



3. The Claimant's case was heard on 9<sup>th</sup> November, 2023, when he testified in support of his case, adopted his witness statement, and produced his list and bundle of documents as exhibits in the matter.
4. The Respondent's case was subsequently heard on 23<sup>rd</sup> June, 2025, when one John Wamwati testified in support of the Respondent's case. He adopted his witness statement and produced the Respondent's documents as exhibits in the case.
5. Submissions were filed for both parties and have been duly considered.

### **The Claimant's Case**

6. The Claimant states that he was at all material times to this suit an employee of the Respondent working as the Head of Central Operations. He avers that his employment commenced on the 15<sup>th</sup> December, 2014, pursuant to a letter of appointment dated 8<sup>th</sup> December, 2014, appointing him as the Head of Central Operations.
7. It is his case that he was later confirmed to the position on the 24<sup>th</sup> day of July, 2015, and subsequently promoted and appointed as the Head of Central Operations on 27<sup>th</sup> April, 2017.
8. The Claimant avers that at all times material to this case, he was discharging his duties with integrity and diligence. He states that one of his key functions as the Team Leader, Central Operations Department was Central Cash Management.

9. He states that the Central Cash Unit serves the bank branches with cash requirements and is controlled by two custodians, one who holds the key and the other who holds a combination.
10. The Claimant states that on 7<sup>th</sup> August, 2017, he conducted a snap check on the main vault in the presence of the Co-custodian, one Esther Mathenge. He states that on the said day, 7<sup>th</sup> August, 2017, the main custodian, Jimlewis Muli, was off duty.
11. He avers that the snap check revealed a discrepancy in the cash register and the cash available, which showed that Kenya Shillings Three Million Nine Hundred and Twenty Eight Thousand, Two Hundred and Seventy Five Only and United States Dollars Two Thousand Seven Hundred and Forty Seven Only were missing.
12. It is his case that the figures as per the treasury books and the system were different and showed that the amount of money that was missing was Kenya Shillings was Thirty One Million, Five Hundred and Twenty Eight Thousand, two Hundred and Seventy Five Only, United States Dollars Sixty One Thousand and Fifteen Only, Euros Twenty Seven Thousand, Eight Hundred and Eighty Only and Great Britain Pounds Thirty Five Thousand, Four Hundred and Ninety Only.
13. The Claimant states that he enquired from the co-custodian, the said Esther Mathenge, but she indicated that she was not aware of how the difference arose, and that he proceeded to call the

main custodian, Jimlewis Muli, to find out what was going on, but who, unfortunately, could not be reached on the phone.

14. It is his case that a few minutes later, the main custodian, Jimlewis Muli, called him back and confessed that he had taken the money for a business deal. The Claimant avers that he asked Jimlewis Muli to come to the office on 9<sup>th</sup> August, 2017, to shed more light on the issue at hand, and further went ahead to call the Security Manager, one Elijah Njeru, to inform him that there was an urgent matter to be handled on the 9<sup>th</sup> day of August, 2017.
15. It is the Claimant's case that on 9<sup>th</sup> August, 2017, the main custodian, Jimlewis Muli, came to the office at 8:00 O'clock and explained that he had taken the money in bits over a period of two (2) weeks after the 17<sup>th</sup> July, 2017. He further avers that the said Mr. Jimlewis Muli claimed that the money was given to his business partner, one Mr. George Maina, for the purchase of printers for sale, and that he intended to return the money after the business deal.
16. The Claimant states that he thereafter engaged the services of the Security Manager, one Mr. Elijah Njeru, who called in the BFID officers to handle the matter. He avers that the BFID officers interviewed the main custodian, Mr. Jimlewis Muli in the presence of the Security Manager, Mr. Elijah Njeru, and the Head of Business, Mr. Benedict Warutere, and that he reiterated his earlier statement and added that he took the money without

the knowledge of his co-custodian, Esther Mathenge, and promised to return the money on the 10<sup>th</sup> August,2017.

17.The Claimant states that he provided the BFID officers with copies of the treasury register and account statements from 1<sup>st</sup> June,2017, to 7<sup>th</sup> August, 2017, for the amounts in Kenya Shillings, United States Dollars, Euros, and Sterling Pounds.

18. He avers that he was extremely shocked and surprised when he received a Show Cause Letter dated 11th August, 2017, informing him that the money had been siphoned since July, 2017, and that he only became aware of the same in August, 2017, after a request to reconcile cash. It is his case that on the same day, he received a suspension letter pending investigations.

19.It is the Claimant's case that on 29<sup>th</sup> September, 2017, he received a Notice of Summary Dismissal alleging gross negligence on his part.

20.In examination in chief, the Claimant told the court that the amount shortfall was Kes 22 million, USD 61,000, Euro 27880, and British Pound 35,440. He further stated to the court that he was not invited to a disciplinary hearing and was not heard in relation to the misconduct.

21.It is his position that he was not given a chance to be heard, nor received minutes or an investigation report.

22. On cross-examination, he told the court that his role was to oversee central cash management, but did not have to be present when the two custodians accessed the vault.

23. It is his evidence that he discovered the discrepancy and informed the CEO by telephone call. It is his further evidence that he received the show cause letter, which required that he respond within 48 hours, but he did not respond. It is his position that he could not access the documents necessary to respond to the show cause due to the suspension.

24. The Claimant prays that the court allow his claim and award him the reliefs sought.

### **The Respondent's Case**

25. The Respondent's case is that it employed the Claimant as its Head of Operations through a Contract of Employment dated 8th December 2014 and confirmed as an employee in July 2015. It avers that the Claimant was subsequently promoted to the position of Central Operations Manager in April 2017.

26. It is its further case that in his role as the Central Operations Manager, the Claimant oversaw the central cash management process which entailed monitoring the movement of money in and out of the vault, routinely taking stock of currency in the vault and enforcing risk management programs to prevent the compromise of the vault.

27. The Respondent avers that on 7<sup>th</sup> August 2017, during a routine inspection of the strong room, the Claimant alleges that he

discovered that Kenya Shillings Forty-Two Million Eighty-Eight Thousand and Eight Hundred and Thirty-Two (Kshs. 42,088,832.00) was missing from the Bank's central vault. It avers further that upon the discovery of the theft, an investigation was carried out by the Respondent's Security officers in collaboration with officers from the Banking Fraud Investigative Department(BFID), which established that colossal sums of money had been stolen under the Claimant's watch, a fact which the Claimant admits.

- 28.The Respondent states that the investigations further established that the money had been siphoned out of the vault from July, 2017, and the Claimant alleges that it came to his attention in August, 2017, while on the other hand, he confirms that he does routine checks of the vaults.
- 29.The Respondent avers that it was further confirmed that the Claimant had failed to immediately report the theft of the money to his line manager, as his supervisor was informed of the same through a third party.
- 30.The Respondent states that it subsequently suspended the Claimant on 11<sup>th</sup> August 2017 to allow for investigations to be concluded. It avers that the Claimant was further issued with a Notice to Show Cause through a letter dated 11<sup>th</sup> August 2017 in order to address the negligence he exhibited while carrying out his duties, which resulted in the theft.

31. It avers further that, following the issue of the show cause letter, a disciplinary hearing was held, and the Claimant appeared before the committee and was allowed an opportunity to defend himself against the charges of negligence and gross misconduct lodged against him.

32. It is the Respondent's case that after considering the facts of the matter, the disciplinary committee concluded that the Claimant was negligent in his duties, which contributed to the theft of the money from the vault, and further resolved that the Claimant's action amounted to gross misconduct.

33. The Respondent states that, acting on the findings of the disciplinary committee, the Claimant was summarily dismissed through a Notice of Summary Dismissal dated 29<sup>th</sup> September 2017. The Respondent maintains that the dismissal of the Claimant was based on legitimate grounds and undertaken as per the provisions of the Employment Act.

34. It is further argued that at the time of his dismissal, the Claimant was informed that he was entitled to a refund of 100% of his contribution and 50% of the Respondent's contribution towards the staff retirement benefits scheme at Enwealth Pension Scheme.

35. It avers that the Claimant was also informed that the remaining 50% of the Respondent's contribution would be retained in the scheme until it was transferred to a new employer's scheme or

to another approved Retirement Benefits Scheme, and that he was told to communicate his preferred choice in writing.

36. The Respondent states that it is not aware of whether the Claimant has since claimed the contributions due to him in the pension scheme. It further avers that it does not have control of the remittance of funds by Enwealth Pension Scheme as it is a separate entity from the bank, and as such, the said funds cannot be remitted to the Claimant by the Respondent.

37. The Respondent states that it is its belief that the Claimant has no reasonable cause of action against it and that this suit should be dismissed with costs to the Respondent.

38. On cross-examination, the Respondent's witness (RW1) confirmed that there were two vault custodians and one would not access the vault without the other. It is his evidence that the Claimant was to do routine checks of the vaults regularly, every two weeks.

39. The Witness further testified that the Claimant was prompted to check vaults through a show cause letter, as he did not raise an alarm about the missing money, as he was not aware. He confirmed that the show cause was not submitted.

40. RW1 further told the court that the Claimant was suspended the same day the show cause letter was given, and that he was allowed 48 hours to respond to the show cause. The witness further told the court that the investigation report has not been produced in evidence.

41. The witness confirmed that he did not know when the disciplinary hearing was conducted and did not know who attended. It is his further testimony that the minutes of the disciplinary hearing were not given to the Claimant, and neither were they produced in evidence.

42. RW1 further confirmed that the pension was not paid to the Claimant and that he was free to pursue the same.

43. The witness maintains that the Respondent lost money due to the Claimant's negligence, hence the suit herein should be dismissed with costs.

#### **Analysis and Determination**

44. Arising from the pleadings, evidence, and the parties' submissions, the following issues arise for determination:

- i. Whether the Claimant was wrongfully and unfairly dismissed.
- ii. Whether the Claimant is entitled to the reliefs sought.

#### **Whether the Claimant was wrongfully and unfairly dismissed**

45. A dismissal/termination is considered wrongful/unfair, where the employer fails to adhere to the twin tenets of fair process and the substantive justification test espoused under Sections 41, 43, and 45 of the Employment Act.

46. Section 41 of the Employment Act demands that an employer notify an employee of the charges against them in a language

the employee understands, and allow the employee an opportunity to make representation, and further guarantees an employee's right to be accompanied by a shop floor steward or fellow employee during the disciplinary hearing.

47. In ***Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR***, the Court of Appeal held:-

***“A show cause letter alone does not satisfy Section 41. The employer must demonstrate that an oral hearing actually took place.”***

48. The Respondent issued the Claimant a show cause letter dated 11th August 2017 and simultaneously suspended him from duty to allow for an investigation into the loss of money. It is confirmed by both parties that the Claimant did not respond to the show cause letter, and the Claimant contends that he was on suspension and lacked access to the documents necessary to respond to the show cause letter.

49. The Respondent did not produce minutes of the alleged disciplinary hearing, and RW1 admitted that he did not know when the disciplinary hearing took place, who attended, or what was discussed. It is also not disputed that the investigation report was neither supplied to the Claimant nor produced in evidence before this court.

50. In my considered opinion, the absence of disciplinary minutes and an investigation report fatally undermines the Respondent's assertion that a fair hearing occurred.

51. In ***Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR***, the court held that failure to produce disciplinary records leads to an adverse inference against the employer.

52. Accordingly, the court finds and holds that the Respondent failed to comply with Section 41 of the Employment Act, rendering the dismissal procedurally unfair.

53. On the issue of whether the Respondent met the substantive fairness test in dismissing the Claimant, Sections 43 and 45 of the Employment Act, 2007 place the burden upon the employer to prove the reasons for termination and that such reasons were valid and fair.

54. In ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others [2019] eKLR***, the Court of Appeal held that:-

***“The employer must prove that the reasons for termination are matters that it genuinely believed to exist at the time of termination, based on reasonable grounds.”***

55. Similarly, in ***Walter Ogal Anuro v Teachers Service Commission [2013] eKLR***, the court emphasized that termination must pass both the substantive justification and procedural fairness tests.

56. It is not in dispute that colossal sums of money were lost from the Respondent’s central vault while the Claimant was the Head

of Central Operations. It is also admitted that the Claimant's role entailed oversight of central cash management, including routine vault checks and enforcement of risk management controls.

57. This said, the evidence on record demonstrates that the vault was operated under a dual custodian system, and the Claimant did not have direct custody of the vault keys or combinations. The court was further told that the primary perpetrator, the main custodian, confessed to siphoning the money without the knowledge of the Claimant or the co-custodian, and that upon discovery of the discrepancy, the Claimant immediately escalated the matter to senior management and involved internal security and BFID officers.

58. While the Respondent alleges negligence on the Claimant's part for failure to detect the loss earlier, no investigation report was produced to demonstrate how the Claimant's acts or omissions directly occasioned the loss. In ***National Bank of Kenya v Anthony Njue John [2019] eKLR***, the Court of Appeal held that negligence must be proved through evidence and cannot be inferred merely from the occurrence of loss.

59. In light of the foregoing, I find and hold that although the Respondent may have had reasonable suspicion, but it failed to discharge the statutory burden under Section 43 of the Act to prove valid and fair reasons attributable personally to the Claimant for the loss it incurred, and which renders the dismissal substantively unfair.

60. In the end, I find the Claimant's dismissal both procedurally and substantively wrongful and unlawful.

**Whether the Claimant is entitled to the reliefs sought**

61. The Claimant herein seeks a declaration that the Respondent is in breach of the employment agreement, an order compelling the Respondent to remit his benefits to the staff retirement benefits scheme, damages for unlawful and unfair termination of employment, and the costs of this claim and interest thereto.

62. Having found that the dismissal lacked both substantive justification and procedural fairness, the court hereby declares that the dismissal was wrongful and unfair.

63. On the claim for pension and retirement benefits, the Respondent admitted that the Claimant was entitled to pension benefits and that the pension scheme administrator is Enwealth Pension Scheme, but contends that it has no control over actual remittance by the scheme.

64. Under Section 35(5) of the Employment Act and the Retirement Benefits Act, accrued pension rights cannot be forfeited. In ***Hassan Athman Hussein v Kenya Ports Authority [2017] eKLR***, the court held that an employer cannot evade responsibility where pension contributions are admitted but not facilitated.

65. Accordingly, the court finds that the Claimant is entitled to his pension benefits and directs the Respondent to facilitate and

confirm remittance and processing of all benefits due to the Claimant under the scheme.

66. On the claim for damages for unfair termination, Section 49(1) (c) of the Employment Act empowers the court to award compensation up to twelve months' salary.

67. The Claimant held a senior position with significant responsibility in the service of the Respondent. It is also obvious that the Claimant's dismissal followed a serious incident, though not conclusively attributable to him.

68. Taking the foregoing into account, I deem an award of eight (8) months' salary sufficient compensation for the wrongful dismissal, and it is hereby awarded.

69. In the final analysis, I find the Claimant's Memorandum of Claim dated 23<sup>rd</sup> May, 2019 merited, and orders are granted as follows: -

- a) A declaration that the Claimant's dismissal from the service of the Respondent is wrongful and unlawful.
- b) An order is hereby issued directing the Respondent to facilitate the processing and remittance of the Claimant's pension benefits.
- c) That the Respondent shall pay the Claimant 8 months' salary as compensation for the wrongful dismissal at Kes.2,866,664/-
- d) That the Respondent shall bear the costs of the suit.

70. Judgment accordingly.

**SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY 2026.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Mark Otieno h/b for Mr. Okatch for the Claimant

Ms. Kale h/b for Mr. Dachi for the Respondent

Ms. Esther S - C/A

ORIGINAL

