IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2015

CORAM: WOOD CJ(PRESIDING)

ADINYIRA (MRS),JSC

DOTSE JSC

BAFFOE BONNIE JSC

BENIN JSC

CIVIL APPEAL

No.J4/47/2014

25TH MARCH 2015

IN THE MATTER OF

JOHN TAGOE ***PLAINTIFF/RESPONDENT/APPELLANT***

VRS.

ACCRA BREWERY LTD. ***DEFENDANT/APPELLANT/RESPONDENT***

BENIN,JSC:-

The plaintiff/respondent/appellant, hereinafter called the appellant, was employed in the service of the defendant/appellant/respondent, hereinafter

called the respondent, in or about 1971. And for about thirty-six years he remained in the employment until his appointment was terminated by the respondent in August 2007. The reason for the termination of his appointment was that the appellant was alleged to have assaulted another member of staff whilst on duty. A disciplinary committee was set up to investigate the complaint and the committee concluded that the alleged assault was proven on the evidence placed before it. The appellant appealed to the disciplinary appeals committee to reconsider his case. After re-hearing the matter on appeal, the appeals committee dismissed the appeal. The appeals committee as well as the first committee both derived their legitimacy from the Collective Bargaining Agreement (CBA), tendered as Exhibit D, that was operative between the employees and the respondent company at all times material to this case.

Having exhausted the internal mechanisms, the appellant approached the High Court with a writ of summons, subsequently amended, claiming the following relief against the respondent:'general damages for wrongful termination of appointment which damages include but not limited to salary, social security contribution, allowances and entitlement from the date of termination of employment.'

After a hearing, the High Court upheld the appellant's claim, having found as a fact that the charge of assault was not established by the evidence on record. It held the termination was wrongful and therefore ordered the respondent to pay damages to the appellant. The respondent appealed against the judgment of the High Court to the Court of Appeal which upheld the appeal and set aside the judgment and orders of the High Court. The main reason why the Court of Appeal upset the High Court's judgment was that the allegation of assault was proven on the established facts. Indeed the Court of Appeal was prepared to rest its judgment after concluding that in its evaluation of the evidence the assault charge was established. However, it went on to talk about other matters which will be discussed herein if and when they become relevant to the determination of the grounds of appeal filed by the appellant in his appeal against the judgment of the Court of Appeal.

The grounds of appeal, as amended, are:

1. The judgment of the Appeal Court is against the weight of evidence.
2. The Appeal Court erred when it equated the prove (sic) in the case of Kusi & Kusi v. Bonsu (2010)SCGLR 60 at 65 to the prove (sic) of assault in the appeal pending before it.
3. The lower court erred when it held that the employment of the appellant was properly terminated.

Counsel for the appellant argued grounds 1 and 3 together. We begin with the omnibus ground that the judgment is against the weight of evidence. A lot of the facts were undisputed on the pleadings and thus required no further proof. These were:

i. The appellant was in charge of the respondent's vehicle with registration number GT 4598 X at all material times.
ii. On the day of the incident, that is 10th July 2007, the appellant's vehicle was loaded with the respondent's products to be conveyed to Tamale.
iii. The appellant's vehicle was to be filled with 950 litres of diesel for the journey and the appellant was issued with a coupon or invoice to collect this quantity of fuel.
iv. The appellant drove the vehicle to the respondent's filling station to load the fuel which filling station was under the charge of Maxwell Nkansah, an employee of the respondent.
v. The said Maxwell Nkansah fueled the vehicle with 940 litres of diesel leaving ten litres to be filled.
vi. The appellant requested Maxwell Nkansah to put the remaining ten litres in a jerry can for him to take along on the trip, but Maxwell Nkansah refused that request.

Thus far there is no issue joined as earlier said. As to why the remaining ten litres was not filled into the tank of the vehicle and whether the appellant was entitled to collect it at all cost, were not very clear and were not even considered at all at every stage of the proceedings though they appear to have some bearing on the events of that day. According to the evidence on record, which include the sworn

testimonies at the disciplinary proceedings, which were tendered at the trial court, Maxwell Nkansah claimed that after putting in the 940 litres, the tank of the vehicle was full to the brim, so he naturally withdrew the fuel pump. On the other hand, the appellant said he requested Nkansah to put in 940 litres and allow him (the appellant) to take the remaining ten litres in a jerry can. He said he made that request because when the tank was filled to the brim the fuel spilled to the ground on bumpy and pot-hole surface of the road. So it was to conserve the fuel and ensure optimum utilization that he requested that the ten litres be put in a jerry can.

Whatever the reason was, the fact remains that not all the 950 litres entered the vehicle fuel tank. It is undisputed that Maxwell Nkansah declined the appellant's request to put the remaining ten litres in a jerry can. The appellant decided on his own to fill the jerry can with the ten litres with the aid of his vehicle mate, one Samuel Otu. And whilst they were drawing the fuel into the jerry can Maxwell Nkansah took hold of the fuel pump and a struggle ensued between Maxwell and the appellant over the equipment, with the result that the fuel splashed on people and/or spilled on the floor. Maxwell Nkansah then went to the Police and lodged a complaint of assault against the appellant claiming the latter slapped him. The appellant rejected the charge. There is no evidence that any further action was taken on the Police complaint.

However, the respondent set in motion its disciplinary process. The appellant was charged with assault before the disciplinary committee. Besides Maxwell Nkansah and the appellant, evidence was adduced by three of the respondent's employees who were at the scene of the incident. The Disciplinary Committee concluded that the appellant did assault Maxwell Nkansah and recommended that his appointment be terminated in place of an outright dismissal which according to the committee was the appropriate penalty for the offence committed. The reason for that recommendation was because of his long service to the respondent. The appellant appealed to the disciplinary Appeals Committee but it was also rejected.

The appellant's case before the court was that he did not commit any offence for which his appointment should be terminated. He rejected the charge of assault and pleaded that his appointment was wrongfully terminated. On the other hand, the respondent pleaded a case of assault against the appellant and led some evidence on it.The trial court judge properly allocated the burden of persuasion when he held that "whether or not the termination of the appointment of plaintiff is contrary to the collective agreement is the principal issue that has to be proved." The High Court judge also held, and rightly so, that assault was a criminal offence and thus the standard of proof was that beyond reasonable doubt, although in a civil trial. The court held that since it was the respondent who was alleging assault against the appellant, the burden of producing evidence and of persuasion rested with them and were required to prove same beyond reasonable doubt. In the court's view whilst the appellant had succeeded in proving that he did not commit the offence for which his appointment was terminated, the respondent did not meet the required standard of proof; indeed it failed to lead any direct evidence of the alleged assault. Both parties, however, relied on the evidence recorded at the disciplinary hearing which was put in evidence, as earlier mentioned.

The Court of Appeal disagreed with the High Court on its findings and concluded that a case of assault was established. This is what the Court of Appeal said:

"In his evidence in chief, the respondent stated that it was a struggle that ensued between him and Maxwell Nkansah……

The respondent tendered Exhibit A, the Disciplinary Committee Enquiry Report. In Exhibit A, witnesses before the Committee also said there was a struggle between the respondent and Maxwell Nkansah.

Assault has been defined in the Osborn's Concise Law Dictionary (8th Edition) edited by Leslie Rutherford and Sheila Bone as '……..any act committed intentionally or recklessly, which leads another person to fear immediate personal violence. An assault becomes battery if force is applied without consent. Assault is also a tort consisting of an act of the defendant which causes the plaintiff reasonable fear of the infliction of battery on him by the defendant.'

See also section 85 of the Criminal Offences Act, 1960 (Act 29)……

From the definition supra, the struggle of the respondent with Maxwell Nkansah when the latter was carrying out his legitimate duty of filling the respondent's vehicle with fuel constituted assault on Maxwell Nkansah. Having admitted that he struggled with Nkansah, when the latter was carrying out his duty, there is no need for further proof as admitted facts need no proof.

See the case of Kusi & Kusi vrs. Bonsu (2010) SCGLR 60, 65: 'Where no issue was joined as between parties on a specific question, issue or fact, no duty was cast on the party asserting it to lead evidence in proof of that fact or issue.'

Ground 1 succeeds and same is hereby upheld." Ground 1 was the omnibus ground that the judgment was against the weight of evidence.

It appears the Court of Appeal over simplified the issue by not paying attention to the parties' pleadings. Among others, section 85 of Act 29 says assault includes battery. Thus the allegation by Maxwell Nkansah could well be considered as battery or both assault and battery. Assault and battery has been defined in section 86(1) of Act 29 to mean the situation where a person, without the other person's consent and with the intention of causing harm, pain, or fear, or annoyance to the other person, or of exciting him to anger, he forcibly touches the other person or causes any person, animal, or matter to forcibly touch him. It seems that the respondent's case was based on battery involving forcible touch by way of a slap to the face of Maxwell Nkansah. It was in that context the case of the respondent ought to have been examined by the Court of Appeal.

The appellant pleaded that the issue about the ten litres of fuel which he requested Maxwell Nkansah to give him 'brought a misunderstanding between him and Maxwell Nkansah. That he never assaulted Maxwell Nkansah and that all the witnesses who testified at the enquiry spoke in his favour that he did not assault Maxwell Nkansah.' These averments are contained in paragraphs 10-12 of the appellant's amended statement of claim. The respondent denied these averments by paragraphs 9 and 10 of their statement of defence. Significantly, the respondent pleaded in paragraph 4 of the statement of defence that they 'will

contend at the trial that plaintiff assaulted Maxwell Nkansah for the simple reason that plaintiff attempted to steal fuel the property of the defendant.'

The High Court took the position that since the respondent pleaded assault, the burden of proof rested with them, for it is trite law that he who alleges, be he a plaintiff or a defendant, assumes the initial burden of producing evidence. It is only when he has succeeded in producing evidence that the other party will be required to lead rebuttal evidence, if need be. However, in a claim founded on wrongful termination of employment contract, the plaintiff assumes the initial burden of producing evidence to satisfy the court about his terms of employment and also that the termination of his appointment was contrary to the terms of his appointment or existing law. The defendant would then be obliged to produce evidence to justify the termination. Thus in this case despite the respondent's plea of assault as justification for the termination of the appointment, the burden of proof does not shift on them before the appellant has made a case in terms as stated above.

The appellant led evidence that he did not assault Maxwell Nkansah. He narrated the events of that day and the proceedings before the two disciplinary committees whose records were tendered in evidence. The proceedings before the Disciplinary Committee, Exhibit A, clearly show that none of the three witnesses who testified at the enquiry supported the claim by Maxwell Nkansah that the appellant slapped or hit him. They all confirmed that the appellant and Maxwell Nkansah did struggle over control of the fuel pump. But at the Disciplinary hearings as well as before the trial court it was never the respondent's case that there was a struggle between the appellant and Maxwell Nkansah. It was their case all through the said proceedings and in the trial court that the appellant slapped Maxwell Nkansah in the face when the latter confronted the appellant over his wrongful act of drawing fuel into the jerry can.

From Exhibit A the Committee decided there was proof of assault because of the evidence that after the struggle Maxwell Nkansah was looking for something to hit the appellant. They believed Maxwell was looking for something to hit the appellant in retaliation for the appellant hitting him. This was their conclusion in

the face of the evidence from all three witnesses named by both Maxwell Nkansah and the appellant, see exhibit 6 at pages 196-197, that the appellant did not hit Maxwell. The inference drawn from the clear evidence was palpably wrong. If anything at all Maxwell's desire to look for something to hit the appellant constituted assault for that would place the latter in fear of harm.

On the evidence before the High Court it found as a fact that there was no evidence that the appellant touched Maxwell Nkansah as alleged. And from the record of proceedings at the disciplinary hearing all the three witnesses affirmed the appellant's version that he did not slap or hit Maxwell Nkansah. On that score the High Court upheld the appellant's claim since the respondent who assumed the burden of producing evidence failed to produce the required evidence in support of their own pleadings that the appellant assaulted Maxwell Nkansah. The High Court's finding that the appellant did not slap or hit Maxwell Nkansah cannot be faulted in the face of the evidence before the court.

The Court of Appeal did not find anything wrong with the trial court's finding that the appellant did not physically assault Maxwell Nkansah. So it sought to justify its decision by the fact that Maxwell Nkansah was performing his legitimate duty hence the struggle with him over the fuel pump was tantamount to assault. But the court did not consider that it was Maxwell Nkansah who rushed on the appellant to retrieve the fuel pump from him whilst he was taking the fuel. And there was evidence that the appellant had been issued with what was variously described in the proceedings as an invoice or a coupon, to take 950 litres so he felt it was legitimate in line with what they had been doing there to take all the allotted consignment. There was uncontroverted evidence that on long distance journey especially to Bolga they used to carry extra fuel in jerry can. So contrary to what the respondent claimed, there were precedents to confirm that it was not against company policy to carry fuel in jerry can. Even if the appellant's insistence on taking the fuel in a jerry can sounds unreasonable yet for purposes of proving assault in crime under section 13(1) of the Evidence Decree, 1975 (Act 323) or even in tort, such unreasonable conduct or behaviour is not sufficient to constitute proof, as all the witnesses said that he did not touch Maxwell Nkansah, contradicting what the latter had told the enquiry. None of the witnesses who

testified at the enquiry appeared to give testimony at the High Court. The person who testified for the respondent at the trial court DW1 Peter Kutah recounted what Maxwell Nkansah had told the Appeals Committee that the appellant hit him. This was the only evidence of assault adduced by the respondent in proof of the plea of assault. This was denied by the appellant. And all the parties agreed that three persons testified at the enquiry as eye witnesses to the incident. And all three witnesses categorically denied Maxwell Nkansah's claim that the appellant hit him. That was why the High Court upheld the appellant's claim in that there was no evidence of assault. On the contrary the Court of Appeal found assault established as a fact as stated above.

In summary the facts as adduced before the Committee as well as before the trial court showed that it was Maxwell Nkansah who rather rushed on the appellant to retrieve the fuel pump from his hands and the two of them struggled over it. Appellant believed he had a right to take the ten litres upon the invoice issued to him and he required it for the long distance trip, whilst Maxwell Nkansah felt otherwise. Both of them decided to stick to their position thereby leading to the struggle over the pump. Nkansah alleged the appellant hit him but this was found to be false. In these circumstances the charge of assault by either of them against the other would not lie. It must be pointed out at this stage that we are mindful of the law as pointed out earlier that assault does not require physical contact to prove. But, where, as in this case, physical contact is offered as proof of assault then the proponent must be forthcoming with the evidence to establish the fact. Under section 85 of Act 29, assault includes battery. But the mere fact that there was a struggle over the fuel pump would not suffice as proof of assault against either of them, for section 86(1) necessarily requires physical contact to prove the factum. In other words, in order to prove assault and battery what the court will be looking for is whether the accused did the act for which he was charged. Here the court would ask the question: did the appellant hit Maxwell Nkansah? And the answer would be negative because the appellant as well as all the three other eye witnesses testified that the appellant did not hit him. The court would not be obliged to consider which of the two persons had a more legitimate reason for the struggle over the fuel pump in order to find one of them liable for assault, as

the Court of Appeal purported to do. The appellant's conduct could have been the subject of a different disciplinary charge if indeed his insistence on taking fuel in a jerry can was contrary to company policy and an offence liable for sanctions under the CBA. But certainly it does not provide a motive for assault in this case, nor does it prove assault.

The trial court's findings of fact on the incident that took place on 10th July 2007 are supportable. The Court of Appeal ought not to have substituted its own findings for those of the High Court in the light of the pleadings and evidence on record. The first ground of appeal is accordingly upheld.

It follows from the finding above that since the termination was founded on the alleged assault it was wrongful for lack of evidence of assault. The third ground is accordingly upheld.

The second ground of appeal was actually otiose as the Court of Appeal did not equate proof in this case with proof in the case cited. The court only cited a principle of law from it that where facts are admitted on the pleadings or in evidence there is no need for further proof. The court was only saying that since there was admission in evidence by the appellant at the trial court and the other witnesses before the inquiry that there was a struggle between the appellant and Maxwell Nkansah over the fuel pump there was no need for any further proof of liability. That is a correct statement of the law. But it was the court's finding of liability based on the fact of the struggle that we disagree with. This ground of appeal fails.

The appellant claimed damages at the trial. The trial court made certain awards to the appellant. There was no appeal against the award of damages and that question was not raised or argued before this court. That being the position, we will restore the awards made by the High Court, which we do grant accordingly. The trial court found that as at the date it gave its judgment in June 2009 the claim had been pending for close to two years, meaning the appellant had almost retired. In paragraph 19 of the statement of claim, as amended, the appellant averred that 'he was employed by the defendant in or about 1971 and that he is 58 years old and will retire at the age of 60 years.' This averment was not

specifically denied by the respondent. There was only a general traverse which therefore put the burden of persuasion on the appellant, but did not entitle the respondent to lead rebuttal evidence. At the hearing the appellant's relevant testimony was this: "I was 58 years old when I was wrongfully terminated and I would have retired in less than two years." This piece of evidence was neither denied nor rebutted, so it is found as a fact that the appellant had just two years to retire as at the date of his termination. The High Court gave its decision on 10th June 2009, one year and ten months to the day the appellant was terminated. At this point it is necessary to correct a factual inaccuracy in the trial court's decision. The court below said that "….plaintiff is entitled to not only his salary…..as at 18th September 2007 when his employment was terminated……" From the record it is undisputed that the appellant's appointment was terminated on 10th August 2007, and not 18th September 2007, as stated by the High Court. See exhibit 3 at pages 191-192 of the record. Apparently the trial court was misled by exhibit 5 at page 195 of the record which is a letter conveying the decision of the disciplinary appeals committee. That letter dated 18th September 2007 was not the letter of termination, it merely endorsed the termination, hence the heading "RE: TERMINATION OF APPOINTMENT"

In the case of **Nartey-Tokoli and Others v. Volta Aluminium Co. Ltd. (No. 2) (1989-90) 2 GLR 341, SC** the court held the employees who were wrongfully and illegally dismissed were entitled to all the benefits under their CBA and any other statutory benefits. It was because their termination infringed existing legislation that the court held it to be illegal, null and void, thereby entitling them to be treated as de jure employees and therefore entitled to all benefits including even those founded on what was described as a gentleman's agreement. The High Court judge cited and relied on this decision in granting the benefits, although he gave a wrong citation. In this case the High Court judge also made reference to the Labour Act, 2003 (Act 651) in finding the respondent liable. The relevant part of Act 651 is section 62(b) which provides thus:

'A termination of a worker's employment is fair if the contract of employment is terminated by the employer on any of the following grounds: …….

(b) the proven misconduct of the worker.'

The contract of employment is the CBA. But since it has been found that the respondent did not have reason for terminating the appointment, under both the CBA and Act 651, the termination was wrongful and illegal, and for which reason the appellant was entitled to all the benefits under the CBA and by existing legislation.

It is clear from the record that the appellant would have gone on normal retirement but for the wrongful termination of his appointment and that question was not determined by the High Court at the time it gave its decision since the appellant had then not proceeded on retirement. But by the effluxion of time, the appellant had reached retirement age sometime in 2009; therefore the appellant is entitled to his retirement benefits as well. There is no need for this court to receive any further evidence on this, since there is undisputed evidence about the appellant's age and the fact that he had only two years remaining on his contract to retire at age 60 and the fact that he was entitled to retirement under the CBA. The court would thus only draw inferences from the undisputed evidence on record.

Under Article 22 of the CBA, the appellant was entitled to twenty-seven days' annual leave excluding Saturdays, Sundays and public holidays. Within a period of twenty-seven working days, we have at least ten (10) Saturdays and Sundays, thereby entitling the appellant to not less than thirty-seven days' leave in a year. Thus for the remaining two years of his contract the appellant was entitled to a leave period of at least seventy-four days. When that is taken into account, it would mean that as at the date of the High Court's judgment the appellant had earned his retirement. Be that as it may, as a de jure employee the appellant would have earned his retirement as a matter of course with time.

Therefore, for the avoidance of any doubt, in addition to all the benefits the trial court awarded the appellant who has reached retirement age, he is entitled to all his retirement benefits, not excluding the benefit under article 45 of the CBA, from the date he qualified for retirement, and thereafter.

Any payments owing to the appellant should be made less any sums of money that the respondent has already paid to the appellant in the aftermath of the termination.

For reasons explained above the appeal is allowed.

A. A. BENIN

JUSTICE OF THE SUPREME COURT

G. T. WOOD (MRS)

CHIEF JUSTICE

S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

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