THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: GBADEGBE, JSC (PRESIDING)
APPAU, JSC
DORDZIE (MRS), JSC
AMEGATCHER, JSC
KOTEY, JSC

CIVIL APPEAL
SUIT NO. J4/27/2015

11TH DECEMBER 2019

1. KWAME BOADI ACHEAMPONG
2. WISDOM NTIM AWUKU ……. PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS

GHANA HIGHWAYS AUTHORITY ……. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY AMEGATCHER JSC, AS FOLLOWS:-

The Directive Principles of State Policy in the 1992 Constitution embraces the life of the nation. It is the policy document by which the state is to create social and economic conditions for the citizens to lead a good life. Article 35 for example mandates the State to provide adequate facilities for and encourage, free mobility of people, goods and services throughout Ghana. Good road networks linking the country together is one of the ideals the State intended achieving under the Directive Principles.

In 1997, Parliament passed the Ghana Highway Authority Act, 1997 (Act 540) establishing the Authority as one of the agencies under the Ministry of Transportation. Among others, the objectives of the Authority are to plan, develop, maintain, protect, administer and

provide safe and adequate infrastructure for road transportation commensurate with the economic development of the country. The Authority is also charged to carry out, either through its employees or through independent contractors, the necessary routine periodic and emergency road maintenance activities in accordance with the service level of maintenance established for each class or type of trunk road.

For the purposes of effective implementation of its functions, the Authority, opened up departments and divisions manned by directors and such other officers and employees as may be necessary for the proper and effective performance of its mandate in all the regions of the country. It is to one of such departments that the 1st and 2nd appellants were employed as Maintenance Engineer and Quantities Manager respectively in charge of the Western Region.

Sometime in 2005, the Ministry of Transportation had information concerning specific roads in the Western Region where it appeared that the road contractors were paid contract sums for no work done. The Ministry was worried because in spite of billions of Cedis spent by Government each year in periodic and routine maintenance works to improve the road network conditions, the outcome did not seem to be commensurate with the huge maintenance expenditure being made, and this kept rising year after year.

The Ministry, therefore, set up a committee and Monitoring Task Force which investigated the matter and made its findings and recommendations. The findings revealed that a total amount of Two Billion, Three Hundred and Seventy-Six Million, One Hundred and Thirty-Eight Thousand, Seven Hundred and Ninety-Six Cedis has been certified for payments for works that have not been executed. Affected roads included the Sefwi Bekwai By-Pass Road, Tarkwa Town Roads and access road across the bridge to Bekado Community Projects. Other inspected roads revealed that the required activities were not executed satisfactorily, but had been certified for payment.

The Ministry forwarded the report to the respondent Authority for implementation. On receipt of the report, the respondent Authority set up an investigation committee to look into what it termed "payment irregularities." This was followed by a disciplinary

committee under the Senior Staff Conditions of Service in which charges of fraud and dishonesty were preferred against the appellants. The disciplinary committee found the appellants guilty of dishonesty but acquitted them of fraud. The disciplinary committee recommended as punishment a demotion in rank and possible removal with benefits.

The respondent Authority accepted the report of the disciplinary committee but rejected its recommendation for punishment. It summarily dismissed the appellants on 22nd February 2006 under section 49(D) of the Senior Staff Conditions of Service. My Lords, the facts above thus form the genesis of this legal battle which started in January 2007 and is currently in its twelfth year on appeal to this court.

The appellants, aggrieved at the summary dismissal, exercised their right under the Constitution to challenge the lawfulness of same. They mounted a suit at the High Court, Accra against the Authority for wrongful and disproportionate dismissal contrary to Articles 192 and 296 of the 1992 Constitution, an order for reinstatement and payment of all outstanding salaries and emoluments. The dream, however, of the appellants to reverse their dismissal became a reality when the High Court, Accra on 18th December 2009 delivered judgment in favour of the appellants and granted all the three reliefs sought by them. Unfortunately for the appellants, this relief was short lived because on 7th November 2013, following an appeal lodged by the respondent Authority against the High Court judgment, the Court of Appeal unanimously reversed the High Court judgment.

The Court of Appeal judgment stated that, "**with all respect to the learned trial judge, there was everything factually and legally wrong with every one of his evaluated positions.**" The Court of Appeal cited evidence to establish deception, material lies, and untruthfulness on the part of the appellants. However, the Court of Appeal also noted that the plaintiffs had served many years in the public service and that the respondent Authority had been inconsistent with regard to punishing the three persons identified in the particular acts under review and so the Court of Appeal reviewed the scope of punishment of the respondents and abated the sanction to removal with full terminal benefits to the point where their employment was terminated.

The appellants disagreed with the evaluation of the evidence and application of the law by the Court of appeal. They filed a notice of appeal on 29th January 2014 to the Supreme Court containing ten grounds of appeal. My Lords, it is this appeal which the apex court is called upon to determine. The appellants filed ten grounds of appeal. In our opinion, the central issue in this appeal is whether there was any legal basis for the disciplinary action taken against the appellants. We believe a decision on this will dispose of the whole appeal.

Counsel for the appellants has submitted in this appeal that the dismissals had been orchestrated by the combined team of the Ministry and respondent Authority fact finding teams thereby making their dismissal unfair. According to counsel, the respondent did not suffer any loss over the issuing of the Interim Payment Certificates (IPCs), no destruction was wrecked on the national purse and road users for the Court of Appeal to take judicial notice and therefore that claim of losses from overpayments was much ado about nothing. Counsel also submitted that the appellants were made 'sacrificial lambs' and victimised and the punishment meted out to them disproportionate because of their weak standings and not that they had done anything wrong. Further, counsel submitted that the preparation of the IPCs by the appellants was based on superior orders as it was the existing practice in the Western Region which was not unlawful. Finally, the appellants invited this court as a court of equity to withhold the Court of Appeal's decision which had been tainted with perceptions of arbitrariness and discrimination.

We have reviewed the record embodying the fact-finding investigation reports and the response by the appellants in the evidence adduced in this matter. We have also analysed the judgments of the High Court which granted the prayer of the appellants and the Court of Appeal which reversed the High Court's judgment. Although the Constitution of the country grants litigants an unfettered right to appeal against the decisions of the Court of Appeal to the apex court, it is the role of every litigant to carefully search his conscience, examine his case very well and be sure about the law supporting his case before exercising that right of appeal to the Supreme Court. It seems to us that some parties gamble with this right of appeal. Others use the appeal process as a face-saving

measure in the hope that the justice delivery system will endorse their unacceptable conduct. We see the appeal before us as one example of a gamble. What motivated the appellants to lodge this appeal to this court beats our imagination. We cannot however, totally blame the appellants. It is sad to say that irrespective of the evidence on record, the trial judge could rule in favour of the appellants declaring their dismissal unlawful and ordering reinstatement to their positions in the respondent Authority. Apart from finding that **there was everything factually and legally wrong with every one of the trial judges evaluated positions,** this is how the Court of Appeal described the learned High Court judge at page 179 of the record:

"**It would seem that the honourable trial judge allowed himself to be drawn into the charred conscience of the respondents and other officers of the GHA, in seeking to justify falsehood, deceit and the dishonest behavior they indulged in when he held that to the extent that the committee was satisfied that it had not been established that the respondents indulged in the dishonest acts for gain, they ought not to have been found to perpetrators of dishonesty. However, as is well known, the acts of corruption in the public services are notorious for being as invidious as they are insidious**."

The description is apt and we do not think that any further comments or adjectives are needed to describe the way the trial High Court judge handled this case.

After reviewing the record, this is what the Court of Appeal found about the character of the appellants who are fighting their innocence in this appeal. Torkonoo JA who delivered the lead judgment described the appellants at page 167 as follows:

"**One does not need to go far in a cursory reading of the ROA to appreciate the fact, weight and import of the dishonesty perpetuated by the respondents on their employers, the wider community of persons involved in the contracts they were obligated to supervise, and the destruction wreaked on the national**

purse and lives of road users by the acts of dishonesty that led to their dismissal."

She then concluded at page 175 that:

"**Through these lines of validation, the nation released millions of Ghana Cedis to the contractors for what was in effect, a mirage and figment of imagination. In our humble opinion, if this does not look, smell and taste like acts of dishonesty, we cannot recognize it when we see it**."

Similarly, Ofoe JA in his supporting opinion appalled at the conduct of the appellants blurted out with the following quote from the Ministry's report:

'Some of the revelations were serious and showed a lack of professionalism by both the supervising staff and the affected contractors. Billions of Cedis have been certified for payment for works that have not been executed….. Generally the supervisory capacity of the regional offices is inadequate. It was clear that the focus of the supervisory staff was more on preparing payment certificates than on quality control. …… Indeed, the concern of the Ministry that serious disparities exist between certified works and the actual executed works on the ground has been confirmed in the Western Region…. The huge overpayments are to be retrieved with interest from the contractors and the supervisory staff involved in the certifications sanctioned."

Then at page 192 this is what Ofoe J.A. said **"On the basis of these findings the committee found the respondents dishonest. We think this is an appropriate description of the acts of the respondents."**

In spite of the observations made above by the Court of Appeal supported by evidence adduced from the record, the appellants lodged this appeal before us submitting that they were not dishonest and were victims of unfair treatment orchestrated by the combined investigation team of the Ministry and the respondent Authority. The appellants

also submitted that they were made 'sacrificial lambs' and victimised and the punishment meted out to them disproportionate because of their weak standings and not that they have done anything wrong.

During the evidence of the 2nd appellant, the following dialogue went on between him and counsel for the respondent at page 53-54 of the record:

Q. Let's go on. Now to raise an IPC there are things that you have to do, last time I took your friend through it. All those things must be done before an IPC can be properly done?

A. Yes My Lord.

Q. In this case you didn't do them?

A. Some.

Q. What you did was to try and project so you forged figures?

A. Yes My Lord…….

Q. Was your boss not punished?

A. But I was punished more than him.

Q. So that is why you are here because the punishment you got was more than him?

A. Yes because I need not to be punished at all.

Apart from the 2nd appellant, the evidence of the respondent's representative Joe Fred Peso at page 69 which was not challenged in cross-examination exposed how the appellants orchestrated their acts of dishonesty with the contractors:

Q. Tell us briefly the facts which informed the committee to find that the plaintiff and others were involved in dishonesty?

A. My Lord we found that certificates prepared from the Western region were certificates for pre-payment and they were presented as certificates for actual work done. So, for that matter we found them liable [sic] of dishonesty."

Joe Fred Peso went further to explain at page 70 the procedure for raising IPC's which the appellants did not follow. According to him:

"**My Lord the procedure is that the contractor first brings the request and then the material support is prepared by the material engineer. Then the maintenance manager and the quantity surveyor go to the site and take field measurements. And then when they come back to the office the quantity surveyor transfers the field measurements into taking off sheets and then prepares bills of quantity and then again prepares a certificate. When the certificate is prepared it is taken to the maintenance manager to be reviewed and then it is taken to the regional director to sign it and then it is sent to the regional administration for signature and then from there to the Highway head office."**

The appellants acted as maintenance manager and quantity surveyor who were assigned those important positions of trust to inspect the site, take field measurements and prepare certificates for their superiors to sign before payment was made to the contractors. Blinded by selfish and dishonest motives, they breached this position of trust and deceived the Ministry and respondent Authority to part with millions of Ghana Cedis for no work and in some cases shoddy work done. The 2nd appellant in the dialogue produced above admitted forging the figures for payment to be effected. If this is not dishonesty, we cannot determine what will qualify as one. Truth be told, the appellants were plainly dishonest and in so doing breached Articles 49(B), (C) and (D) of the Senior Staff Conditions of Service, exhibit "W".

Article 49 vested power in management to take disciplinary action against an officer who commits a major or minor offence. Major offence is defined to include bribery, corruption or other dishonesty. The sanction provided for breach is dismissal with forfeiture of all terminal benefits except benefits payable under the Social Security and National Insurance Trust. The decision to dismiss appellants summarily was made in accordance with the Conditions of Service. We endorse the dismissals. In our opinion, management cannot be faulted for the dismissals.

A case with similar ratio as this case came before the Court of Appeal in **Lever Brothers Ghana Ltd v Annan; Lever Brothers Ghana Ltd v Dankwa (Consolidated) [1989-90] 2 GLR 114.** Under article 31 of the contract of employment, employees could be summarily dismissed by the employers, where the employee had been guilty of serious misconduct such as dishonesty or other serious offence. Lever Brothers, alleging that the plaintiffs had been involved in a fraudulent deal relating to the sale of their products, suspended the plaintiffs from duty and referred the allegation of fraud to the police for investigation but later withdrew the criminal complaint from the police and summarily dismissed the plaintiffs from their employment. The plaintiffs sued in the High Court-claiming damages for wrongful dismissal. The trial judge found for the plaintiffs. On appeal, the Court of Appeal held that where an employee had been guilty of misconduct so grave that it justified instant dismissal, the employer was entitled to dismiss summarily such an employee he considered guilty of dishonesty without even a hearing.

In this appeal before us, even when it was clear as crystals in the investigation reports that the appellants had committed dishonesty, the respondent Authority nevertheless gave them full hearing before the dismissals. The appellants then questioned the decision of management to summarily dismiss them because the respondent's investigation committee had recommended their reduction in rank. Our answer to this can be found in another Court of Appeal case entitled **Republic v. State Hotels Corporation; Ex parte Yeboah [1980] GLR 875**. In this case, article 26 of the collective agreement entered into by the State Hotels Corporation and the Industrial and Commercial Workers Union

(I.C.W.U.) of the Trades Union Congress provided that, "Any employee who in the opinion of the employer has been found guilty of a serious misconduct such as dishonesty, insubordination, drunkenness, dereliction of duty shall be dismissed." A board of inquiry appointed by the corporation found that the respondents, employees of the corporation and members of the I.C.W.U., had inflated the prices of some potatoes they bought for the corporation and shared the money. The managing director on receipt of the report summarily dismissed the respondents. The respondents then brought an action for an order of certiorari to quash the report of the board of inquiry and the decision to dismiss them. The Court of Appeal per Edusei JA held at page 879 that:

"**where a collective agreement vested the corporation with the power to dismiss summarily any employee who in its opinion had been found guilty of dishonesty, the corporation had the power to dismiss them summarily and the decision to dismiss summarily was entirely for the managing director who was in no way bound to accept the recommendations of the board of enquiry**."

In our opinion, the recommendations of the investigation/fact finding enquiry set up by the respondent Authority was not binding on management. The Chief Executive was right in making his own decision to dismiss the appellants summarily.

Another submission put forward by the appellants is that in the performance of their functions, they acted on superior orders as was the existing practice in the Western Region. Regrettably, they have been made 'sacrificial lambs' and victimised with disproportionate punishment. We will not buy into the defence of a criminal or unlawful act being legalised because it has been made the practice in an establishment. No matter how long the practice may be, what is unlawful will remain unlawful. The law on superior orders is settled. Halsbury's Laws of England (4th ed), Vol. 11(1) has this principle at p. 34, para. 27:

"**The mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not excuse the person who does it from criminal**

liability, but the fact that a person does an act in obedience to a superior whom he is bound to obey, may exclude the inference of malice or wrongful intention which might otherwise follow from the act."

In the case of **Yaokumah v The Republic [1976] 2 GLR 147** a major in the Army drove a military vehicle to the Ghana-Togo border and loaded uncustomed goods headed for Accra. He was apprehended at a check point and arrested. At his trial, he pleaded the defence of superior orders. On appeal to the Court of Appeal, Amissah JA stated the legal position in the following words:

"**This in effect amounts to a defence of superior orders. We agree that a subordinate officer is obliged to obey the commands of his superior. But this obligation is limited to commands which are lawful or at least are not obviously unlawful. Besides the commands must be given in the course of duty…. The appellant's own conduct is giving a false reason to the officer responsible when requisition the transport and the various false explanations he gave when found out is ample evidence of his knowledge of the unlawfulness of such order or request by his superior officer. He was not under a duty to obey or to comply with any such order or request."**

The appellants also put forward the arguments that the respondent did not suffer any loss over the issuing of the Interim Payment Certificates (IPCs); no destruction was wrecked on the national purse and therefore that claim of losses from overpayments was much ado about nothing.

We disagree with the appellants submission on the effect of the issuance of the IPC.s on the national purse. Funding for road construction is provided by Parliament from hardworking tax payers' contributions, loans from developmental partners, revenue accruing from the Authority and monies transferred to the Authority from the Road Fund Board - see sections 25 and 26 of Act 540. The huge capital outlay for road construction and maintenance has been the challenge of all governments in this country since independence who struggle to raise the needed revenue from the yearly budget to meet

the daily cry for such infrastructural developments coming from farmers, chiefs, industrial companies, school children, community leaders and so on. The demand for road maintenance and construction is far greater than what the yearly budget of any government can accommodate. It is, therefore, disheartening for the appellants to collude with fellow Ghanaian contractors and rob the state of hard-won resources set aside to meet the states obligations for infrastructural developments and then gather the courage to argue that the loss complained of was much ado about nothing.

Public servants owe a duty to serve the state with total commitment, dedication and honesty. Where their conduct as in this case fell short of the high calling expected on them, they would have failed in their position of trust and a betrayal to the people and the national interest. Such a betrayal will not qualify the public servant to be rewarded with benefits and gratuity which is reserved for exiting employees who serve with distinction and unblemished records.

We note that at the concluding stages of the judgment of the Court of Appeal it applied the doctrines of equity vis-a-vis the punishment that was meted out to the regional director of the Authority and came to the conclusion that the appellants had worked for several years and deserved to be given some reprieve aimed at proportionality with the way the regional director was treated. This is how Torkonoo JA put it at page 182:

"**As grave as the acts of dishonesty of the Respondents are, we note that prior to the matters in contest, they had served many years in the public service. Again, we note that the appellants were inconsistent with regard to punishing the three persons identified in the particular Acts under review. Mr. Nai Kwade who presided over the preparation of the IPC remained employed while the respondents were punished by termination of appointment and loss of benefits. As a court of equity, we review the scope of punishment of the respondents and abate the sanction to removal with full terminal benefits as at 22nd February 2006, when their employment was terminated**."

We take a serious view of the dishonest conduct of the appellants which has had and continue to have negative effects on the entire citizenry of this country not mentioning expectant mothers who travel on some of these bad roads daily without reaching the hospitals and health facilities because of miscarriages suffered as a result of the state of the roads. My Lords, mindful of the collective commitment imposed on us by Article 35(8) of the Constitution that "The State shall take steps to eradicate corrupt practices and the abuse of power," we have parted ways with the Court of Appeal. We disagree with the reasons assigned for abating the maximum punishment imposed on the appellants and granting then reprieve to walk away with their benefits. Our position is strengthened by the case of **CHATLANI v HAROUTUNIAN [1974] 2 GLR 263.** In that case, the plaintiff was employed by the defendant as a store-keeper and later manager of the defendant's retail store. Later, shortages both in cash and in goods were discovered after stock-taking. There were other shortages discovered in previous stock-takings. Also, on three different occasions, the plaintiff borrowed money from the cash sales for his own personal use without the knowledge and consent of the defendant. The plaintiff was summarily dismissed by the defendant because of the shortages. The plaintiff sued claiming damages for wrongful dismissal and payment of his gratuity. Abban J (as he then was) held that at the time of the plaintiff's dismissal his honesty for that post of trust had become questionable and since his dismissal was justified, the plaintiff cannot recover damages, neither can he succeed in his claim for gratuity. "**It is my view that payment of gratuity to an employee is dependent upon faithful and efficient discharge of services to the employer and upon the employee leaving the employment on grounds other than misconduct**."

We endorse this dictum of Abban J (as he then was) and restate the legal proposition that payments of gratuity, end of service benefits or any other package to a worker severing relationship with the employers on any grounds is a condition precedent on the employee leaving without blemish and upon faithful and efficient service to the employer. Where as in this case the basis for the severance in relationship is on the grounds of fraud, dishonesty, breach of trust or other serious misconduct, the employee would not

be entitled to the benefits associated with leaving the service of the employer. Accordingly, the evidence on record having confirmed without doubt that the appellants were involved in acts of dishonesty resulting in their dismissals, we find no basis for the concession granted by the Court of Appeal reducing appellants summary dismissals to removals with full benefits. We, therefore reverse the decision of the Court of Appeal to abate the dismissals to removals with full benefits and restore the summary dismissals imposed on the appellants by the respondent under article 49(D) of the Senior Staff Conditions of Service.

In conclusion, we find no merit in the appeal lodged at this court against the decision of the Court of Appeal dated 7th November 2013. We, accordingly, dismiss the appellants appeal. We vary the Court of Appeal's order abating the dismissals to removals with full benefits and order that the terminal benefits, if paid to the appellants should be retrieved from the appellants and returned to respondent Authority's chest.

SGD. N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

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