



A CWW Toolkit To

***Involuntary Termination
of Employment In Kenya***



Conversations
with Wandy

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The definition of involuntary termination

Termination of employment in Kenya can either be voluntary or involuntary. Voluntary termination occurs when an employee resigns from their position by giving the required notice to the employer of their intention to resign. Involuntary termination on the other hand occurs when an employer terminates the employment of an employee with a valid reason, following a fair procedure and by rules of natural justice and equity, either summarily or with notice.

It is paramount to note, however, that employment in Kenya is not at will. For clarity, at-will employment is an employer's ability to terminate the employment of an employee for any legal reason and without warning. An employee in this circumstance not will have no right to file suit for loss resulting from their dismissal.

The ingredients that make an involuntary termination lawful

a) The reason must be valid

The Employment Act in section 41 gives the valid reasons for terminating the employment of an employee as:

- Poor performance
- Misconduct
- Physical incapacity owing from accidents or illness

Other reasons that are valid for involuntarily terminating an employee's employment are following the death of an employee and declaration of redundancy. Where there is a need for an employer to declare redundancy, Conversation With Wendy's toolkit on Managing Redundancies is a useful resource.

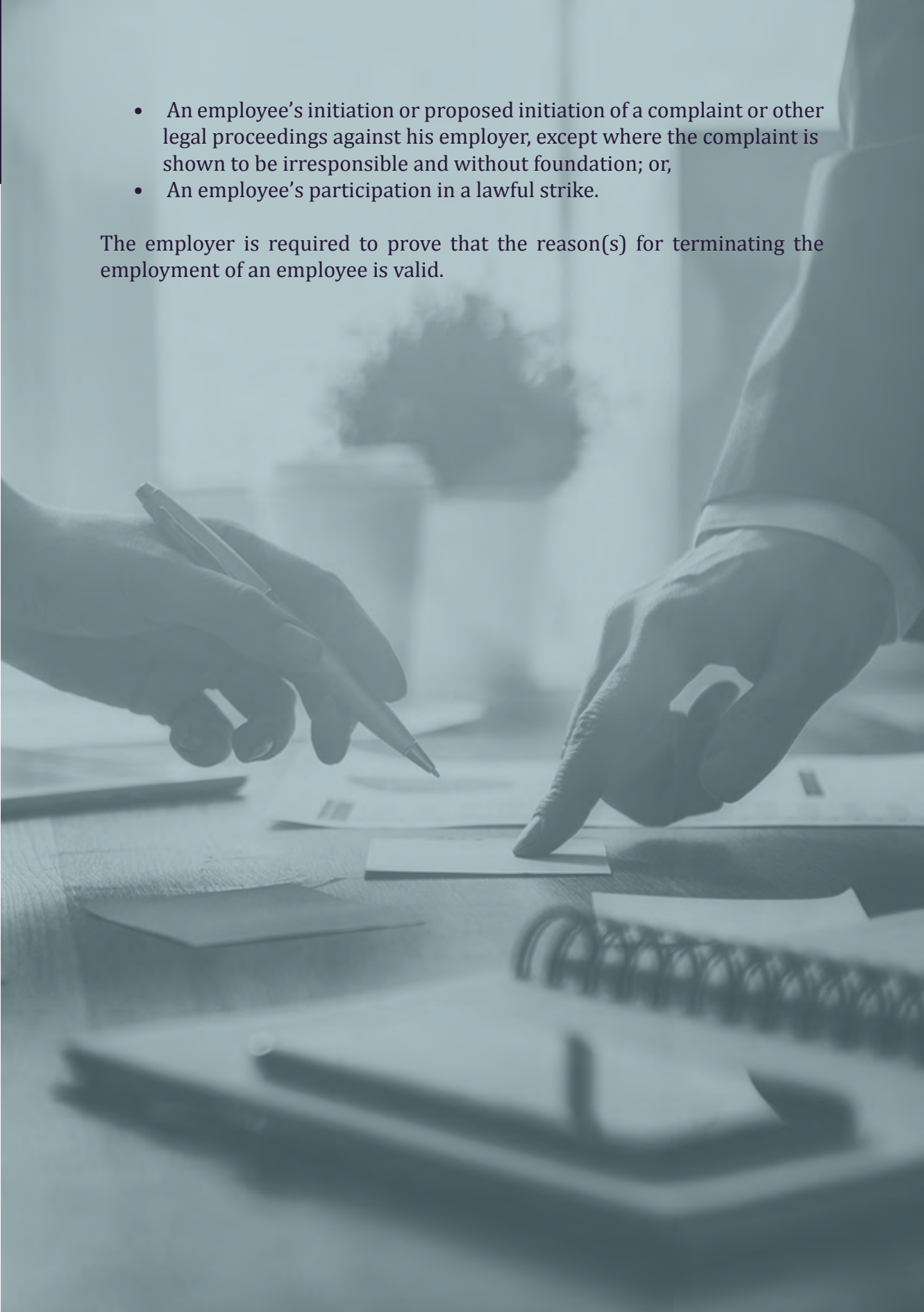
In the event of a term contract that comes to an end, an employer has no obligation to justify the termination other than the effluxion of time. However, an employer should give an employee notice of the lapse of a contract. A thirty-day notice in such cases is sufficient.

An employee, under section 46 of the Employment Act, is protected from dismissal where the circumstances or reasons leading to their dismissal are as a result of the following;

- A female employee's pregnancy, or any reason connected with her pregnancy;
- The going on leave of an employee, or the proposal of an employee to take leave to which he was entitled under the law or a contract;
- An employee's membership or proposed membership of a trade union;
- The participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
- An employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
- An employee's refusal or proposed refusal to join or withdraw from a trade union;
- An employee's race, color, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;

- An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or,
- An employee's participation in a lawful strike.

The employer is required to prove that the reason(s) for terminating the employment of an employee is valid.



b) The procedure of termination must be fair

It is not sufficient to only prove that the reasons for terminating an employment contract at the time of termination genuinely existed; it is further required of an employer to prove that they did follow a fair procedure in terminating the said contract of employment.

The following steps should be followed when terminating an employment contract with an employee;

i. Issue an employee, in writing, with a request for them to explain why disciplinary action should not be taken against them following an incident that constitutes a valid reason for termination. This request is sometimes referred to as a show-cause notice. It should contain the following;

- A specific description of the incident.
- A citation showing how the incident is not in compliance with either company policy and or employment law. It is important to be very specific here.
- A request to the employee to explain why disciplinary action should not be taken against them.
- A timeframe within which the written explanation is expected to be received.
- A reminder of the gravity of the incident and that the potential disciplinary action includes termination of employment.

ii. Constitute a potential disciplinary committee. This committee will become active in the event the explanation given by the employee to the letter requesting the explanation is insufficient. The constitution of the committee varies but should not include outside counsel for an organization.

iii. Upon receipt of the written explanation by the employee, an employer should then respond; if the explanation from the staff is insufficient, with an invitation to a disciplinary hearing. This invitation should contain the following;

- A title clearly stating that the letter is indeed an invitation to a disciplinary hearing.
- A clear and specific description of the alleged incident.
- A reference to the request for an explanation, its subsequent response and the organization's finding the response to be insufficient.
- A statement on which company policy and or employment laws the incident is not in compliance with.
- A date, time, and venue for the disciplinary hearing.

- A reminder to the employee of their legal right to be accompanied by another employee to the hearing. The accompanying employee is not a witness but an observer of the fairness or otherwise of the hearing. No outside persons are allowed to accompany the employee; this includes lawyers.
- An assigned person that the employee can ask questions to for clarification for their comfort as they prepare for the hearing. This should ideally be the chairperson of the disciplinary committee.
- A reminder to the employee that the disciplinary action that may be taken against them includes termination of employment.

It is important to ensure that the time set aside for the disciplinary hearing allows the employee sufficient time to prepare for the hearing.

iv. During the disciplinary hearing, it is paramount that the committee allows the employee a fair opportunity to present their case to them. Minutes of this meeting should be taken and signed by all members of the committee, the employee, and the employee's representative (the accompanying employee).

The employee at this meeting should be advised that the committee will take time to deliberate on which appropriate action should be taken against the employee. It is important to give timelines on when the employee should expect a decision from the committee. The employer should issue the decision within fourteen days of the disciplinary hearing.

v. The decision arrived at by the panel; in this case being the termination of employment, should be issued in writing to the employee. This letter should contain;

- A title communicating the decision of the panel, e.g., Termination of employment on grounds of misconduct.
- A summary of the description of the incident and the policy or laws it is not in compliance with.
- A summary of the process the employee has undergone from request for an explanation to the disciplinary hearing.
- The reasons the panel arrived at the decision.
- The effective date of termination of employment.
- Details of the benefits accruing to the employee following the termination.
- A reasonable time within which the employee is given to appeal the decision of the disciplinary committee. The employee should be allowed a maximum of seven days within which they can appeal the decision of the disciplinary panel.



c) Natural justice and equity

Rules of natural justice and equity are demonstrated when the process and outcome can show no bias, procedural fairness and consistency in handling similar matters. These rules should be exemplified throughout the involuntary termination process.

Employers are advised to look out for the following matters that can make an involuntary termination be seen as against the rules above;

- Holding a hearing despite the fact that a decision to terminate has already been made prior to the hearing.
- Judging the conduct of an employee in the termination process for past actions that cannot be substantiated and which causes bias in decision making.
- Failure to give an employee reasonable notice of the process for example giving an employee a request for explanation letter in the morning and requiring the employee to attend a disciplinary hearing the same day in the afternoon
- Failure to allow an employee in this process adequate time to present their case in the process. This includes allowing an employee to question further and clarify information that is stated to the employee by the disciplinary panel.
- The disciplinary panel giving different decisions to matters that are similar for example when two employees abscond duty for no justifiable reason and one is terminated while the other is given a verbal warning.
- Taking unnecessarily long time to conclude processes for instance taking three months after a disciplinary hearing meeting to give a decision to terminate an employee.

The required notice for involuntary termination

The notice given in cases of voluntary termination is dependent on termination clauses contained in an employment contract. Should there be no termination clause in the contract, an employer should be guided by section 35 (1) of the Employment Act. For the avoidance of doubt; termination notice as per the law, are as follows;


- Where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;
- Where the contract is to pay wages periodically at intervals of less

than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing;

- Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

If the notice period included in an employment contract is greater than the notice period stated above, the notice as per the employment contract shall prevail.

A termination notice as guided by the law and or employment contract can either be served or paid in lieu.



NOTICE

Summary dismissal

An employer is allowed to summarily dismiss an employee on grounds of gross misconduct without giving notice as detailed above. It is important to note that the ingredients of an involuntary termination will remain, i.e., the reason has to be valid, the process should be fair and by the laws of natural justice and equity during a summary dismissal. The only change that occurs is that the dismissal then is immediate without the issuance of or payment of contractual notice in lieu.

Summary dismissal is guided by section 44 of the Employment Act. The section is prescriptive as to what entails gross misconduct. As per the law, the following shall constitute gross misconduct for purposes of summary dismissal;

- Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- During working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
- An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- An employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or a person placed in authority over him by his employer;
- An employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
- In the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offense punishable by imprisonment and is not within fourteen days either released on bail or bond or otherwise lawfully set at liberty; or
- An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offense against or to the substantial detriment of his employer or his employer's property.

It is important to note that summary dismissal of an employee does not deny an employee summarily dismissed to claim unfair termination.

Benefits calculation

The labor laws of Kenya set a legal minimum of the pay items that an employee is entitled to, following an involuntary termination. The employment contract, company policies, and active collective bargaining agreements also provide ground the pay items that an employee is entitled to, following an involuntary termination of employment. The labor laws are clear that should an enhanced provision in comparison with the legal minimums be available, the enhanced provisions shall prevail.

When a termination has occurred with notice, the pay items payable to a dismissed employee are;

- Salary earned up until the date of termination.
- All accrued and unused leave days due and owing to a terminated employee.
- One months' notice or one months' wages in lieu of notice.
- Any other amounts due and owing to the employee.

The items stated above are the legal minimums. Employers are advised to consult their internal policies to ensure full compliance.

When an employee has been summarily dismissed, the payable items are as below;

- Salary earned up until the date of termination.
- All accrued and unused leave days due and owing to a terminated employee.
- Any other amounts due and owing to the employee.



Issuance of a certificate of service

An employer is required to issue all terminated employees with a certificate of service. Failure to do so may cause the termination to be considered unfair.

Reporting

An employer is to report to the National Employment Authority; within seven days of an involuntary termination, the details of a terminated employee.





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