IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, OKWENGU & AZANGALALA JJ A.)

CIVIL APPEAL NO. 50 OF 2011

BETWEEN

EXPRESS CONNECTIONS LIMITED. … ……..……APPELLANT

AND

EZEKIEL KIARIE KAMANDE..…….….. RESPONDENT

(An Appeal from the Award/judgment and decree of the Industrial Court of Kenya at Nairobi (Hon Mr. Justice Rika) dated 19th August 2010

in

Cause No. 554 N of 2009)

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JUDGMENT OF THE COURT

[1] This appeal arises from proceedings in the Industrial Court that were initiated by **Ezekiel Kiarie Kamande** who is now the respondent before us. He had lodged a claim against **Express Connections Ltd** (hereinafter referred to as the appellant). The appellant was sued **trading as Double M Commuttertrain**. The claim was anchored on a dispute arising from an oral contract of employment allegedly entered into between the respondent and the appellant in 2001, pursuant to which the appellant employed the respondent as a supervisor for its fleet of vehicles. The respondent claimed that he was unlawfully dismissed from the said employment on 14th September 2009, and that the appellant had refused to pay him his dues. As a result, the respondent sought judgment against the appellant for Kshs 3,631,732.00 being payment for one month's salary in lieu of notice; days worked in September 2009; payment for outstanding leave days; payment for overtime and public holidays worked; and payment for Kshs 78,000.00 being service pay for 8 years worked.

[2] In its statement of defence, the appellant denied having entered into any contract with the respondent maintaining that it was incorporated on 10th June 2003. Without prejudice to that denial, the appellant contended that the respondent was employed as a supervisor in August 2005, by Michael Kanyago, Fredrick Wachira Wagura, Sylvestus Githinji and John Mwangi Mugo who were carrying on matatu business trading as Double M Commuttertrain (*hereinafter referred to as Commuttertrain partnership*); that the respondent walked out of his employment in protest to a requirement put in place by Commuttertrain partnership for all employees to sign in every morning and evening; that the respondent

was guilty of gross misconduct as he refused to obey lawful orders and absented himself from work without any good reason; and that Commuttertrain partnership was therefore entitled to summarily dismiss the respondent from employment.

[3] Hearing of the claim proceeded before **Hon Rika J** sitting with **Mr. P Osero** and **Mr. J Lokwee**. Having heard the evidence of two witnesses for the respondent and two witnesses for the appellant, and considered the written submissions filed by each of the partys' advocates, the Industrial Court made an award on 19th August. 2010 in which it found that the respondent was an employee of Commuttertrain partnership; that Commuttertrain partnership comprised of 4 natural persons and 4 corporate partners including the appellant; that the respondent's dismissal by Commuttertrain partnership was unfair within the meaning of **Section 45** of the **Employment Act No 11** of 2007; and that the partners in Commuttertrain partnership were jointly and severally liable. The court awarded the respondent a total of kshs.1, 498,499.60 as terminal benefits and compensation. This award is what triggered the appeal now the subject of this judgment.

[4] The appellant filed a memorandum of appeal raising 14 grounds. In a nutshell the appellant faults the Industrial Court for failing to dismiss the respondent's claim upon finding that he was actually employed by Commuttertrain partnership consisting of 4 individuals and 4 corporate bodies; failing to find the respondent's suit to be fatally defective; ruling that liability in regard to the respondent's claim should be borne jointly and severally by persons who were not parties to the suit, and therefore condemning such persons unheard; finding that the respondent's dismissal was unfair; and awarding compensation for loss not specifically pleaded.

[5] Learned counsel **Mr Kefa Ombati**, who represented the appellant in this appeal, argued that the respondent pleaded in his statement of claim that he was employed by the appellant, and the trial court having made a finding that the respondent was not employed by the appellant, this finding should have resulted in the dismissal of the respondent's claim. Counsel asserted that the respondent had sued the appellant as a company that was distinct and separate and not as a member of a partnership; that at best the trial court could only have directed the respondent to amend the claim; and that without such an amendment the respondent's suit was fatally defective.

[6] Further, Mr. Ombati submitted that the person sued by the respondent was the partnership that is Commuttertrain partnership, and the trial court having found that the partnership was made up of 4 natural persons and 4 corporate bodies, the trial court could not presume that the witnesses who testified did so on behalf of all the partners; that since only one of the partners was sued and the other 7 partners were not part of the proceedings, the court could not make any findings against Commuttertrain partnership as Commuttertrain partnership was not the one on trial. Counsel added that since there was no employer-employee relationship between the respondent and the appellant, the issue of procedural fairness could not arise; and that the respondent not having pleaded nor proved any claim for salary in lieu of notice, or compensation for wrongful dismissal, no award ought to have been given in this regard. Counsel therefore urged the court to allow the appeal and award costs in the appellant's favour.

[7] Learned Counsel Mr. John Chivai, who appeared for the respondent, reiterated the submissions that had been made on behalf of the respondent before the Industrial Court. He noted that the respondent's claim was against the appellant trading as Commutertrain partnership; that there was clear evidence that the respondent was a partner in Commutertrain partnership; that under section 16 of the Partnership Act, every partner is liable jointly and severally. Further that under **Order 1 Rule 9** of the **Civil Procedure Rules**, the respondent's suit could not be defeated due to misjoinder, nor did the respondent have any obligation to join parties it could not prove the claim against.

[8] Counsel for the respondent further maintained that Commutertrain partnership was actually heard as the two defence witnesses who testified were a partner and an employee in Commutertrain partnership. In regard to the award for damages, counsel argued that the respondent's claim was not for special damages but damages arising from specific breaches of the law. He therefore urged the Court to dismiss the appeal.

[9] The appeal before us emanates from an award made by the Industrial Court (now renamed

'**Employment and Labour Relations Court**' pursuant to Statute Miscellaneous Amendment Act 2014 No. 18 of 2014). The right of appeal against that award remains as conferred by **section 17(2)** of the Industrial Court Act notwithstanding the repeal of that section by the Statute Miscellaneous Amendment Act 2014. This is because as at 10th March, 2011 when the memorandum of appeal was lodged, **section 17(2)** of the **Industrial Court Act** was still in force and it limited the right of appeal from any judgment or award of the Industrial Court, to matters of law only. The appellant's right of appeal therefore remains as it was when the appeal was filed, and this means the appeal is limited to matters of law only. The significance of this is that as this Court (differently constituted) observed in ***Judicial Service Commission v Gladys Boss Shollei & Another eKLR 2014***, the jurisdiction of this Court in an appeal from the Employment and Labour Relations Court under **section 17(2)** of the **Industrial Court Act**, as circumscribed by the Constitution and the Industrial Court Act, requires the appraisal and evaluation of the learned trial Judge's interpretation and understanding of the law; the application of these laws to the undisputed and established facts; and the evaluation of the reasonableness of the conclusions of the learned Judge. The Court's power to re- evaluate the evidence is thus limited as it is not open to this court to question the established findings of fact of the trial court, unless the propriety of the trial court's finding becomes a legal issue.

[11] One of the main issues for determination before the trial court was whether the respondent was the appellant's employer. In this regard the Court rendered itself as follows:

> ***"The Claimant's position is that he was employed by the respondent as a supervisor on 3rd February 2001. The contract of service was made orally. No written material was available to show that the Claimant was employed by the respondent on 3rd February 2001. ...In view of the denial by the respondent on the existence of an oral contract of employment effective 3rd February 2001, the Claimant had a duty to lead sufficient evidence to establish that he was orally employed by the respondent on 3rd February 2001. In our finding he did not adduce sufficient evidence to show that."***

[12] In our view this finding cannot be faulted. The respondent's case was that the appellant i.e. Express Connections Ltd trading as Double 'M' Commutertrain, employed him on 3rd February 2001, but this was negated by the documentary evidence adduced by the appellant that showed that neither the appellant company (Express Connections Ltd), nor the Commuttertrain Partnership was in existence as at that date. The documents proved that the appellant was incorporated on 10th June 2003. The respondent conceded as much when he stated that the company was not in existence when he was employed. The issue that we must determine is whether following the finding that the appellant was not in existence on 3rd February 2001, and did not employ the respondent on that date as respondent alleged, the respondent's claim ought to have collapsed.

[13] From the memorandum of claim the respondent's claim arises over a span of about 8 years covering the years 2001 to 2009. We take note that an employment relationship is not a static relationship dependent on a one off event. It is a contractual relationship that may be for a specific period or continue for an indefinite period until terminated either by contract or act of the parties. As with any contract, the relationship is anchored on consideration flowing from each of the parties the bottom line being remuneration for work done.

[14] Therefore, notwithstanding the fact that the respondent failed to prove his employment on the specific date that he had pleaded, the court was right to go further to inquire whether there was any employment relationship upon which the respondent's claim for the rest of the period could be anchored. In this regard there was evidence of the employment identity card issued to the respondent by Commutertrain partnership; worksheets of records of the vehicles supervised by the respondent; and bank statements confirming monthly payments made to the respondent by Commutertrain partnership in the year 2009. In addition Mary Wangare Mwangi (Wangare) the Human Resource Manager of Commutertrain partnership and Michael Ndungu Kanyago (Kanyago) a partner in Commutertrain partnership both testified that as at 2005 the respondent was employed by Commutertrain partnership. The witnesses conceded that the relationship continued until sometime in 2009 when the respondent

allegedly absconded from work. In the circumstances there was sufficient evidence upon which an employment relationship could be anchored between the Commutertrain partnership and the respondent during the years 2005 and 2009. Indeed this position is given credence by the appellant's pleadings at paragraph 7 of the defence in which it pleads in the alternative that the appellant was employed by the proprietors of Commuttertrain

[15] The above findings give rise to several issues that require further consideration: Who were the partners in Commutertrain Partnership, is there any link between Commutertrain partnership and the appellant company? and should the appellant company bear liability to the respondent for claims arising from its employment with the Commutertrain partnership? In considering these issues the Industrial Court, posed the following questions in regard to the respondent's employment:

> ***"The next question is, who employed him in August 2005? Who shoulders any accrued liability under the Employment Act? Was Express Connections misjoined in the claim, and should we dismiss the claim?"***

[16] As already noted the Commuttertrain partnership employed the respondent in August 2005. This relationship continued until the year 2009 when the respondent allegedly absconded, and Commuttertrain partnership, through a letter signed by its Human Resource Manager one Rose Muraguri, terminated the employment. Thus the employer-employee relationship between the respondent and the Commuttertrain partnership was established.

[17] Nonetheless, the matter is complicated by the fact that the respondent did not sue Commuttertrain partnership. He sued the appellant trading in a name identical to that of the partnership. Therefore the question that must be addressed is whether there was any relationship between the appellant and Commuttertrain partnership and if so, whether the appellant can be held liable for Commuttertrain partnership's liability. This question was partly answered during the trial by the respondent's witnesses Wangare and Kanyago. Both witnesses maintained in their evidence in chief that Commuttertrain was a partnership of 4 natural persons who pooled their buses together and manage their transport business through the partnership. Under cross examination Kanyago who was one of the natural partners explained that each of the natural persons were directors in limited liability companies that owned buses, and these buses were the ones that were pooled together and managed as Commuttertrain partnership.

[18] On the issue whether it was the natural persons (as individuals) or the respective companies who pooled together to form the partnership, the Industrial Court addressed the evidence in its judgment as follows:

> ***"From the evidence of Michel Kanyago, it is clear these 4 companies were themselves deemed as partners in the existing Double M partnership. In his evidence Mr Kanyago appeared to state as much when he first testified that Double M Commuttertrain is a partnership of 4 individuals before conceding in cross examination that it was a partnership of 4 transport companies. Mary Mwangi herself acted as a Human Resource Manager of Double M Commuttertrain, and was a director of Express Connections Ltd. These are 4 individuals, 4 private companies that have pooled their resources and operated under a general partnership.***
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> ***A partnership in law can be general or limited liability partnership (LLP). The Double M Commuttertrain is a general partnership…The 4 individuals and 4 companies had the legal capacity to enter into a general partnership. In their minds there appeared no distinction between the natural and the corporate entities. Mr Kanyago testified in chief that the 4 individuals partnered to form Double M Commuttertrain. In cross-examination, he stated it was the private companies. We think either way he was right. All supervisors were employed by the partnership. Conductors and drivers were employed by the companies."***

[19] We entirely agree with the assessment and conclusion arrived at by the trial court. The appellant was

one of the 4 companies that together with the 4 individuals comprised the Commuttertrain partnership. Section 6 of the Partnership Act provides that persons who have entered into a partnership with one another are for the purposes of the Act called collectively a firm, and the name under which their business is carried on is called the firm name. In this case "Double M Commuttertrain" was the firm name under which the Commuttertrain partnership jointly carried out the transport business.

[20] The appellant being one of the partners in the firm, the description of the appellant in the statement of claim as trading as "**Double M Commuttertrain**" was proper as that was the firm name of Commuttertrain partnership. The suit against the appellant was thus in accordance with Section 16 of the Partnership Act that states:

> ***"Every partner is liable jointly with co partners and also severally for everything for which the firm, while he is a partner therein becomes liable under section 14 and 15"***

[21] **Section 14** of the **Partnership Act** provides for liability of the firm to the same extent as the partner, where loss or injury arises or any penalty is incurred by the firm, due to wrongful acts or omissions of partners during the ordinary course of the business of the firm. A plain interpretation of sections 16, 14 and 15 of the Partnership Act, is that a partner in a partnership can be sued individually for the firm's liability. In this case the employment of the respondent and the termination of the respondent's employment were actions that took place during the normal cause of the firm's business, and therefore the suit against the appellant for liability arising from the employment relationship was proper. It did not matter that all the partners of Commuttertrain partnership were not joined in the suit, as the appellant was jointly and severally liable for the partnership's liability.

[22] In its final award the Industrial Court stated as follows:

> ***"In the end we find for the claimant and award in the following terms:***
>
> ***(a)…..***
>
> ***(b) The claimant be paid by Double M Commuttertrain partnership comprising the aforestated 4 natural and 4 corporate persons the total sum of ……"***

[23] Having satisfied itself that the appellant was the one sued and that as a partner in Double M Commuttertrain partnership it was severally liable for the claim against the partnership, the Industrial Court erred by making a final award against "Double M Commuttertrain partnership comprising the aforestated 4 natural and 4 corporate persons." This was because although all the partners were jointly and severally liable, the respondent had the option of pursuing the joint liability of all the partners in the Commuttertrain partnership, or the individual liability. The respondent chose to pursue the appellant only for its individual liability in regard to the partnership liability for the respondent's employment claim. Thus it was wrong for the Industrial Court to make an award against the other partners who had not been sued.

[24] From the evidence that was adduced before the Industrial Court, the respondent demonstrated that he was purportedly dismissed from his employment for allegedly absconding his duty. Under section 43 of the Employment Act the burden was upon the appellant to prove the reason for the respondent's termination, and therefore the appellant had to prove its allegation that the respondent did abscond from duty. However the witnesses called by the appellant failed to prove that the respondent absconded from duty. Moreover it was evident that there was no proper disciplinary hearing that was held before the decision to terminate the respondent's employment was arrived at, nor was he paid any salary in lieu of notice. Therefore the finding that the respondent was unfairly dismissed from his employment was proper.

[25] In his memorandum of claim that was orally amended on 4th June 2010, the respondent claimed a total of Kshs 3,631,732. The industrial Court awarded the

respondent Kshs 1,498,499.60 being:

a)	14 days worked in September 2009	9,750
b)	Pay for leave for 4 years	78,000
c)	Overtime for 4 years	1,217,049.60
d)	Overtime for public holidays worked for 4 years	57,200
e)	One month notice pay	19,500
f)	6 months compensation for unfair termination	117,000
Total		**1,498,499.60**

[26] The appellant's main quarrel with this award is that the respondent had not sought in his claim any payment for salary in lieu of notice or payment of compensation for unfair termination. This is based on the following statements made by the Industrial Court:

> ***"Lastly, although not pleaded, the claimant would be entitled to notice pay of one month. The court was asked to grant any other relief it deems appropriate. Notice pay and compensation for unfair termination need not be specifically pleaded"***

[27] The above statement did not reflect the correct position as at paragraph 5 of the memorandum of claim, the respondent pleaded as follows:

> ***"…. The claimant therefore states that the effect of the letter dated 14th September 2009 was to dismiss him***
>
> ***from employment without the requisite Notice, hence the claimant prays for the sum of Kshs 19,500.00 being one month's salary in lieu of notice."***

[28] It is evident that there was an inadvertent omission at paragraph 11 where, in praying for judgment, the final figure sought does not appear to have taken into account the pleading at paragraph 5. However in his evidence the respondent did reiterate the claim for payment of one month's salary in lieu of notice. In the circumstances the claim was for consideration by the court and the granting of the prayer for payment of salary in lieu of notice notwithstanding the omission, cannot be faulted. As regards the award of 6 months compensation for unfair termination, the respondent did not lay any claim in this regard. All he sought was payment of salary in lieu of notice and payment of monies lawfully due to him in regard to salary earned, overtime worked, pay in lie of leave and service pay. A party who is sued is entitled to know the claim against him/her. This can only be deduced from the pleadings.

[29] Where, as in this case, a party has failed to plead and claim an essential part of his claim, he must be deemed to have waived that part of his claim and the court cannot purport to grant the same. Moreover section 49 of the Employment Act that provides for remedies for wrongful dismissal and unfair termination, gives three options: payment in lie of notice; or compensation with a maximum of 12 months salary or both salary in lieu of notice and compensation. This means that a party ought to specify the remedy that he/she is seeking.

[30] In light of the above we come to the conclusion that the award of 6 months compensation to the respondent cannot stand, and we would accordingly set aside the same.

[31] The upshot of the above is that we set aside the award made by the Industrial Court on 19th August, 2010 under (b) that "***the claimant be paid by Double M Commuttertrain partnership comprising the***

aforestated 4 natural and 4 corporate persons the total sum of kshs1,498,499.60 in terminal benefits and compensation," and substitute therefor an award that the claimant be paid by the appellant t/a Double M Commuttertrain the total sum of Kshs 1,381.499.60 being payments for salary in lieu of notice, days worked, overtime and leave days.

[32] Given the parties' previous relationship, we order each party to meet their own costs in this appeal and in the lower court. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 27th day of May, 2016.

P. KIHARA KARIUKI PCA

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JUDGE OF APPEAL

H. M. OKWENGU

…….……

JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR