) 185, *Ihezukwu v. Unijos* (1990) 3 NSCC 80, *Ransome-Kuti v. A.G. Federation* (1985) 2 NWLR (Pt. 6) 211 at 229 – 230 paras. H – B, and *F.R.N. v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113.

He further argued that the Respondents did not effectively counter the depositions contained in the Applicant's Affidavit and that the Respondents' Affidavits were self-contradictory. He also argued that the argument of the Respondents that the Applicant has waived her right by the acceptance of salary in lieu of notice was misconceived and that the authorities relied upon were irrelevant. He also submitted on this point that the reliance placed by the respondents on Article 8(2) of the ILO'S *Termination of Employment at the Initiative of the Employer Convention No. 158 of 1982* would not hold water as the said convention has not been domesticated in Nigeria. And that even if it has been domesticated, it would still be subject to the Supreme Court's decision in

Military Administrator, Benue State v. Ulegede (2001) 17 NWLR (Pt. 741) 194 on the subject.

He also submitted further on the issue of waiver that the Applicant cannot in law waive her fundamental right and that the Court has the duty to protect the right. He relied on *F.R.N. v. Ifegwu* supra, *Asika v. Atuanya* (2008) 17 NWLR (Pt. 1117) 484, *Onyirioha v. I.G.P.* (2009) 3 NWLR (Pt. 1128) 342, *Ariori v. Elemo* (1983) All NLR 1, and *Menekaya v. Menekaya* (2001) 16 NWLR (Pt. 738) 203 at 236 paras. B-C.

On the issue of locus standi he contended that the Applicant has locus based on the contents of her affidavit which showed that her fundamental right has been infringed upon. He relied on *Ukegbu v. N.B.C.* (2007) 14 NWLR (Pt. 1055) 551, *Kolawole v. Folusho* (2009) 8 NWLR (Pt. 1143) 388 and *Okocha v. INEC* (2009) 7 NWLR (Pt. 1140) 295; and on Article 3(e) in the *Preamble* to the *Fundamental Rights (Enforcement Procedure) Rules 2009*.

On the issue of statute of limitation of the action he submitted that the action of the Applicant is not defeated simply because he commenced same about ten months after the termination of her appointment, and that all the authorities cited by the Respondents related to *Public Officers Protection Act* and because the Respondent have not shown that they fall under the protection of the Act, they cannot claim benefit from the authorities. He also argued that even if they were afforded protection by the said law, the provisions of Order III of the *Fundamental Rights (Enforcement Procedure) Rules 2009* oust such protection. He also argued that all the authorities cited by the Respondents to buttress the argument that motive is irrelevant in the termination go off the mark as they are not related to fundamental right actions. He concluded by arguing that motive is relevant in the case by virtue of section 9(1) of the *Evidence Act*. He cited a Supreme Court of the US case of *Desert Place Inc. v. Catharina F. Costa* 539 U.S (2003) at p.11.

He finally urged the Court to discountenance the submissions of the Respondents' Counsel.

I now proceed to the objections as to the competence of the action raised by the Respondents' Counsel in his Written Address. They are three in number:

(1) that the Applicant has waived or acquiesced in her right to complain having accepted the pay off from the Respondents;
(2) that the Applicant has no locus standi; and
(3) that the 2nd and 3rd respondents are not amenable to the jurisdiction of the Court being that they are distinct entities from the 1st respondent incorporated under Nigerian laws.

It is apposite to deal with these objections before proceeding further as their resolution has important bearings on the life of the action: they touch on the jurisdiction of the Court. The respondents have argued that because the Applicant accepted the one month salary in lieu of notice she had waived and acquiesced in her right to this action. The Applicant has submitted that her complaint being on fundamental right cannot be waived. The applicant's Counsel cited the case of *Menakeya v. Menakeya* spura to buttress his argument.

A cause of action is discoverable from the originating process filed by the person instituting the action; in this particular instance, the Applicant, and not from the process or argument of the opposing party. From the originating process the Applicant is complaining against the breach of her right to freedom from discrimination and inhuman treatment as guaranteed by the *1999 Constitution* and *the African Charter*. The issue to determine is whether the doctrines of waiver and acquiescence apply to a breach of fundamental rights. The *Supreme Court* has held in *Menekaya v. Menakaya* (2001) 16 NWLR (Pt. 738) 203 at 236 paras. B – C the supreme Court has held that:

> *A mandatory statutory provision directing the performance of any duty is not a party's personal right to be waived. You cannot resort to estoppels to compromise a statutory provision of a public nature.*

The effect of the provisions of sections 34 (1)(a), 42, 254C- (1)(d) – (g) of the *1999 Constitution* and Articles 2, 5, 15 & 19 of the *African Charter is* to impose duties on all authorities and persons, whether in their official or private capacities, to observe the duties imposed in their dealings with Nigerian citizens. Once it is alleged these duties are breached, the doctrine of waiver and acquiescence cannot stop an action founded on such breach – See *Milad Benue State v. Ulegede* (2001) 17 NWLR (Pt. 741) at where the Supreme Court held that:

> *Where the retirement of a person is void because of non-compliance with the provision of a statute, the acceptance of benefits in lieu of*

Notice cannot preclude such person from complaining about an unlawful retirement which was void ab initio.

The Court of Appeal also held in *Anzaku v. Milad., Nassarawa State* (2005) 5NWLR (Pt. 919) 448 at 485 paras. A – B that:

The Nigerian democratic Constitution in its language exhibits how much value it places on the worth of each and every one of the citizens. It does not and will not condone, indeed not tolerate class or ethnic discrimination whether by any law of the land or any action on the part of any executive or administrative authority or person or the State in sharing advantages, and even disadvantages, based on sex, race, place of origin, ethnic, religious or political affiliation.

I therefore agree with the submission of the Applicant's Counsel that the issue of waiver or acquiescence does not apply to this case. The law is that "no man can renounce a right of which his duty to the public, or the claims of society forbid its renunciation." – see *Mobil Prod. (Nig.) UnLtd. V. LASEPA* (2002) 18 NWLR (Pt. 798) 1 at 37, paras. D.

I now come to the issue of lack of locus standi on the part of the Applicant raised by the Respondents' Counsel. The Respondents' Counsel has argued that the Applicant lacked locus standi bècause she has not shown that her civil right has been infringed and that the right she is claiming emanated from contract of employment which has been lawfully determined. There is no doubt that the dispute in question arose from contract of employment and there is no doubt also that the Respondents can terminate the contract. But the Applicant's case is that in terminating the contract the Respondents breached her statutory rights: right to freedom from discrimination and freedom from inhuman treatment. And what confers locus standi on a party is that the party must be able to show on his writ that his rights have been or are in danger of being infringed – see *Ojukwu v. Ojukwu* (2000) 11 NWLR (Pt. 677)65 and *Lawal v. Salami* (2002) 2 NWLR (Pt. 752) 687.

At that stage, the Court is not concerned with whether the action would succeed but with whether merely looking at the writ, a cause of action which can be heard exists. And there is no doubt that the Applicant has made out a case which is

proper for the Court to examine – see *A.N.P.P. v. R.O.A.S.S.D.* (2005) 6 NWLR (Pt. 920) 140 at 181 paras. A – B wherein it was held that:

> *In order to determine whether a plaintiff has locus standi, the court will only examine the statement of claim and nothing else*

The next issue is that of non-culpability of the 2nd and 3rd Respondents. The Applicant's Counsel has argued that the 1st Respondent is an agent of the 2nd and 3rd Respondents in Nigeria and that the 2nd and 3rd Respondents had at various times represented themselves as such (see para. 2(v) of the Applicant's Brief). The Respondents' Counsel countered this by relying on the individualistic identity of a corporate body as distinct from those who laboured to bring it into existence.

My take on this is that the rule of separate corporate identity of an incorporated company is not an invariable one. Exceptions are recognized in law. And what is more, the Director of Human Resources of the 2nd Respondent while replying the e-mail sent by the Applicant for her case to be reviewed held the 2nd Respondent out as the brain and life of the 1st Respondent and that it had authority to either confirm or review the conduct of the 1st Respondent. And the fact that the 3rd Respondent issued the cheque for the pay off of the Applicant for the job already done cements the confirmation that the 1st Respondent is a mere agent of the 2nd and 3rd Respondents. Therefore, this is proper case where the veil of incorporation can be lifted or rather it is already lifted by the 2nd and 3rd Respondents. There have held themselves out as being the controllers of the 1st Respondent and it is too late in the day to resile. I therefore agree with the Applicant's Counsel that the 1st Respondent is a mere agent of the 2nd and 3rd Respondents. I therefore also resolve this issue against the Respondents.

The Applicant's Counsel raised the issue of the *Public Officers Protection Act or Law* while replying to the Respondents' Counsel's Brief in relation to all authorities cited by the Respondents' Counsel in respect acquiescence. I cannot find where the issue was argued by the Respondents' Counsel. The Respondents' Counsel merely cited authorities on the *Public Officers Protection Act* in relation to his arguments on acquiescence. Well, be that as it may, I must say since the Respondents are not public officers as defined under section 318(1) of the *1999 Constitution* as altered, they cannot enjoy the protection of the Act or Law.

Having dealt with the preliminary issues touching on the jurisdiction of the Court, it now remains to examine the case on the merits. Both the Applicant and the Respondents' Counsel have formulated issues for the determination of the case, which issues have been reproduced earlier on. I do not see any of the issues as capable of just determination of the case. I therefore proceed to formulate the following issue which, in my humble opinion, affords a just determination of the case. The issue is *"whether in the circumstances of this case the Applicant's fundamental rights have been breached"*.

The fundamental rights which the Applicant claimed were breached are sections: 34(1)(a), 42 and 254C(1) (d) – (f) of the *1999 Constitution* and Articles 2, 5, 15 and 19 of the *African Charter*. Section 34(1)(a) of the 1999 Constitution provides thus:

> *Every individual is entitled to respect for the dignity of his person, and accordingly –*
> *(a) no person shall be subjected to torture or to Inhuman or degrading treatment; ...*

Section 42 provides thus:

> (1) *A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –*
> *(a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject to; ...*

Section 254C – (1) of the 1999 Constitution as altered provides thus:

> *Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other Court in civil and matters –*
> *(a) ...*
> *(b) ...*
> *(c) ...*

(d) relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of this Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's or any other matter which the Court has jurisdiction to hear and determine;

(e) ...

(f) Related to connected with unfair labour practice or International best practices in labour, employment and And industrial relations matters;

(g) Relating to or connected with any dispute arising from discrimination or sexual harassment at workplace; ...

Articles 2, 5, 15 and 19 of the *African Charter* provide thus:

(2) Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, religion, political ... or other status.

(5) Every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation, ... inhuman or degrading punishment and treatment shall be prohibited.

(15) Every person shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

(19) All people shall be equal. They shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of some people by another.

A close perusal of these rights shows that they are obligatory on all authorities and persons without exceptions in order to make sure they are adhered to and not breached in their dealings with citizens of Nigeria.

In arguing that these rights in favour of the Applicant have been breached, the Applicant Counsel contended that the Applicant was sacked simply because she was pregnant, which according to him amounted to discrimination on account of sex and as such also amounted to inhuman treatment. According to the Applicant's Counsel, the Applicant had informed her supervisor, one Hanjara Santali, at 10.09 a.m. on the 14th of June 2010, through her official e-mail that she was pregnant (paras. 16 – 19 of the Applicant Affidavit). The said Hanjara Santali, at 2.23 p.m. the same day, replied the e-mail in the following words "Please take it easy and I will try my possible best that you keep your job. I will see how we can work things out". The Applicant Counsel further contended that the said Hanjara Santali reported the fact of the Applicant's pregnancy to the Management of the 1st Respondent immediately after the exchange of the e-mails. The Applicant further contended that within some few hours of this, she was presented with a sack letter the same day simply because she was pregnant (paras. 19 – 21 of the Applicant's Affidavit).

In countering this contention, the Respondents deposed to two Counter Affidavits, the first by one Dr. Owens Wiwa (the Country Director and sole trustee of the 1st Respondent) and the other by Mrs Hanjara Santali (the Supervisor to the Applicant). The relevant parts of Dr. Owens Counter Affidavit are paragraphs 10 – 15 of the Counter Affidavit. Therein Dr. Owens claimed that shortly after the termination of the appointment of the Applicant on the 14th of June, 2010, she wrote him an e-mail pleading with him to retain her job and that she was ready to forfeit her maternity leave and that it was at that time that he became aware for the first time that the Applicant was pregnant.

He went further to state that he was not privy to the discussion between Mrs. Hanjara Santali and the Applicant and that neither were their e-mails copied him. He claimed that the 1st Respondent has no policy against married or pregnant women and that the health insurance of the 1st Respondent covered sick and maternity expenses. He claimed that a significant part of their employees are women and that they are entitled to maternity and sick leaves with full pay. To further buttress the non-discriminatory policy of the 1st Respondent, he stated that as at the time Hanjara Santali and the Applicant were exchanging e-mails on the 14th of June, 2010 that Hanjara Santali was also pregnant and she was not sacked. He added that when Hanjara Santali was having difficulty with her

pregnancy the 1st Respondent provided her with all needed assistance to ease her difficulty and enable her perform her duties.

The relevant portions of Hanjara Santali's Counter Affidavit are paragraphs 3 – 10. In the main, the Counter Affidavit corroborated paragraphs 10 – 15 of Dr. Owen's Counter Affidavit earlier outlined. In addition, she said when the Applicant informed her of her pregnancy, she congratulated her and that she was not a member of the management of the 1st Respondent and as such did not affect decisions.

The question is, from the above pieces of evidence, could it be said that the termination of the appointment of the Applicant was motivated by the fact of her pregnancy? My answer is yes. The reply of Mrs Hanjara Santali to the e-mail of the Applicant informing her of the Applicant's pregnancy for the first time will throw some light on this. She had said "... I don't want you to work too hard. Please take it easy and I will try my possible best that you keep your job. I will see how we can work things out". To this, the Applicant had replied saying, "truth is I am pregnant ... I did not know I was going to be called for this job if not I would have waited a little bit before taking in ... I got married on the 20th of March and I am 12 weeks ... was hoping you were far gone with yours so that at least when you go for maternity, I can be here and then you'ld be back by the time it's my turn ... but just heard you are 17 weeks ..."

From the above conversion it is clear that the two parties were aware that the pregnancy of the Applicant was going to pose some threat to her work. It is also clear that the reason why the Applicant's pregnancy would pose some threat to her job is the fact that the two women would be due for maternity leave about the same time thus leaving the office vacant. It is also true that Hanjara Santali knew that the 1st Respondent would not be happy with the pregnancy of the Applicant at the material period, otherwise there would not have been the need for the reply "... I don't want you to work too hard. Please take it easy and I will try my possible best that you keep your job. I will see how we can work things out". The above conclusions are borne out by paragraph 4 of the Hanjara Santali's Counter Affidavit, which goes thus:

> *That being pregnant myself at the time and knowing the challenges that comes with pregnancy which could affect her overall performance* ***especially being on probation****, I encouraged her and*

promised to help her keep her job by rendering all necessary assistance when the need arises. (Bold type mine for emphasis)

From the above it is no longer in doubt that the policy of 1st Respondent frowns on a female employee getting pregnant during probation. It is also clear that the fear that the Applicant's performance might also diminish during her pregnancy is a relevant factor that the 1st Respondent considers as a policy. It follows that Hanjara Santali is not a person to be believed, having contradicted herself in her Counter Affidavit.

The next question is did Hanjara Santali inform Dr. Owens or the Management of the 1st respondent of the Applicant's pregnancy? The answer again is yes. Though Dr. owens has denied being informed of the conversation between Hanjara Santali on the Applicant's pregnancy and Hanjara Santali has also corroborated this in her Counter Affidavit, but the question is what did Hanjara Santali do with the information as a responsible supervisor to whom an officer working under her has given information through official and not private e-mail address? As a supervisor to the Applicant she is definitely the first and proper person whom the Applicant would pass information to for conveyance, if necessary, to the management. The argument that this was a private conversation between the duo would not hold as the e-mail was via the official e-mail address of Hanjara Santali which shows that the conversation was not meant to be private. That Hanjara Santali did not report to the appropriate authority (her superior), as we are being made to believe, is a dereliction of duty in any organization; and that the authority did not query her on this leaves much to be desired. It simply shows that she did what was needful by reporting to her superiors and that the authority is just trying to play smart.

It is not in all cases that a court needs to resort to calling oral evidence to resolve conflict in affidavit. If the conflict could be resolved via conflicts in the affidavit itself or other documentary evidence, a court of law needs not resort to oral evidence. A court of law is not bound to believe a piece of improbable evidence simply because it is deposed to in a Counter Affidavit - see *Anzaku v. Gov., Nassarawa State* (2005) 5 NWLR (Pt. 919) 448 at 502 paras. C - F. Another piece of evidence that bears out the falsehood of both Dr. Owen and Hanjara Santali is to be found in exhibit 10 of the Affidavit of the Applicant. There it was clearly stated that Hanjara Santali was one of the members of the three-man panel that

interviewed the Applicant, and this has not been denied. Yet the Respondents still continue to claim that she is not a member of management.

The fact that the Applicant was sacked very shortly on the very same day she informed her Supervisor, Mrs. Hanjara Santali, of her pregnancy without any prior complaint whatsoever against her shows clearly that it was her pregnancy that cost her the job. The fact that she wrote several letters of appeal to the Respondents in which she indicated that she was sacked because she was pregnant without any denial by the Respondents confirms that the sack was motivated by the pregnancy, and is an admission on the part of the Respondents. No wonder that the Respondents throughout have never offered any reason why the Applicant was sacked.

It is also interesting to note that at no place in the Counter Affidavit is the specific allegation of the Applicant that her employment was terminated because of her pregnancy expressly denied by the Respondents. All they did was to show how well they treat pregnant women in their organization and that they have a policy that favours pregnant women (paras.13 – 15 of the Dr. Owens Wiwa's Counter Affidavit and paras.8 – 10 of Hajara Santali). And this does not remove the malignant fact that the Applicant was sacked by reason of her pregnancy: they never specifically denied sacking the Applicant because she was pregnant. The law is that when a fact is deposed to in an affidavit and it is not specifically denied, the other party is deemed to have admitted the evidence as true – see *Ajomale v. Yaudat (No. 2)* (1991) 5 NWLR (Pt. 191) 266.

The fact that Hanjara Santali was equally pregnant and not discriminated against is of no moment because she was no longer on probation and it would still be of no moment even if she were to be on probation like the Applicant. The fact that the Respondents have a favourable policy in favour of pregnant women is also of no moment also as they have failed to show how this policy is implemented on a female officer on probation and on the Applicant. The Supreme Court of Canada has held in *Suzan Brooks v. Canada Safeway Limited* that:

> *It cannot be said that discrimination is not proven unless all members of a particular class are equally affected.*

The Supreme Court of Canada in the case above relied on *Zarankin v. Johnson* (1984) 5 C.H.R.R. D/2272 at p. D/2276 which it quoted with approval thus:

... an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only group adversely.

When all the above pieces of reasoning are pieced together the irresistible conclusion to be reached is that circumstantially the Applicant was sacked because she was pregnant. I therefore agree with the Applicant's Counsel that circumstantial evidence could be used to draw relevant inference of the culpability of the Respondents. I also agree with the Applicant's Counsel that motive is relevant in the case by virtue of section 9 (1) & (2) of the *Evidence Act*. The motivating factor for terminating the Applicant's appointment is her pregnancy.

The next question is whether the provisions of the laws allegedly infringed are applicable to master/servant contract, and if so, whether the Respondents have breached the laws. The Applicant's Counsel relying on a number of authorities has argued that the provisions are applicable to master/servant employment relationship. The Respondents' Counsel has countered this argument by submitting that the common law principle that he who hires can fire at will is the law applicable and that the Respondents have not breached the laws in questions.

In resolving this question, it is necessary to draw attention of the parties to the fact that the principle governing master/servant relationship remains sacrosanct. A master can here and fire at will, with or without giving any reason at all. But when a master sacks in circumstances in which it is proved that any of these provisions is breached, he would have committed a wrong (tort). While the Court would not order reinstatement, it would order the payment of damages. To this extend the provisions of these laws are applicable to all types of employments in Nigeria. The Court of Appeal has aptly captured the above reasoning in *Anzaku v. Gov., Nassarawa State* (2005) 5 NWLR (Pt. 919) 448 at 490, para. G. when it held that:

Section 42 of the 1999 Constitution seeks to protect a citizen of Nigeria against the application of "any law in force in Nigeria". This is apart from protecting him against "any executive or administrative action of Government ".

The Court further held that in construing the meaning, characteristics and application of section 42 of the *1999 Constitution*, the following elements are evident:

(a) *the provisions are rigid – the words "shall not" in subsection 1 and "shall" in subsection (2) bear this out;*

(b) *the words and language are not only clear and precise but the prohibition which they convey are also absolute in their context;*

(c) *it is prohibition against discrimination on grounds of the community, ethnic group, place of origin, sex, religion or political opinion to which a citizen belongs. They must not form an obstacle to a citizen of Nigeria exercising his rights;*

(d) *so protective are the words, for, not only in the express application of any law in force in Nigeria, but in the practical application thereof, would the provision permit a citizen to be subjected to discrimination. Such discrimination is not to be practiced, with respect to express and also practical application of any executive or administrative action of Government;*

(e) *the provisions not only curbs the excesses of any law but also any executive or the administrative action of Government;*

(f) *"any law" is so encompassing an expression, not limiting the type of law. It applies to any system of law in Nigeria, whether statute law, customary law, Islamic or common law, applicable in Nigeria which subject a citizen to discrimination, or disability, or restriction on account of any of the grounds specified in the section; ...*

The common law of contract under which the Respondents have acted is no doubt in force in Nigeria and in its practical application has affected the Applicant negatively by infringing her right of freedom from discrimination on account of sex. Since the section intends to protect Nigerians and the Applicant is a Nigerian, the provision is applicable to the master/servant relationship. The law of contract must of necessity be read subject to the provisions of the *1999 Constitution*, especially, the provisions of Chapter 4, and in this particular instance sections 34(1)(a) and 42 of the *1999 Constitution*. The Applicant is a woman and her pregnancy has been found to be the reason for her sack by the Respondents. Therefore, she has been discriminated against by reason of her being a woman and therefore subjected to disability – see also *Muojekwu v. Ejikeme* (2000) NWLR

(Pt. 657) 402 and *Augustine Nwafor Mojekwu v. Caroline Mgbafor Okechukwu Mojekwu* (1997 7 NWLR (Pt. 512) 283. This same action of the Respondents amounts to inhuman, malicious, oppressive and degrading treatment in that the Respondents in their action held themselves out as abhorring the humanity of a woman in being pregnant. The decision of the *European Court of Justice (ECJ)* in *Tele Denmark A/S v. Handels-og Kotorfunktion-aererne Forbundi I Danmark (HK)*: C-109/00 (2000) ECR 1-6993, (2000) All ER (EC) 941 is relevant here. The decision was on art 5(1) of the ETD/76/207/EEC which contains non-discriminatory principles. A woman was employed for a fixed period of 6 months the first two months of which she was to spend on training. The woman was pregnant when she was offered the job and did not tell her employers. Her pregnancy had the effect that she would not work for a substantial part of the contract and she was sacked on the ground that she failed to disclose the information during interview. The *ECJ* while declaring that the dismissal was unlawful held thus:

> *'Since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex whatever the nature and extend of economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal. In either case, the employee's inability to perform her contract of employment is due to pregnancy'.*

The decision of the Supreme Court of Canada in *Brooks v. Canada Safeway Ltd.*, (1989) 1 S.C.R. is also illuminating on the issue of discrimination on account of pregnancy. It was held that:

> *Discrimination on the basis of pregnancy is discrimination on the basis of sex. ... Pregnancy discrimination is a form of sex discrimination simply because of the basic biological fact that only women have the capacity to become pregnant. Appellants' disfavoured treatment under the plan flowed entirely from their state of pregnancy, a condition unique to women. Those who bear children and benefit the society as a whole should not be economically or socially disadvantaged. It is thus unfair to impose all the costs of pregnancy upon one half of the population.*
> *'It is also wrong to believe that pregnancy related discrimination could not be sex discrimination because not all women become*

pregnant. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Indeed, pregnancy cannot be separated from gender. The fact, therefore, that the plan did not discriminate all women, but only against pregnant women, did not make the impugned distinction any less discriminating.

The respondents' Counsel has also argued that since the Respondents have complied with Article 8(2) of the ILO's *Termination of Employment at the Initiative of the Employer Convention No. 158 of 1982* by issuing payment in lieu of notice which the Applicant had accepted, the Applicant no longer has a right in law to challenge her sack. To this, I must say the Respondents' Counsel, with all respect, did not quite appreciate the issue at stake. The issue is not whether or not there is proper notice, but rather that the reason for the sack is unlawful. To this extent, the convention in question is inapplicable.

The duty of the Court to prevent a breach of the provisions of the fundamental rights sections of the *1999 Constitution* is heightened by the Nigerian obligations to the comity of nations which also forbids such practices – see the *African Charter* supra and the *ILO's Convention No. 111 of 1958* on Discrimination. This obligation is reflected in section 254C – (1) (f) - (h) of the *1999 Constitution* as altered.

I therefore find that the Applicant fundamental rights have been breached, and then the next question is, what is the remedy? There is no injury without remedy. In the instant case, the Court cannot order reinstatement as this is a case of master/servant relationship, and the Applicant did not claim same. The Applicant has claimed general and exemplary or aggravated damages. A party is entitled to general damages if it is established that the party has suffered an injury or a wrong has been committed against that party. General damages are meant to compensate the party and put him in the position he would have been if the injury or wrong did not occur – see see *Gari v. Sierafina (Nig.) Ltd* (2008) 2 NWLR (Pt. 1070) 1. I therefore hold that the Applicant is entitled to general damages.

The Applicant has also asked for exemplary or aggravated damages. Exemplary damages are awarded as a punitive measure where malice or gross disregard for the law is proved – see para. 1258, *Sasegbon's Laws of Nigeria*, Vol. 8, DSC

Publications, Lagos, 2005 and para. 1115, p. 518, *Halsbury's Laws of England*, Vol. 12(1), Fourth Edition Reissue, Reed Elsevier (Uk) Ltd, 1978, *G.F.K.I. (Nig.) Ltd v. NITEL Plc* (2009) 13 NWLR (Pt.1164)344 at 373. It is clear that exemplary damages are awarded in very restricted and enumerated situations. Unfortunately these situations do not accommodate the Respondents in this case.

In *Chief Williams v. Daily Times of Nigeria* (1990) 1 NWLR (Pt. 124) 1 the Supreme listed the categories of situations where exemplary damages could be awarded as: (1) where statute prescribe them, (2) where oppressive, arbitrary or unconstitutional act of a government servant has giving rise to the suit, and (3) where the defendant's tortuous act has been outrageous or scandalous and was done with a guilty knowledge, the motive being that the chances of economic gains far outweigh that of penalty. Section 46 of the *1999 Constitution* does not prescribe that exemplary damages shall be awarded in case of violation of the rights secured. It is also clear that the Respondents are not government agents and neither was their tortuous act done with a view of profit in mind. This is a case of unlawful termination of appointment which grossly violates the protection granted to the Applicant by the *1999 Constitution*.

Aggravated damages are awarded to compensate the plaintiff for his wounded feelings – see para. 1114 of *Halsbury's Laws of England* supra. In the same paragraph, *Halsbury's Laws England* enumerated the situations under which a court may grant aggravated damages as follows:

> *In actions in tort, where the damages are at large, the court may take into account the defendant's motive, conduct and manner of committing the tort, and, where these have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded. The defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner. The court may consider the defendant conduct up to the conclusion of the trial, including what he or his counsel may have said at the trial.*

I have given a most careful consideration to the above. I must state that the feelings of the Applicant has no doubt been wounded by the Respondent's assault on her womanhood. Her pride has also been severely wounded. It is on record that the Applicant made several self-humiliating entreaties to the Respondents to

reconsider the decision to sack her which the Respondents flagrantly rebuffed. It is also on record that the Applicant even appealed to the 1st Respondent's Head Office in the United States which instead of calling the 1st Respondent to order decided to ratify its illegal act. It is also equally on record that up till now the Respondents have not shown any remorse: they have continued to justify the action. Considering this high-handedness and gross violation of the constitutional rights of the Applicant, it is my considered opinion that the Applicant is entitled to the award of aggravated damages to compensate for her wounded feelings.

This Court held, in *Industrial Cartons Ltd v. NUPAPPW* (2006) 6 NLLR (Pt. 15) 258, a case of ordinary wrongful termination of employment, that one month salary in lieu of notice would not meet the justice of the case. The Court frowned at the peremptory manner by which the Claimant's appointment was terminated which the Court believed had the effect of suggesting that the Claimant did something wrong. The Court awarded six months salaries as meeting the justice of the case. What is more, this is a case of gross violation of the constitutional rights of the Applicant and peremptory termination of appointment of the Applicant is suggestive of the Applicant's commission of a wrong which deserves greater vigilance of protection from any court of law: this Court will not condone willful violation of the *Constitution* of this Country under any pretext. Based on this authority and section 19 (d) of the *National Industrial Court Act, 2006*, I assess the compensation to which the Applicant is entitled to be one year of her full gross pay which is **N5, 576,670** (Five Million Five Hundred and Seventy-Six Thousand Six Hundred and Seventy Naira only) – see exhibit 3 of the Applicant's Affidavit.

This is the judgment of the Court. I make no order as to costs.

.....

Hon. Justice B.A. Adejumo, OFR
President, National industrial Court of Nigeria

CHIEF REGISTRAR'S OFFICE NATIONAL INDUSTRIAL COURT Date 14/6/16

NATIONAL INDUSTRIAL COURT SIGN DATE 14/6/16 ABUJA

CERTIFIED TRUE COPY
TARGEMA J. I.
Deputy Chief Registrar

NATIONAL INDUSTRIAL COURT
ABUJA