

**EVIDENCE TAKEN BEFORE THE SENATE SPECIAL COMMITTEE
INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE BY
IMPEACHMENT OF THE DEPUTY GOVERNOR OF MACHAKOS
COUNTY HELD ON TUESDAY, 12TH AUGUST, 2014, AT THE COUNTY
HALL CHAMBER AT 9.00 A.M.**

[The Chairperson – Sen. Mutahi Kagwe]

SENATORS PRESENT

Sen. (Dr.) Agnes Zani	-	Vice Chairperson
Sen. Sen. Njoroge		Sen. (Prof.) Peter Anyang'-Nyong'o
Sen. Martha Wangari		Sen. Sammy Leshore
Sen. Lenny Kivuti		Sen. Daisy Kanainza
Sen. Kennedy Mong'are Okong'o		Sen. Abu Chiaba
Sen. Hassan Omar Hassan		

SECRETARIAT

Ms. Eunice Gichangi	-	Director, Legal Services, Senate
Ms. Mary Chesire	-	Deputy Director, Committee Services, Senate

IN ATTENDANCE

THE DEPUTY GOVERNOR'S TEAM

Mr. Bernard Kiala	-	The Deputy Governor
Mr. Harun Ndubi	-	Advocate
Mr. Anthony Oluoch	-	Advocate
Ms. Celestine Anyango Opiyo	-	Advocate
Hon. Alexander Kathizi	-	Member of County Assembly
Hon. Peter Kyalo	-	Member of County Assembly
Hon. Pastor Festus Ndeto	-	Member of County Assembly
Hon. Justus Katumo	-	Member of County Assembly

THE COUNTY ASSEMBLY'S TEAM

Mr. Kioko Kilukumi	-	Advocate
Mr. Benjamin Musau	-	Advocate
Mr. Wilfred Nyamu	-	Advocate

Mr. Hillary Muthui

-

Principal Legal Counsel

(The Special Committee convened at 9.15 a.m.)

The Chairperson (Sen. Mutahi Kagwe): Hon. Senators, counsel, ladies and gentlemen, yesterday we left the proceedings at the point where the counsel for the County Assembly was continuing their presentation. This morning, we will continue to do so. You have got 45 minutes on your side. But before we begin, as is usual with us, I would like to ask that Sen. (Dr.) Zani leads us with a word of prayer.

(Prayers were said by Sen. (Dr.) Zani)

The Chairperson (Sen. Mutahi Kagwe): I am aware that we agreed yesterday that we would give you some leeway, counsel for the Assembly, as far as the timing is concerned, just in case you think it has escaped our arrangement. Please, start and proceed.

Mr. Harun Ndubi: Mr. Chairman, Sir, perhaps before my colleague begins, I want to place on record our unhappiness. You will recall yesterday we had been insistently asking to be advised on which witnesses are going to testify and in which order. It is for the good reason that we prepare ourselves adequately. As we left in the evening, Mr. Kioko Kilukumi and Ben Musau advised us that they were going to call Mr. Francis Mwaka. We spent the better part of last night and this morning sifting through the evidence preparing for this witness, Francis Mwaka. Only this morning, as we went down to register, Mr. Ben Musau informed me that they are no longer calling Francis Mwaka but are calling Hellen Kiilu. Of course, it is their case but we are entitled to a fair process where we are informed in advance of what kind of case they are making and from which witness. I am saying this with a measure of conviction that the witnesses are being called on account of the defence's cross examination, so that like I said yesterday, they are calibrating the next witness on account of the weaknesses that may have appeared from the previous witnesses' testimony.

Mr. Chairman, Sir, much as there may be no direct order you may make, we would like it to go on record that we are unhappy that we are being ambushed. We consider this a trial by ambush and not due process.

The Chairperson (Sen. Mutahi Kagwe): The only comment I can make on that is that yesterday I raised the matter. I said that there should be ample information on witnesses. This is a rule that will apply on both sides. I urge that normal courtesies that are extended in issues like this one are done so. It is only fair and right.

Let us proceed.

Mr. Benjamin Musau: Thank you, Mr. Chairman. I took the earliest opportunity to update my learned friend about the order of presentation of evidence. In fact, he has pre-

empted what I was going to start with because I was going to inform the Special Committee and explain the particular circumstances.

The situation with Mr. Francis Mwaka is such that the evidence already on record is adequate and has been covered by most of the witnesses who have appeared before the Special Committee. Therefore, in the interest of fairness and expediency, because of the time limits that this Special Committee is faced with, we thought that we have a duty to assist the Special Committee to ensure that we only bring to the attention of the Special Committee that which has not been covered in detail. This is why we have decided not to call Mr. Mwaka as a live witness. In fact, he is a witness and the evidence is already on record. Instead, we have lined up the following to witnesses: First, in the witness box is Hellena Kiilu. The second witness will be Mr. Francis Maliti. I have already given that list to my learned friend in good faith and in view of expedition.

The Chairperson (Sen. Mutahi Kagwe): Proceed then. First swear in the witness.

(Ms. Hellena Syombua Kiilu took the oath)

Mr. Benjamin Musau: Madam Hellena Syombua Kiilu, would you please confirm your names to the distinguished Members of the Special Committee of the Senate?

Ms. Hellena Syombua Kiilu: Mr. Chairman and hon. Members of the Senate Special Committee, I want to confirm that my name is Hellena Syombua Kiilu.

Mr. Benjamin Musau: Distinguished Members of the Special Committee, the evidence to be given by this witness is in the bundle that we have given the Committee and is tagged as item No.11 in the folders. In the bundle prepared by the Special Committee, it runs from 224 through to 245. We will start with the affidavit.

Madam Hellena, will you please introduce yourself to the Special Committee?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, like I said my name is Hellena Syombua Kiilu. Currently, I am in charge of the docket called Decentralised Units, Urban Areas and Municipalities within the County Government of Machakos.

Mr. Benjamin Musau: Madam Hellena, what are your qualifications?

Ms. Hellena Syombua Kiilu: I hold a first degree, a Bachelor of Arts in Political Science from the University of Nairobi. I have a Masters of Business Administration from Moi University. I am currently undertaking my Doctorate of Business Administration in Strategic Management. I am in my third year.

Mr. Benjamin Musau: Where are you taking the doctorate studies?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, from California Miamar University. They have a branch in Kenya.

Mr. Benjamin Musau: What is your relevant experience?

Ms. Hellena Syombua Kiilu: For the last 26 years before I joined the County Government, I was a DO Cadet, I rose through the ranks to the position of a County Commissioner. My last station was Embu and then I joined the County Government. So, I think in terms of relevance and my work in the county, being in charge of decentralized units, we are implementing the decentralized functions as per the law.

Mr. Benjamin Musau: Did you swear the affidavit on record on 9th July, 2014?

Ms. Hellena Syombua Kiilu: Yes I did.

Mr. Benjamin Musau: Could you, please, take the Special Committee through that affidavit?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I stated as follows:-

“1. I am a Political Scientist having graduated with the degree of Bachelor of Arts from the University of Nairobi and subsequently studied and obtained a Master of Business Administration from Moi University. I am the County Executive Member (CEC) responsible for the Department of Decentralised Units, Urban Areas and Municipalities in the Government of Machakos County, which position I have held since 6th April, 2014.

2. I attended the 20th Cabinet meeting for Machakos County held on 7th July, 2014 at the Governor’s office from 10.00 a.m.

3. At the preliminary stage of the meeting the Deputy Governor, Mr. Bernard Kiala, said that he wanted to raise a personal matter regarding his security. He stated that sometime back security at his rural residence had been withdrawn and that thereafter somebody called and issued death threats against him.

4. He told the meeting that after his own investigations, he can report that the Chief of Staff wanted to kill him.

5. At this point, the Governor said that these are serious allegations and he enquired from the Deputy Governor if he had reported to the police or made a statement to the police and what action the police had taken.

6. The Deputy Governor claimed that he had reported the matter to the police at Embu and that he had also recorded a statement there and the police had told him that they were investigating.

7. Immediately thereafter, the Cabinet discussed briefly and resolved that all members of the Cabinet should confirm whether or not they were facing any criminal charges or whether or not any member had a complaint for investigations pending before the police and all members replied negatively except the Chief of Staff who said that he

had a political case filed by Hon. Mwau arising from the Wiper campaigns in Kibwezi, which was ongoing.

8. The Governor concluded the issue by ruling that it was only fair that the police be given an opportunity to conclude the investigations and take action in accordance with their decision.

9. The Deputy Governor then said that he was feeling uncomfortable to sit in the same forum with people who were threatening his life.

10. At this point, Hon. Eng. Francis Maliti (CEC member responsible for the Department of Water, Irrigation and Sanitation) rose on a point of order and requested an amendment to the agenda to insert an agenda item "Discussion of the Deputy Governor's Conduct." He justified this by saying that the Deputy Governor had been widely covered in the media on several occasions in various fora while criticizing the County Government while he is also serving in the same Government.

11. I seconded the proposal for amendment of the agenda to include as an item of the Agenda for the meeting "Discussion of the Deputy Governor's Conduct".

12. The Cabinet meeting then resolved collectively to amend the agenda. The County Secretary, therefore, amended it accordingly by including the new agenda item as Agenda item Number 2 entitled: "Discuss Conduct of Deputy Governor".

13. The Cabinet, therefore, requested the Deputy Governor to step outside so that his conduct could be discussed, allegations drawn up and, thereafter, he would be called back to respond on the allegations of misconduct which had caused the agenda to be amended.

14. The County Secretary accompanied the Deputy Governor outside the Cabinet meeting room and when the County Secretary returned to the meeting, he informed the members present that he had already organized a room for the Deputy Governor to sit as he awaited to be called back in.

15. I expected that the Deputy Governor would come back to the meeting after the procedure drawing up the allegations against him.

16. I confirm that the matters indicated in the minutes of the 20th Cabinet Meeting including the serious allegations of misconduct and abuse of office by the Deputy Governor as indicated by various CEC Members are a true record of the deliberations of the meeting and that I participated in the meeting from the beginning to the end.

17. I also add that during the Cabinet discussions and drawing up on the allegations, the Cabinet got a media update that the Deputy Governor had already updated his Facebook page with a false account that he had been ejected from the Cabinet Meeting for raising issues about corruption and nepotism. This information also subsequently appeared in the print media.

18. Upon conclusion of the meeting, the Cabinet resolved that it was only fair, notwithstanding the social media updates, that the Cabinet had been following the updates from the Deputy Governor, that the Deputy Governor should be formally informed of the allegations made against him by way of a written letter and that he be required to attend the next Cabinet Meeting, which we resolved will be held on 9th July, 2014, to respond to these serious allegations of abuse of office and misconduct.

19. I attended the meeting of the Cabinet held on 9th July, 2014, at the Governor's Office and the County Secretary (CS) circulated to the Cabinet a copy of the letter dated 7th July, 2014, which he had written to the Deputy Governor informing him in writing of the detailed allegations against him and also confirming that he had invited the Deputy Governor to attend the meeting of 9th July, 2014.

20. I also confirm that the Deputy Governor attended the day's meeting and that he sought more time to prepare his response.

21. The Cabinet resolved to give the Deputy Governor seven days to prepare his response and the Cabinet will hear his response during the Cabinet Meeting scheduled for 16th July, 2014.

22. This is all I have to state and I made this affidavit consciously based on my own knowledge, save for information that I believe and the source of which I have disclosed. It is dated 9th July, 2014."

Thank you, Mr. Chairman, Sir.

Mr. Benjamin Musau: Okay, thank you very much. You said that you are the CEC Member responsible for Decentralized Units, Urban Areas and Municipalities. Would you, please, explain what that docket entails?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, as the name of my department entails decentralized units, you remember the Constitution created units akin to the ones we had and we still have in provincial administration for grassroots administration. So, in Machakos County, we have the eight sub-county administrators; we have 40 ward administrators who will be appointed and, later on, the Constitution did allow the creation of the village elders which, at an opportune date, will be discussed by the County Assembly. I think the municipalities and local authorities were formerly called in Kenya the local governments. So, it is the thinking of municipalities and urban centers because, again, they have been defined. So, that is the docket that I guide.

Thank you, Mr. Chairman, Sir.

Mr. Benjamin Musau: Whom do these sub-county administrators report to?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, we have a chain of command as it were. Sub-county administrators ideally report to the Chief Officer in the Ministry of Decentralized Units, Urban Areas and Municipalities. If there are any issues, he reports to me.

Mr. Benjamin Musau: For the avoidance of doubt, does your docket also include co-ordination of security matters and the extent to which it is relevant? Can you, please, guide this Committee on your relevant security duties?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, when the Constitution created two levels of governments, the national Government and the county governments, there is a clause in law which states that both levels of government shall consult on matters of interest. In the case of Machakos County, it was an administrative decision that since the county governments and the national Government, which is represented by the County Commissioners, the Deputy County Commissioners and all that, we linked up and agreed. There is an aspect of security and we thought it was relevant and it was of value to us to liaise and co-ordinate on matters that touch on people's security, not necessarily leading, but facilitating where practical.

Mr. Benjamin Musau: So, in the course of your duties, did you come across any information or evidence that might be relevant to this Special Committee of the Senate which is investigating the impeachment of the Deputy Governor of Machakos?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, as I said earlier, the physical security touches on issues of intelligence. It was brought to my attention by the Director in charge of Protocol in the county, who also has a background in security that there were some leaflets that were circulating---

Mr. Harun Ndubi: Mr. Chairman, Sir, I wonder if hearsay is admissible, irrespective that this is an investigation, but we are all agreed that it is a *quasi-judicial* process. It should not be admissible that a person says "I heard from so-and-so who is qualified in a particular area" when we do not have that information or evidence before us or that person has not been called.

Mr. Benjamin Musau: Mr. Chairman, Sir, there is no hearsay whatsoever in what the witness is testifying. The witness has not even given any testimony, the basis on which my learned friend could draw a conclusion of hearsay. What the witness is saying is that in the course of her duties, she came across information and evidence that is relevant. I think that it is quite out of order and it is not even in accordance with the rules of the court for my learned friend to object to this evidence.

Mr. Harun Ndubi: Mr. Chairman, Sir, that is not correct. She is on record as saying that she received information from a protocol officer who has a background in intelligence, that he had received information about leaflets. If that is not hearsay, then I do not know what it is.

Mr. Benjamin Musau: The witness has not talked about any leaflets.

The Chairperson (Sen. Mutahi Kagwe): Actually, the witness did talk about leaflets. I will allow you to continue; but, please, remember what counsel for the Deputy Governor has said; you should be talking about facts.

Mr. Benjamin Musau: All I need is just to paraphrase the question so that you can paraphrase your answer. The Special Committee is interested to know whether or not you have information within your docket that can assist. If so, please, explain what the information that you have is so that we can get you through the evidence.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I have information that is relevant to issues in this Special Committee. With your permission, I will continue and table them in order in which they were presented to me.

Mr. Benjamin Musau: So, what information did you gather that is relevant?

Ms. Hellena Syombua Kiilu: The following documents were given to me with a view to looking at the contents, there were some recorded messages and then there were various print outs from our CCTV cameras. That is what was given to me and I handed them over to the CS for onward transmission to the County Assembly.

Mr. Benjamin Musau: Thank you very much. At this juncture, I would like to request assistance from the technical team to play the CCTV video.

The Chairperson (Sen. Mutahi Kagwe): Yes, Sen. (Prof.) Anyang'-Nyong'o?

Sen. (Prof.) Anyang'-Nyong'o: Mr. Chairman, Sir, can I ask the witness just one question? In item 17 of your testimony, you said that:-

“I also add that during the Cabinet discussions and drawing up on the allegations, the Cabinet got a media update that the Deputy Governor had already updated his Face book page with a false account that he had been ejected from the Cabinet Meeting for raising issues about corruption and nepotism. This information also subsequently appeared in the print media.”

The Cabinet got the media update from who?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, as we sat in the Cabinet, where we had requested the Deputy Governor to step outside, we all have our IPads and it is routine that you get to know what is happening at any one given time.

Sen. (Prof.) Anyang'-Nyong'o: Mr. Chairman, Sir, is it their practice in the Cabinet that you get media updates about all Members of the Cabinet regularly?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, it is not criminal to carry your phones in Cabinet sessions. What is in accordance to decorum is that we are requested to put them on silent mode. But if something is like that coming up, you are able to see.

Sen. (Prof.) Anyang'-Nyong'o: So, has there been experience in the past where you have got updates about each other and reported it to the Cabinet?

Ms. Hellena Syombua Kiilu: Yes, yes, yes, yes.

Sen. (Prof.) Anyang'-Nyong'o: Thank you.

The Chairperson (Sen. Mutahi Kagwe): You had something that you wanted to say?

Mr. Harun Ndubi: Mr. Chairman, Sir, when I raised the objection about hearsay and subsequent to your direction, I noticed that the witness is now making up sweeping statements that she has information. Thankfully, she said that it was given to her. The basis of that information, how it was given to her and by whom is important for us. Otherwise, I see that the witness is trying to circumlocute the objection about the hearsay evidence by purporting that she owns the information; but she is saying that it was given to her and then she says that she later on gave it to someone else who dealt with it in a particular manner. If it is hearsay – unless she confirms how she came into the possession of that information, then you may disallow the witness from proceeding in the manner that she proposes to do.

Mr. Benjamin Musau: Mr. Chairman, Sir, and hon. Members of the Senate Special Committee, the witness can be asked to give the source of the information and to name the protocol officer that is responsible for the collection of this information. So, could you, please, assist the Committee?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, this information was given by the Head of Protocol, Rtd. SSP Musyoka.

Mr. Harun Ndubi: In that regard, Mr. Chairman, Sir, we still uphold our objection. The County Assembly knows very well that if that SSP Musyoka is the source of the information, that is the person they should have brought to testify and give the sort of documents or information that the witness now purports. To the extent that it is not SSP Musyoka who is here, what she is saying or what she is purporting to tender to the Committee is hearsay. Thank you.

Mr. Benjamin Musau: Mr. Chairman, Sir, the submission by my learned friend is quite untenable. The witness is testifying on matters relating to information and things that she knows. She was in the Cabinet meeting; she got the CCTV images and information while attending the Cabinet meeting that the Deputy Governor had falsely alleged. What she is proving before the Committee is evidence within her own senses. It is admissible

The Chairperson (Sen. Mutahi Kagwe): Is it something that you do in your docket; the security part of your docket?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, part of my docket is liaison on security matters. So, it is within my docket.

The Chairperson (Sen. Mutahi Kagwe): I will allow the recordings.

Mr. Benjamin Musau: Thank you very much, Mr. Chairman, Sir. So, can you, please, play the CCTV images that were played yesterday?

(The Committee viewed the CCTV footage)

The Chairperson (Sen. Mutahi Kagwe): Just as a matter of interest, Counsel for the Assembly; is it the same CCTV that we saw yesterday or is it another one?

Mr. Benjamin Musau: It is the same one but we are showing the other media updates which were not shown yesterday because there were some issues with the system.

(The Committee continued viewing the CCTV footage)

Mr. Benjamin Musau: I think we want to start with the video on the CCTV, then we will come to that. I think that is the one where he addressed the media. We have put them in a logical sequence so as to assist the Special Committee.

(The Committee continued viewing the CCTV footage)

Sen. Martha Wangari: Mr. Chairman, Sir, sorry for the interruption, but yesterday we had requested to be taken through the CCTV footage because it does not have sound. Would it be possible to explain the arrows?

The Chairperson (Sen. Mutahi Kagwe): Actually you remember Counsel for the Deputy Governor had the same thing yesterday. I do not know whether you want to wait until it is done and then you explain. I think it was explained yesterday but as you can see, the questions are still there.

Mr. Benjamin Musau: Mr. Chairman, Sir, the witness is going to explain. I think because we saw this yesterday, we can straightaway go to the explanation by the witness. This appears in the bundle before the distinguished Senators on pages 224 to 229. Can you please take the Committee through that video?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, in five minutes or less, I will explain. This is related to other issues raised on his transport and the allegations that the Deputy Governor had made. The first CCTV camera showed the Subaru Legacy which he had been allocated. The distance between the Governor's office and the town office which was the Deputy Governor's office is about 300 metres. It is a very short distance and nobody of his status would walk that long because it is very humiliating.

Mr. Benjamin Musau: You could also refer to the timings on the CCTV footage.

The Vice Chairperson (Sen. (Dr.) Zani): Mr. Chairman, Sir, the reason we were asking that the explanation goes together with the motion picture was so that we can follow because the static photos are not the same. I beg that we make it concurrent that we are looking at the same thing that she is explaining. Is it possible that you inform us exactly where the CCTVs are? Some of them seem to be in the streets and so it is a bit difficult to know exactly how those recordings were obtained.

The Chairperson (Sen. Mutahi Kagwe): In other words, the technical people can just go back a bit. It is quite slow a bit. What the request here is that, as it is going on, can someone take us through it and while doing so, one of the things that will be very useful is if we can get some indication of when the CCTV footage was taken; the timing of it, because normally on the CCTV, it would indicate time.

(Ms. Syombua took the Committee through events that took place as viewed on the CCTV camera)

The Vice Chairperson (Sen. (Dr.) Zani): Where are the CCTV cameras located?

Ms. Hellena Syombua Kiilu: There are some within our offices and others on the highways on manageable distances and manned at a control centre where in record time what is happening is recorded.

Sen. (Prof.) Anyang'-Nyong'o: Mr. Chairman, Sir, how do we know from that arrow on the CCTV camera that that is the Deputy Governor? I can see a crowd of people and something which looks like a matatu, but I cannot prove that it is a matatu. So, how does this help us?

Ms. Hellena Syombua Kiilu: There is a crowd there and unless the Committee wants to do more scrutiny, but I can confirm that that was the Deputy Governor and the crowd had started forming. That is just next opposite his office.

Sen. (Prof.) Anyang'-Nyong'o: Madam, it is not that you can confirm. It is that I can see. You are trying to convince me that there is a Deputy Governor there. If you were in my shoes and not in Machakos, would you be convinced that there is a Deputy Governor there?

Mr. Benjamin Musau: Mr. Chairman, Sir, we have made evidence on the scene. I think it is the matatu driver and the conductor who could have answered that question. This is a CCTV image and I think the witness cannot fully at this point own it.

The Chairperson (Sen. Mutahi Kagwe): Okay, let us hurry this through.

(Ms. Hellena Syombua Kiilu took the Committee through the events on the CCTV camera)

Mr. Harun Ndubi: Mr. Chairman, Sir, may be one last question: Will we be allowed to view this in cross examination or can we ask questions for clarification so that we do not need to come to it? If you permit, I will request that they go back a bit because there is a discrepancy I have noticed but it will be important for the Committee to note.

Mr. Benjamin Musau: Mr. Chairman, Sir, I think it is not permitted by the rules of evidence for witnesses to be cross examined during examination-in-chief.

The Chairperson (Sen. Mutahi Kagwe): We will give you a chance to cross examine her.

Mr. Harun Ndubi: Thank you. That is all I wanted.

Ms. Hellena Syombua Kiilu: That marks the end of the viewing.

Mr. Benjamin Musau: Could you confirm to the Committee the timings? I think they are shown on page 224 for the avoidance of doubt.

Ms. Hellena Syombua Kiilu: The first clip was taken at 12.43 p.m. That is when he was given the alternate car to take him back. All the timings are indicated in this---

Mr. Benjamin Musau: So, would you like to submit your affidavit together with the bundle of documents appearing on pages 224 through to 225 of the Committee's bundle as evidence together with CCTV images?

Ms. Hellena Syombua Kiilu: Yes, Sir.

Mr. Benjamin Musau: Are there any other DVDs that will constitute the rest of your evidence?

Ms. Hellena Syombua Kiilu: Yes, Sir.

Mr. Benjamin Musau: Thank you very much. Together with the CCTV images and the other DVDs that would constitute the rest of your evidence?

Ms. Hellena Syombua Kiilu: Yes, I would love to.

Mr. Benjamin Musau: Thank you very much. I will now ask that we play the tape on the Deputy Governor addressing the media in his office.

The Chairperson (Sen. Mutahi Kagwe): I think it is also important at this juncture for me to let the Counsel for the assembly know that even though we are holding time for the technical hitches, we have approximately 20 minutes remaining for your hearing.

Mr. Benjamin Musau: Most obliged. But is the Special Committee taking into account the interruption?

The Chairperson (Sen. Mutahi Kagwe): That is what I said. We will hold some time for the technical hitches. We do not want you to be disadvantaged for that. But nonetheless, even when we hold that, you still have about 20 minutes.

Mr. Benjamin Musau: Mr. Chairman, Sir, just for clarification. That is the net time and it excludes the application---

The Chairperson (Sen. Mutahi Kagwe): That does not include the cross-examination. We will hold time when they are cross-examining.

Mr. Benjamin Musau: Most obliged, Mr. Chairman, Sir.

Sen. Njoro Ben: On a point of order, Mr. Chairman, Sir. Would it not be in order if the bundles that the witness has referred to are received by the Committee at this stage?

The Chairperson (Sen. Mutahi Kagwe): We already have them.

Mr. Benjamin Musau: Mr. Chairman, Sir, in view of the time scales, I seek your direction. The purposes for which these video recordings are being played, is for the witness to confirm that she can recognize the voice of the Deputy Governor. So, if there will be no objection to the voices and the “*nguu*” speeches in Kikamba, the speech that is going to be played here is in a language that the Senate can understand--- The next ones will be in Kikamba. If you could direct, then we can call the next witness.

The Chairperson (Sen. Mutahi Kagwe): Counsel, it is your time. You decide.

Mr. Benjamin Musau: Much obliged. Let us proceed.

(A video recording was played)

Can you stop there?

(The video recording was stopped)

The transcript of that is on page 230. Since that is in Kikamba, the translation follows immediately after the Kikamba text. So, I would like to put the question to the witness. Is the person appearing in that video the Deputy Governor, Mr. Benard Kiala?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I want to confirm that, that is not a photoshop. The voice is that of the Deputy Governor.

Mr. Benjamin Musau: Is that the photo of Mr. Kiala?

Ms. Hellena Syombua Kiilu: Yes, Sir.

Mr. Benjamin Musau: Would you, therefore, take us through the translation which is on page 230 in the bundle?

The Vice Chairperson (Sen. (Dr.) Zani): On a point of order, Mr. Chairman, Sir. It is very important for us to understand the sequence of these events - what is happening when and what the time is – so that there is no confusion from the trajectory that you are giving us from the meeting. Is this, for example, happening before or after the CCTV footage that we saw? So that we can actually have a trajectory of what is happening, we need both the timing and the other issues that you are discussing.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, the CCTV footage was done prior to this. When the Deputy Governor left the cabinet meeting– and we are 300 metres apart – he went for the *matatu* drama and came back and called the Press to his office. That is the order of events as they occurred.

Mr. Harun Ndubi: Mr. Chairman, Sir, could the witness have some respect for the Deputy Governor? She is using some condescending and intemperate language. There is something that she said about the Deputy Governor---

The Chairperson (Sen. Mutahi Kagwe): Point taken. Refer to the Deputy Governor in the right protocol.

Ms. Hellena Syombua Kiilu: I apologize.

The Vice Chairperson (Sen. (Dr.) Zani): The timing please. You left that out when answering my question. It is not on the clip, like it is on the others.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, from the matatu stage to his office, it was between 1.00 p.m. to 2.00. p.m.

The Chairperson (Sen. Mutahi Kagwe): In other words, the sequence is the one that you are referring to?

Ms. Hellena Syombua Kiilu: Yes.

The Chairperson (Sen. Kagwe): In the interest of time---

The Vice Chairperson (Sen. (Dr.) Zani): There is no specific timing on this particular media coverage that was done.

Ms. Hellena Syombua Kiilu: I did not see any, but it was between 1.00 p.m. and 2.00 p.m.

The Chairperson (Sen. Mutahi Kagwe): Okay. Please, go on.

Mr. Benjamin Musau: Have you listened to that particular recording?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I have.

Mr. Benjamin Musau: Is this translation true and correct?

Ms. Hellena Syombua Kiilu: It is translated correctly.

Mr. Benjamin Musau: Can you, please, read through it?

Mr. Harun Ndubi: Mr. Chairman, Sir, I apologize again and do this on account of duty. The witness has not stated that she is the one who translated this thing. We have looked at that document which we were served with long ago, especially the record that came from the county assembly and there is no certification. Nobody takes ownership of the translation. She cannot, therefore, come and say that this is the correct translation, having laid no basis on how she came into possession of the document that she is bringing to us here.

Mr. Benjamin Musau: The witness has already said that she received this information and sent it to the county secretary, who then sent it to the county assembly. So, the witness is saying that she has listened to the tape – she understands Kikamba - and this is the correct translation.

Mr. Harun Ndubi: All those words are coming from my friend's mouth. The witness has said nothing about whether or not she understands Kikamba.

The Chairperson (Sen. Mutahi Kagwe): I just want to clarify that for the Committee the most important thing is: Are the words correct as spoken? That is the important thing.

Mr. Harun Ndubi: Mr. Chairman, Sir, that would come, with greatest respect, from an independent witness. Even if that witness were called by the Committee on its own motion, this is an accuser - you have read her affidavit – and therefore, she cannot be the

one stating the translation to the information that you have is correct, unless you call an independent Mkamba from wherever in Nairobi to come and talk to us about it.

Mr. Benjamin Musau: Mr. Chairman, Sir, with due respect to my learned friend, this is an investigation. Actually, no information ought to be locked, in whichever form it comes. It is no doubt that, that is the Deputy Governor. Let the Committee get to know whether the words that are associated to him are as transcribed here. That is what is important. This is an investigation and it is not a court of law. If we go technical, this Committee will not actually adequately assess the evidence as relayed here. Some of those issues can actually be dealt with in submissions.

Mr. Harun Ndubi: Mr. Chairman, Sir, if that be the proposition, there would be no basis to have even the rules of this Committee of the Senate or, in fact, even convening this Committee. This is because anybody could carry an inquiry howsoever they want. There are rules. We cannot have it when it is suitable for us and not do it when it is unsuitable for us. We must do the right thing. You cannot have a person who is prejudiced using scandalous language against the Deputy Governor and then, be the person certifying that this information, whose source she cannot tell us, is true or not true. That cannot be.

Mr. Benjamin Musau: Mr. Chairman, Sir, the witness was just about to confirm---

Sen. Ben Njoroge: On a point of order, Mr. Chairman, Sir. Going through the Evidence Act, Section 144 (2) says that the court shall admit the evidence of any fact if it thinks that the fact if proved would be admissible and not otherwise. Just to get the facts right, I think what is before us should be admissible because we really need to go with the facts.

Mr. Harun Ndubi: Mr. Chairman, Sir, it is not a tit for tat with the Senate, but may I point out that the Constitution, under Article 50, provides very clearly the rules of a fair trial and natural justice, under Articles 25 and 47. That must be superior to the section of the Evidence Act which the hon. Senator is referring to.

The Chairperson (Sen. Mutahi Kagwe): I think that you have a point, counsel. There is need for us to be reading a translation that is authenticated. I am convinced that it is necessary for us to do so. Therefore, I would like counsel to advise or tell us how they intend to authenticate that information.

Mr. Benjamin Musau: We will cover this within the closing statement. Meanwhile, the particular witness who is before you understands Kikamba and is a Mkamba. I thought that I should have been permitted to lead the witness to through the translation.

The Chairperson (Sen. Mutahi Kagwe): The issue that is in front of us is: As she reads the translation, there is the question of whether or not the translation is correct. Who is the authority on whether or not it is correct and who verified that, that is the correct thing, unless you want to say, in your opinion, what it is?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, in my opinion, it is.

Mr. Benjamin Musau: What the Chairman is asking is about the authentication. We will get a certificate as necessary.

The Chairperson (Sen. Mutahi Kagwe): That is necessary, just in case somebody wants to challenge it and say that this is not the correct translation.

Mr. Benjamin Musau: Mr. Chairman, Sir, since your directions on 20 minutes, we have not moved an inch, because of objections.

The Chairperson (Sen. Mutahi Kagwe): I said that whenever there is an exchange, we will be holding that time for you. The same will apply to the other side.

Mr. Benjamin Musau: Madam Helena Kiilu, you had actually said that you listened to these recordings.

Ms. Hellena Syombua Kiilu: Yes.

Mr. Benjamin Musau: Do you understand Kikamba well?

Ms. Hellena Syombua Kiilu: Yes, I do.

Mr. Benjamin Musau: Do you, therefore, confirm that what appears on page 230 – the Kamba version - is a correct version?

Ms. Hellena Syombua Kiilu: Yes, it is.

Mr. Benjamin Musau: Would you like to read to the Senate Special Committee the translation which follows thereafter?

Ms. Hellena Syombua Kiilu: “of the Kamba brief to the press but the meeting started with the presence of the Governor and the ten executive members. I thereby took the opportunity to explain to the Governor and the Cabinet the problems that I had been facing; one being the issue of my life being threatened. I explained to the cabinet that I had reported the matter to the police and thought it would be good to put the issue as an agenda and discuss it with the Cabinet. This is because one of the people who were threatening me was in attendance in the meeting, that is, the chief of staff, Mr. Mutuse.

After I finished raising the issue, there were some disagreements and the Governor said that the things being discussed were touching on my character and my conduct. The Cabinet asked me to step out so that they can discuss the issue in my absence. When I went out, I found my official car without its number plates, immobilized and blocked in a

way that I could not move. When I consulted the Director from the Governor's office on the issue, he said that those were directions from the Governor and I should not get used to government vehicles because I am fighting the government. Then I decided to walk to my office.

The reason we are having these problems in our county is the reason I have been saying that the Machakos jobs should be given to the children of Machakos. This is because the jobs in Machakos are many and are being given to people from outside the county. This is the reason why our youths are not getting jobs. I would stand again and say that tenders and contracts should be given to the people of Machakos. Even the ongoing job at Mwala Sub-county including water supply, road construction, drilling boreholes and so on, should be given to the people of Mwala so that they may see the importance of devolution. If it is in Yatta, the jobs should be given to the contractors there to help our people do business and sustain themselves. We should bring more money to our people because devolution states that money should be brought to the grassroots where our people are.

The other reason why I am being chased out of the Cabinet meeting is because of the CORD meeting we had yesterday. The reason I attended is because the Governor and the Leader of Majority in the Assembly were elected by the Wiper Party. So, if I say that the Government of Machakos is made of the Wiper, then I will be saying the truth.

Mr. Benjamin Musau: Madam Helena, you have read through the translation of what the Deputy Governor said while addressing the media in his office on 7th July, 2014. One of the statement towards the bottom of the first page, there is a statement saying; "the Cabinet told me to step out to discuss the issues in my absence". Is that correct?

Ms. Hellena Syombua Kiilu: That I was chased out?

Mr. Benjamin Musau: He said, "the cabinet told me to step out to discuss the issues in my absence."

Ms. Hellena Syombua Kiilu: Yes.

Mr. Benjamin Musau: Then he continued to say; "when I went out, I found my official car without its number plates, immobilized and blocked in a way that I could not move it from where it was parked. When I consulted the Director from the Governor's office on the issue, he responded saying that directions had been given from the Governor that I should not get used to government vehicles because I am fighting the government. So, from there, I decided to walk to my office."

Is it true that the Deputy Governor walked to his office?

Ms. Hellena Syombua Kiilu: It is not true.

Mr. Benjamin Musau: Then further on he says; “the Machakos jobs should be given to the children of Machakos”. Is that national or county government policy?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, we do not have a policy that says strictly people should be employed from one county, neither do we have a law in this country and the counties in extent which says only residents of that county or country should be employed.

Mr. Benjamin Musau: Is the Deputy Governor sincere when he says that the jobs in Machakos are many and are being given to people from outside the county? Is that true?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I think he would be best placed to explain that bit because it is his docket that handles issues to do with hiring in consultation with the County Public Service Board.

Mr. Benjamin Musau: At this juncture, I would like to ask the witness to be taken through the video which recorded what the Deputy Governor said at Bomani AIC. If that is not available, what he said at Masii Catholic Church. We can pick any of them, preferably the one for Masii Catholic Church. In view of time constraints, I wish to refer you to the media updates which appear for the Committee on page 233. What are these updates?

Ms. Hellena Syombua Kiilu: If you are in the current social media, you can update your page as and when emerging news arise. In the documents that I was given, there is one which he talks about being threatened. It is just a small caption, please allow me to read--

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Mr. Benjamin Musau: Did you get that particular update yourself from the media?

Ms. Hellena Syombua Kiilu: Yes.

Mr. Benjamin Musau: Could you please read through quickly because of time so that we can move on?

Ms. Hellena Syombua Kiilu: It says:-

“On Tuesday night, I was threatened with death by someone calling himself Joseph Chuma from Makueni County. He claimed to be a maid of “*nguu*”. I reported the matter at Embu and subsequently the caller was arrested by the Embu Criminal Investigations Department (CID) and he spilled the beans. Now I know who gave him my telephone number, who typed the threats texts because Chuma is illiterate; where they met along Mombasa Road, Nairobi, who they were with including “*nguu*” himself, will be arraigned in court next week.”

Mr. Benjamin Musau: So as to connect your evidence, in your affidavit paragraph 3, you mentioned that the Deputy Governor said that he wanted to raise a personal matter regarding his security, probably this update is in that connection. Is it in that connection?

Mr. Harun Ndubi: Mr. Chairman, Sir, Musau is stretching his luck too far. You cannot testify with the witness's opinion.

Mr. Benjamin Musau: I am asking the witness to connect the facebook update. I can go through the long method or the witness can speak for herself. Please, connect.

Mr. Harun Ndubi: I think the decency of proceedings---

The Chairperson (Sen. Mutahi Kagwe): I think there is a little bit of fishing and I would advice counsel that you have only ten minutes to bring out any issues you want. I believe that this matter has been brought out, and I think it would be best to move on to substance.

Mr. Benjamin Musau: Thank you. I think I was waiting for that; is the video ready?

The Chairperson (Sen. Mutahi Kagwe): Is this thing digital or analogue because it is taking too long?

(The video was played before the Committee)

Mr. Benjamin Musau: You can stop it at that point.

Mr. Chairman, Sir, I need your direction with all due respect. This is in Kikamba and is the Masii Catholic Church speech. I want to ask the witness questions and she will take us through some of the translations and because it is on record, I will stand her down for cross-examination before I call the next witness.

The Chairperson (Sen. Mutahi Kagwe): The verification and authenticity would be the same if you have a translation.

Mr. Benjamin Musau: Would you please confirm that that was the recording of the Deputy Governor at Masii Catholic Church? Please confirm the date.

Ms. Hellena Syombua Kiilu: This was on---

Mr. Harun Ndubi: Mr. Chairman, Sir, my colleague is putting me in a very awkward situation where I need to be interrupting all the time. It is not nice. There is nothing from the voice that says this is Masii. You cannot propose the answer to the witness and ask the witness to say "yes it is Masii". She can only tell us what she is hearing from the

voices and what the words are suggesting and not what Mr. Benjamin Musau would like her to say.

Mr. Benjamin Musau: That particular interjection is uncalled for. There is background information; these images and voices can only be connected by---

The Chairperson (Sen. Muathi Kagwe): I think the disadvantage we have is that there is no image. What we are hearing is a voice somewhere in the background but counsel is quite correct to say that there is no way we can tell where that was. I think what we have from that church event you are talking about in the bundle is the translation. I said that we needed a verification of that translation. What is missing here is the actual video for us to know that this is in the church. We should be able to see the church and people so that we can verify whether it is correct. There is no way of knowing what is happening in that voice.

Mr. Benjamin Musau: I do not know why the Senate system cannot play the live video. We went through this yesterday and from your directions, said that we are going to provide this and we have done so with the originals. What we are doing is to tie those up through evidence.

The Chairperson (Sen. Mutahi Kagwe): We do have the videos ourselves but it was important for counsel on this side to also get it correctly.

Mr. Benjamin Musau: We also gave copies to the counsel and we hope that he went through it yesterday.

Mr. Harun Ndubi: Be fair. You gave out those CDs at night.

The Chairperson (Sen. Mutahi Kagwe): I would like to propose that we move on because I do not think we have any problem with a verified translation of this. In the interest of time, I am not sure that there is anything new we are going to get from this.

Mr. Benjamin Musau: Then I asked just for the avoidance of doubt; you had confirmed that, that was Mr. Kiala's voice which was in the background. Please, confirm the date?

Ms. Hellen Syombua Kiilu: That was a speech in Masii on the 6th of July.

Mr. Benjamin Musau: And on page 237, there is also the transcript of the Deputy Governor's speech at Bomani; is that AIC Bomani?

Ms. Hellen Syombua Kiilu: Yes, it is.

Mr. Benjamin Musau: What was the date of that?

Ms. Hellena Syombua Kiilu: It was on 29th July--- Sorry, it was on 29th June. Then there was another one in these combinations done on the 15th of June.

Mr. Benjamin Musau: Okay, that is all, Mr. Chairman, Sir, and hon. Senators.

The Chairperson (Sen. Mutahi Kagwe): Thank you very much. Cross examination?

Mr. Harun Ndubi: Thank you, Mr. Chairman, Sir. How many minutes do I have? This is probably the most important witness.

The Chairperson (Sen. Mutahi Kagwe): You have ten minutes.

Mr. Harun Ndubi: Not 20 minutes?

The Chairperson (Sen. Mutahi Kagwe): Not 20 minutes, counsel. But I will give you another five minutes just so you are happy.

Mr. Harun Ndubi: Thank you. Now, can I begin with the witness with a question on page 233, the social media update, whose English you are unhappy with. I want you to read the last sentence of that update that you read starting with “Now I know---.” Can you read it?

Ms. Hellena Syombua Kiilu: Which one are you referring to?

Mr. Harun Ndubi: The social media update you referred us to and which you read on page 233.

Ms. Hellena Syombua Kiilu: I have our minutes.

Mr. Harun Ndubi: Maybe you can read mine.

Ms. Hellena Syombua Kiilu: The one that says on Tuesday?

Mr. Harun Ndubi: Yes, yes, yes; okay. Thank you.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, on Tuesday night, I was threatened with death by someone---

Mr. Harun Ndubi: No, read the last sentence beginning “Now I know who---” from the middle actually.

Ms. Hellena Syombua Kiilu: “Now I know who gave him my telephone number, who typed the threat text message because Chuma is semi illiterate, where they met along Mombasa Road, Nairobi, and who they were with, including Nguu himself.

Mr. Harun Ndubi: Thank you. Including Nguu himself. Would that mean he was referring to a particular person, whoever it is he called “Nguu himself?”

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, the context in which “Nguu” is used in this particular sentence referred to an individual. But in the context that it has been used--

Mr. Harun Ndubi: No, no, no, no; I am asking the questions. The other questions you want to be asked, Mr. Musau will ask you.

Mr. Benjamin Musau: Mr. Chairman, Sir, and distinguished Members of the Senate, I think my learned friend should be called upon to restrain from provoking his colleagues.

(Laughter)

Mr. Harun Ndubi: Thank you. I do not intend to provoke him.

Anyway, let us go to the affidavit first very quickly because we do not have much time. Look at your paragraph 5 of your affidavit where you say “At this point, the Governor said that these are serious allegations and he enquired from the Deputy Governor if he had reported to the police, the police should be left to investigate.” Is that correct?

Ms. Hellena Syombua Kiilu: Yes it is, Mr. Chairman, Sir.

Mr. Harun Ndubi: That is what the Governor said? Look at paragraph 8; it also says that the Governor ruled that the police should be given time to investigate this matter. Is that correct?

Ms. Hellena Syombua Kiilu: Yes.

Mr. Harun Ndubi: In paragraph 7, you discussed these matters briefly and there was need to find out from Members of the CEC if any of them had a criminal case pending with the police or in court. Is that correct?

Ms. Hellena Syombua Kiilu: Yes, it is.

Mr. Harun Ndubi: Why was it necessary?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, it was necessary because the conduct of a person goes beyond issues that were brought in as an agenda. There were issues that were touching on the allegations and his personal security. That is why we felt as a Cabinet that they needed to go to the police because they have the capacity to investigate. On the other matters that were in house, we talked about them---

Mr. Harun Ndubi: No, I want to find out why it was necessary for especially you to say whether or not you had a criminal matter pending when the Deputy Governor had made a specific accusation against the Chief of Staff. That is what I want to understand.

Ms. Hellena Syombua Kiilu: I think this question was in the context of knowing whether we had hidden some issues amongst ourselves as a Cabinet.

Mr. Harun Ndubi: Yes; thank you very much. Because, actually, there was suspicion that the Deputy Governor had hidden some information about his past.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, it is not within my knowledge to see the intentions of that question that was asked.

Mr. Harun Ndubi: No, no, no, no; you have said by yourself that you wanted to know whether any of you had hidden information about something; about their criminal record, because you specifically said that the question was whether you had a criminal record. Was there suspicion that any of you or the Deputy Governor had hidden information about their past?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, since it was not me who asked this kind of information, again, I do not feel I have the capacity to answer that.

Mr. Harun Ndubi: You have been offering a lot of opinions; now on this one you do not?

Anyway, you also said in your paragraph 10 “Where Mr. Maliti moved that we discuss the Deputy Governor’s conduct.” Was this on the basis that the Deputy Governor had made a complaint or did Mr. Maliti table before the Cabinet information that there was previous conduct of the Deputy Governor?

Mr. Benjamin Musau: I object to that question. I have already informed my learned friend that Mr. Maliti will be called as a witness and I think it is out of order for him to put a question to this particular witness that can legitimately be put to Mr. Maliti.

Mr. Harun Ndubi: Mr. Chairman, Sir, my colleague is forgetting something about corroboration in evidence. This witness attended the Cabinet meeting we are discussing; they discussed and made a decision to take certain actions against the Deputy Governor, and that is what I am seeking to understand why that decision was taken.

Mr. Benjamin Musau: If my learned friend was---

Mr. Harun Ndubi: Mr. Musau, if you may allow me to complete my sentence---

The Chairperson (Sen. Mutahi Kagwe): Please, let us be courteous to each other.

Mr. Harun Ndubi: Thank you. This witness attended that meeting of the Cabinet; she seconded Maliti's Motion to amend the agenda of the day. So, surely, she must be the right person to ask these questions.

Mr. Chairman, Sir, I seek your protection and guidance.

The Chairperson (Sen. Mutahi Kagwe): You are very protected in this House. However, please, ask a question about her; I think that would be useful.

Mr. Harun Ndubi: Mr. Chairman, Sir, she seconded the Motion; there must have been a basis. What was the reason you seconded that Motion, if I may ask you now?

Ms. Hellena Syombua Kiilu: I seconded this Motion because I felt that matters that were brought forth were very weighty because they touched on somebody's personal security. You know it was also informed by the other media statements that the Deputy Governor was making. So, we thought it was in order because we can only discuss that in a Cabinet meeting.

Mr. Harun Ndubi: Thank you. The personal security that these matters touched on and you felt they were weighty, was it the Deputy Governor's security?

Ms. Hellena Syombua Kiilu: Yes, it was.

Mr. Harun Ndubi: Now, did you discuss his security or did you discuss his conduct?

Ms. Hellena Syombua Kiilu: I said security was part and parcel of the issues that we wanted to add as an agenda.

Mr. Harun Ndubi: But I want you to just be forthright and we will be quickly done with this. You said that the Motion was to discuss the Deputy Governor's conduct?

Ms. Hellena Syombua Kiilu: Conduct and---

Mr. Harun Ndubi: No, no, no; you actually quoted this. Look at paragraph 10; it is in quotes that the Motion was amended to include the agenda item "Discussion of the Deputy Governor's conduct." Is that correct?

Ms. Hellena Syombua Kiilu: Yes.

Mr. Harun Ndubi: Thank you. Now, you say in paragraph 13 that after you had resolved to discuss his conduct, you asked him to leave or to step outside so that his conduct could be discussed, allegations drawn up – I emphasize that point – and thereafter he would be

called back to respond on the allegations of misconduct has been taken. You understand English correctly?

Ms. Hellena Syombua Kiilu: Very well.

Mr. Harun Ndubi: What do you understand by that paragraph 13, after you had requested him to step out so that what happens?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I do not know in what context that question is being asked.

Mr. Harun Ndubi: Plain reading; do not try to second-guess what I mean. Just answer the question. What is your understanding of that sentence in your averment, that after you asked him to step out, so that what happens?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I wish not to be drawn into the linguistic framing of these questions because I think it is out of the context of the issues we---

The Chairperson (Sen. Mutahi Kagwe): I think what the counsel is asking you is just to read what you have written yourself.

Ms. Hellena Syombua Kiilu: Paragraph 13, that we requested the Deputy Governor to step outside so that his conduct could be discussed, allegations drawn up because I was there and, thereafter, he would be called back to respond on the allegations of misconduct---

Mr. Harun Ndubi: Thank you. The decision that there would be allegations was taken before the discussion. Is that not correct?

Ms. Hellena Syombua Kiilu: They were emerging because you know when we were bringing in an agenda, it implies that there are areas that we need to expound on as the Cabinet, and that is what happened.

Mr. Harun Ndubi: No, no, no; yes; you had decided that you will step out, we will discuss you, we will draw up allegations, then we will call you to come and answer to these allegations. That is what your decision had been. Is that correct?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, it follows that you cannot discuss somebody unless there are issues. We cannot do that if it was---

Mr. Harun Ndubi: I think you have answered my question. Thank you very much for your forthrightness. I want to refer you to the minutes of the 20th Cabinet Meeting, which

is on page 249. These are the things she had referred to. Do you have the minutes with you?

Ms. Hellena Syombua Kiilu: What minutes?

Mr. Harun Ndubi: Maybe if she can be shown this bundle, this is the official Senate---

Ms. Hellena Syombua Kiilu: Official---?

Mr. Harun Ndubi: Look at those minutes of the meeting of 7th July; someone referred to it as *Saba Saba*.

Ms. Hellena Syombua Kiilu: Yes.

Mr. Harun Ndubi: You have confirmed in paragraph 16 of your affidavit that you confirmed those serious allegations were in those minutes. Tell me where in those minutes these allegations are recorded.

First, let me ask you; are those minutes signed at the end, I think on the second or third page?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I would wish to request that---

Mr. Harun Ndubi: Yes or no; are they signed?

Ms. Hellena Syombua Kiilu: You know they cannot be signed if you know---

Mr. Harun Ndubi: You should just say “yes they are signed” or “no, they are not signed.” Period!

Ms. Hellena Syombua Kiilu: This paper is not signed.

Mr. Harun Ndubi: The next page, is it signed?

Ms. Hellena Syombua Kiilu: It is certified.

Mr. Harun Ndubi: Correct. The third one, is it signed? The third one is not even part of the minutes. Is it?

Ms. Hellena Syombua Kiilu: It is certified as well.

Mr. Harun Ndubi: Thank you. Now, tell me in those certified minutes where you see an entry or content regarding the discussion on the Deputy Governor on that day.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, these are excerpts of Cabinet meeting minutes.

Mr. Harun Ndubi: Those are the minutes that were taken to the County Assembly on the basis of which the Deputy Governor was impeached. They are the minutes before the Senate; we do not know anything else.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, they may not know anything because this is what we felt was relevant.

Mr. Harun Ndubi: Thank you. Now, I want you to look at paragraph 20 of your affidavit; there was a meeting on 29th. Is that not correct?

Ms. Hellena Syombua Kiilu: Yes, Mr. Chairman, Sir.

Mr. Harun Ndubi: And that is the day you have sworn in that affidavit which is on 9th July or is it a different date?

Ms. Hellena Syombua Kiilu: I need to check on the dates to know when they were---

Mr. Harun Ndubi: When did you swear the affidavit?

Ms. Hellena Syombua Kiilu: On 9th July.

Mr. Harun Ndubi: And you are saying in that affidavit that the Deputy Governor attended the meeting of that day?

Ms. Hellena Syombua Kiilu: The swearing in was done in the afternoon and the Cabinet meeting was done in the morning.

Mr. Harun Ndubi: You are confirming that the Deputy Governor attended that meeting?

Ms. Hellena Syombua Kiilu: Yes, he did.

Mr. Harun Ndubi: Now, on paragraph 29, you have said that - Mr. Chairman, Sir, I hope you will take into account the hesitation by the witness eating into my time. When the witness takes time to answer, that is my time and I should be compensated.

(Laughter)

The Chairperson (Sen. Mutahi Kagwe): Counsel, I am trying very hard to see that. I will add you two more minutes.

Mr. Harun Ndubi: Witness, do you confirm that you asked the Deputy Governor for more time to answer to such allegations and you agreed that you should answer by 16th July? Was there a Cabinet meeting on 16th July?

Ms. Hellena Syombua Kiilu: I would have to check on our records to confirm.

Mr. Harun Ndubi: Do you know or not, because this was a special meeting to discuss the Deputy Governor?

Ms. Hellena Syombua Kiilu: I need to check in our records because we have very many meetings.

Mr. Harun Ndubi: Where did you sign this affidavit at?

Ms. Hellena Syombua Kiilu: It was signed within the premises of the Cabinet room.

Mr. Harun Ndubi: Do you remember that you signed them on the 9th July and we are here because of the impeachment proceedings that started at the county assembly?

Ms. Hellena Syombua Kiilu: Yes, I am aware.

Mr. Harun Ndubi: You are aware that those proceedings began on 10th July?

Ms. Hellena Syombua Kiilu: I need to check

The Chairman (Sen. Mutahi Kagwe): Are you aware or not?

Ms. Hellena Syombua Kiilu: I am not aware.

Mr. Harun Ndubi: Are you aware that the decision to impeach the Deputy Governor was taken before you deliberated on the allegations that you had drawn against him?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I am not aware.

Mr. Harun Ndubi: Are you aware whether there were impeachment proceedings on the Motion that they admitted on 9th July when you were having this Cabinet meeting?

Ms. Hellena Syombua Kiilu: I am not aware.

Mr. Harun Ndubi: Why were you signing this affidavit? What for?

Ms. Hellena Syombua Kiilu: We signed this affidavit as a record of what we felt bordered on issues of criminality. So, for us, it is a legal thing.

Mr. Harun Ndubi: You were swearing this affidavit on 9th July, even when you had told the Deputy Governor go and come back on 16th July and tell us your answer to these allegations?

Ms. Hellena Syombua Kiilu: I would like the Committee to interrogate the intentions of the questions.

Mr. Harun Ndubi: Mr. Chairman, Sir, if you add me just one more minute!

The Chairperson (Sen. Mutahi Kagwe): Now you are stretching.

Mr. Harun Ndubi: I know but I am trying to assist the Committee.

The Chairperson (Sen. Mutahi Kagwe) You have one minute and that is it.

Mr. Harun Ndubi: Thank you. On the CCTV, you appreciate that what you saw did not contain the date, time and location?

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, I said---

Mr. Harun Ndubi: I do not have much time, so tell me no or yes. Were they there or not?

Ms. Hellena Syombua Kiilu: There are dates on the print out.

Mr. Harun Ndubi: No, no,no. I am talking about what we saw on the video.

Ms. Hellena Syombua Kiilu: On the printout---

Mr. Harun Ndubi: Can you confirm that it is edited to include different scenes?

Ms. Hellena Syombua Kiilu: Yes, Mr. Chairman, Sir.

The Chairperson (Sen. Mutahi Kagwe): Re-examination!

Mr. Benjamin Musau: On this particular CCTV, the images that were played together with the images that are on record, are those correct or have they been tampered with by the county government?

Ms. Hellena Syombua Kiilu: They have not been tampered with in any way.

Mr. Benjamin Musau: So, you are reconfirming that the evidence given is water tight?

Mr. Harun Ndubi: Mr. Chairman, Sir, once more, if she admits they are edited, you cannot use another word tampering. I did not use the word “tampering”. You can only say that they were edited. Whether they were tampered with or not shall all be an opinion we will bring to you in our submissions and you can hold as a Committee.

The Chairperson (Sen. Mutahi Kagwe): I think that will come at submissions.

Mr. Benjamin Musau: Madam Helena Kiilu, has there been any editing or tampering of the CCTV video evidence that you have presented?

Ms. Hellena Syombua Kiilu: No, Mr. Chairman, Sir.

Mr. Benjamin Musau: When my learned friend put to you a question on the amendment of the agenda item which you explained very well on paragraph 10 - if you can refer to it – of your affidavit, in which you say that Mr. Francis Maliti justified the proposal to amend the agenda by saying that the Deputy Governor had been widely covered in the media on several occasions in various for a while criticizing the county government while he is also serving in the same government”; you seconded in the second averment on paragraph 11 the proposal to amend. Why did you do that for the avoidance of doubt? You talked about Mr. Francis Maliti. Is that the one you are referring to in paragraph 11?

Ms. Hellena Syombua Kiilu: Yes, Mr. Chairman, Sir.

Mr. Benjamin Musau: Was it because you had told the Committee that security falls under your docket? Why did you not support? Just tell us in one word or one sentence.

Ms. Hellena Syombua Kiilu: Mr. Chairman, Sir, in the submitted documents, there was a reference of a *nguu* and a *nguu* taken in the context of security repeatedly. We looked at that from a security perspective and we said if you are telling people *toka*, it causes fear because Machakos County borders Embu on the Masinga side. We have people living in Machakos County and we felt that it was against the rules of national integration to even bring this to Machakos.

Mr. Harun Ndubi: Mr. Chairman, Sir, the evidence about *nguu toka* did not come from this witness in the examination-in-chief.

The Chairperson (Sen. Mutahi Kagwe): In fact, what I want to point out is that your time is actually up and I would like you to wrap up whatever it is that you need to in the next two minutes.

Mr. Benjamin Musau: Thank you very much, I call the next witness.

The Chairperson (Sen. Mutahi Kagwe): Please, appreciate that you have two minutes for the next witness.

Mr. Benjamin Musau: Mr. Chairman, Sir, I want to request that you give us ten more minutes because the time that this particular witness has taken is largely because of the interruptions although I do not doubt the record.

The Chairman (Sen. Mutahi Kagwe): Let me put it this way, counsel; I held time for you during the interruptions. In fact, I extended time for you. Since I extended a little time when he was cross examining, I can extend a little time for you for about five minutes but really we need to move on.

Mr. Benjamin Musau: The next witness is Mr. Francis Maliti Wambua and his evidence is actually on Flier No.12 in our bundle.

(Mr. Francis Wambua Maliti took the oath)

Mr. Benjamin Musau: Mr. Francis Wambua Maliti, could you please confirm your names and also confirm to this Committee that you swore an affidavit on 9th July, 2014 which is before the Committee?

Mr. Francis Wambua Maliti: My name is Francis Wambua Maliti.

Mr. Benjamin Musau: What are you responsible for?

Mr. Francis Wambua Maliti: I am responsible for the Ministry of Water and Sanitation in the Machakos County Government.

Mr. Benjamin Musau: Did you swear the affidavit dated 9th July, 2014?

Mr. Francis Wambua Maliti: Yes, Mr. Chairman, Sir.

Mr. Benjamin Musau: Would you like to offer it as evidence?

Mr. Francis Wambua Maliti: Yes, Sir.

Mr. Benjamin Musau: For the lack of time, I would specifically refer you to particular statements in the affidavit. In particular, I will ask you to read paragraph 10.

Mr. Francis Wambua Maliti: Thank you. It reads:-

“At this point, Hon. Francis Maliti CEC Member responsible for the Department of Water, Irrigation and Sanitation rose on a point of order and requested for an amendment to the agenda to be served as an agenda item, the discussion of the Deputy Governor’s conduct. He justified this by saying that the Deputy Governor had been widely covered in the media

on several occasions in various for a while criticizing the county government while he is also serving in the same government”.

Mr. Benjamin Musau: Why did you move the Motion to amend the agenda?

Mr. Francis Wambua Maliti: I moved this Motion because the Deputy Governor had raised very weighty issues in that particular Cabinet meeting. He had alleged that there was a member in that meeting, a Mr. Mwenge Mutuse who had threatened to kill him. Secondly, it also arose from an observation I had made for about three or so weeks where the Deputy Governor had been involved in various rallies, and in those rallies, he made various pronouncements about the County Government of Machakos which he serves. To me, some of the pronouncements were made to create disaffection against the County Government of Machakos. He was in breach of the principle of collective responsibility as a member of the Cabinet because he had not raised such matters in the Cabinet before. Some of the issues he had mentioned in those pronouncements were very critical to the County Government of Machakos. For example, he used the word “*nguu*” and *nguu* is referred to by the Kamba community as a bad animal because the rules of natural justice demand that you must be given an opportunity. *Nguu* is referred to by the Kamba Community as a bad animal, because it is destructive to their farms. We plant pigeon peas in Ukambani.

Mr. Anthony Oluoch: Mr. Chairperson, Sir, just a point of clarification. To what extent is the witness being allowed to speak off-the-cuff on matters he has not deponed to in his affidavit?

Mr. Benjamin Musau: Mr. Chairperson, Sir, these are matters that he has deponed to in the affidavit in terms of summaries that we pointed out yesterday. What the witness is now doing is giving details. He is explaining why he moved the Motion to amend the agenda to discuss the Governor’s conduct, which I thought my learned friends are very much interested in, if the last witness is anything to go by.

Mr. Anthony Oluoch: Mr. Chairperson, Sir, it should not be an opportunity for him to open up evidence which he did not put before this Committee.

Mr. Benjamin Musau: Mr. Chairperson, Sir, we have discussed that and this Committee will admit any evidence as long as it is not a new allegation.

The Chairperson (Sen. Mutahi Kagwe): I am convinced that there is need to answer those questions.

Mr. Francis Wambua Maliti: Thank you, Mr. Chairperson, Sir. Because of his reference to *nguus*, whom he referred to as people who are serving in Machakos County Government--- Before I was interrupted I said---

Mr. Benjamin Musau: Carry on from where you were interrupted. I hope that the time will start running now.

The Chairperson (Sen. Mutahi Kagwe): I want to inform you that you do not have much time.

Mr. Francis Wambua Maliti: I said that “*nguu*” refers to a destructive animal, because to the Kamba Community it destroys pigeon peas, which is a staple vegetable for the Kambas. Two, there is water scarcity in Ukambani. We draw water from earth dams and pans. These animals known as tortoises, commonly referred to in Kikamba as *nguu*, usually get into that water, stir it to the extent that when women go to fetch it, it is dirty. So, when you have an unwanted person in a group in Ukambani, we usually say quietly that there is a *nguu* or *vaa ve nguu*.

Mr. Benjamin Musau: What do you mean by *vaa ve nguu*?

Mr. Francis Wambua Maliti: I mean an unwanted person. So, if that person is not a Kamba, he will not even understand that he is unwanted, but the other people will have been alerted that this person is unwanted in this group.

The Chairperson (Sen. Mutahi Kagwe): Counsel, I am not sure that at this point that, that is the reason you moved the motion or whether it was the issue of security concerns that were raised. I am not very sure about that at this point.

Mr. Benjamin Musau: Just to help you, in the affidavit that you have sworn, you have stated very clearly that you moved a motion to amend the agenda. Before you moved that Motion, the Deputy Governor had complained about security threats and the Governor had caused all of you to discuss whether you had any criminal cases pending. In the context of this particular issue and conduct of the Governor, did you move the motion to amend because of the threats that the Deputy Governor reported or because of these other concerns about the conduct of the Governor. Please, elaborate from there.

Mr. Francis Wambua Maliti: Mr. Chairperson, Sir, it was over and above that. I said that, one, the Deputy Governor raised very weighty measures about his security. Two, I had observed, personally as a member of the cabinet, in the last three or so weeks, that he had been making pronouncement in public that were critical to the County Government of Machakos.

The Chairperson (Sen. Mutahi Kagwe): Okay. We have got that. I do not think that we need to repeat that all over again.

Mr. Benjamin Musau: Would you want to pick any particular example from the various examples that you have mentioned over the last two or three weeks preceding that meeting?

Mr. Francis Wambua Maliti: Yes. On one occasion, when attending a church service in Ndalani Catholic Church, on 15th June, 2014, the Deputy Governor said that in Machakos County there were some people who were influencing tendering, such that the tenders were given to people who do not come from Machakos County. He was addressing the public. He also said that in the same county there were people who had been employed, who do not come from the county, and that is why children from Machakos County were not securing jobs in the County Government of Machakos.

Mr. Benjamin Musau: In other words you are saying that the Deputy Governor, in that meeting at Ndalani, was complaining that there was employment and tenders going out to people---

The Chairperson (Sen. Mutahi Kagwe): Counsel, I want to stop this, because there is no more time. I have extended my courtesies as much as I can.

(Mr. Benjamin Musau spoke off-record)

The Vice Chairperson (Sen. (Dr.) Zani): Just a very quick clarification. I am trying to understand the scenario. Supposing the Deputy Governor had not raised the issue of security at that meeting, because he is the one who raised it, how do you project that meeting would have progressed on that day?

Mr. Francis Wambua Maliti: My personal opinion is that he was very much agitated when he was raising the issue of security.

Sen. (Prof.) Anyang'-Nyong'o: On a point of order, Mr. Chairperson, Sir. I do not think that you are answering the Vice Chairperson's question. If the Deputy Governor had not spoken at all, what trajectory would the cabinet have taken?

The Vice Chairperson (Sen. (Dr.) Zani): The agenda that you suggested that it be adjusted to address his conduct, was based on what he had actually raised. If that forum had not come, would it have been necessary to bring this amendment to the agenda to discuss the conduct?

Mr. Francis Wambua Maliti: Mr. Chairperson, Sir, I think that it would not have been possible. Maybe it would have come later in another meeting.

The Chairperson (Sen. Mutahi Kagwe): Very well.
Cross-examination.

Mr. Anthony Oluoch: Thank you very much, Mr. Chairperson, Sir. Mr. Maliti, I want to ask you a couple of questions because of the time. If you could be brief, it would help us very much. I want to refer you to paragraphs 3, 4, 5 and 6 of your affidavit. You indicate

and the same has been asked of you, that the Deputy Governor expressed concern over his security. In your view, was the issue adequately addressed?

Mr. Francis Wambua Maliti: Yes.

Mr. Anthony Oluoch: In paragraph 7, there is an unexplained shift from the Deputy Governor's concern about security to the question about alleged criminality and who has criminal offences. Could you explain to this Committee what the motivation for this shift was? Was there in the agenda discussion about executive members who have criminal offences and the question of disclosure?

Mr. Francis Wambua Maliti: At that stage, the Chair then said that it was very important that as public and state officers we conducted ourselves very well. He said that in accordance with the public---

Mr. Anthony Oluoch: I have asked: Was it in the agenda? We are trying to look at the projection of this meeting.

Mr. Francis Wambua Maliti: No.

Mr. Anthony Oluoch: Is there a rationale between the concern for security and the immediate shift to "please, disclose if you have criminal offences?" In your view, is there a rational connection?

Mr. Francis Wambua Maliti: There is a connection because the Deputy Governor had alleged that there was somebody sitting in the meeting, who had threatened to kill him, which is criminal.

Mr. Anthony Oluoch: Are you aware that this is one of the grounds that was later raised to impeach the Deputy Governor; the question as to whether he has a criminal offence, which he did not disclose?

Mr. Francis Wambua Maliti: I am not aware.

Mr. Anthony Oluoch: Witness, could you, please, be candid with this Committee? You are a Member of the County Executive and must have gone through the proceedings before you came here. You are under oath. Are you aware of the allegations that the Deputy Governor is facing today, coming from the executive, who were the accusers to the county and now before the Senate?

Mr. Francis Wambua Maliti: I am aware of the allegations to the extent of the words that I have read precisely.

Mr. Anthony Oluoch: So, what you are telling this Committee under oath is that other than what you have in your affidavit, you do not know what was drawn as grounds to impeach the Deputy Governor. Is that your testimony?

Mr. Francis Wambua Maliti: No.

Mr. Anthony Oluoch: “No” meaning that you know what is before this Committee?

Mr. Benjamin Musau: I object. With all due respect, and I was trying to restrain myself, the impeachment proceedings are initiated by the county assembly, which is a separate and independent arm. This witness is from the executive arm. He is from the CEC and the suggestions to connect should really be a matter of concern.

Mr. Harun Ndubi: Mr. Chairperson, Sir, the affidavits, including his affidavit, were used in the impeachment proceedings and are in the record.

Mr. Anthony Oluoch: Mr. Chairperson, Sir, I asked for your protection. I hope that my time is being held.

The Chairperson (Sen. Mutahi Kagwe): Just to finalize this matter, these documents are in the public domain. I think that everybody has got a copy. I would be shocked if somebody who is interested in this matter has not seen them. So, it is good to explain these things in very clear terms when the question is asked.

Mr. Anthony Oluoch: Mr. Chairperson, Sir, for the clarity of the Committee, we are asking about the *bona fides* of these proceedings. I want to put the question again. The Governor from nowhere put a question as to the disclosure of criminal offences. These criminal offences or disclosure was not part of the agenda. They later turned out to be part of the charges that were facing him. Would you agree with me that the decision to impeach the Deputy Governor was a premeditated issue before even this meeting was called? Answer “yes” or “no”?

Mr. Francis Wambua Maliti: No.

Mr. Anthony Oluoch: Mr. Chairperson, Sir, I hope that time was being held for me. Please, explain to this Committee why on 9th July, prior to the date of the commencement of the impeachment proceedings, you were signing an affidavit which has later been used at the County Assembly and now before the Senate.

Mr. Francis Wambua Maliti: We were signing these affidavits because we had realized, as a cabinet, that the Deputy Governor was conducting himself in a manner which was not acceptable and it was necessary to start or recommend disciplinary action.

Mr. Anthony Oluoch: Thank you very much for the answer. I want to put the next question. Could you confirm to this Committee that on the meetings of 7th and 9th, the Deputy Governor appeared and the executive gave him seven days to appear to explain these allegations? Is that true or not true?

Mr. Francis Wambua Maliti: True.

Mr. Anthony Oluoch: So, what was the Deputy Governor appearing to do on 16th, when you had already made up your mind in affidavits that he is guilty of the offences that you allege? What was the basis for his appearance on 16th?

Mr. Francis Wambua Maliti: Rules of natural justice demand that you must be given an opportunity.

Mr. Anthony Oluoch: You frame questions and already make a determination of what you are asking him to appear to clarify before?

Mr. Francis Wambua Maliti: What we had put in the affidavit is what we had already observed. We were not saying anything different from what we were going to tell you.

Mr. Anthony Oluoch: Let me now draw your attention to this document which is our response on pages 359 to 366. Could you kindly tell us if at the end of those proceedings on page 366--- What is the date of that judgement? I am referring to a judgement over an alleged criminal offence against the deputy governor. It is criminal case No.820 of 2005. Can you confirm that? Could you confirm to this Committee on page 364, the last paragraph says:-

“The court finds that the prosecution has been unable to prove its case.”

Could you confirm that?

Mr. Francis Wambua Maliti: Yes.

Mr. Anthony Oluoch: Could you confirm that this is dated 23rd June, 2010?

Mr. Benjamin Musau: This particular line of cross-examination, I do not know, but the witness needs to be given time to go through the particular document on which he is being cross-examined because I do not think he knows.

The Chairperson (Sen. Mutahi Kagwe): The documents are in the file. Please, answer the question.

Mr. Anthony Oluoch: Yes. On page 365, I am asking you to confirm if there is a date 23rd June, 2010. Please, read the date.

Mr. Francis Wambua Maliti: It is 23rd June, 2010.

Mr. Anthony Oluoch: The next question; had the deputy governor become the deputy governor of Machakos at that time?

Mr. Francis Wambua Maliti: No.

Mr. Anthony Oluoch: Could you then clarify to this Committee for purposes of the disclosure the executive was seeking to whom he was supposed to disclose and for what reason?

Mr. Francis Wambua Maliti: I am not clear on the question. Perhaps, you should repeat.

Mr. Anthony Oluoch: I want you to read that document and the question I want to put to you is that prior to 23rd June, 2010, he was not yet the deputy governor. Is there any other criminal offense because the executive drew up these charges, other than this for which you confirm he was acquitted, that you are aware?

Mr. Francis Wambua Maliti: No.

Mr. Anthony Oluoch: Let me ask you the last question.

The Chairperson (Sen. Mutahi Kagwe): Very briefly, please.

Mr. Anthony Oluoch: Did the executive give the deputy governor copies of these affidavits so that he can prepare for his defence that you had called him for on 16th, did you give him copies of these affidavits which were drawn on 9th? Are you aware whether he was given those copies?

Mr. Francis Wambua Maliti: I am not aware.

Mr. Anthony Oluoch: You are not aware and yet these affidavits were being drawn for purposes of the proceedings that are now before this Committee?

Mr. Francis Wambua Maliti: I want to remind you that I said that when we made these affidavits, the deputy governor was also supposed to come and appear before the cabinet and defend himself.

Mr. Anthony Oluoch: Last question; was the executive as cabinet sitting in a disciplinary capacity? In what capacity were they sitting over the deputy governor's conduct? Was it in a disciplinary capacity or normal administrative meeting and whether the mechanism for proceedings that deal with conduct of the deputy governor?

Mr. Francis Wambua Maliti: I think as members of the cabinet we have the ability to censure one of ours. We can also recommend disciplinary action against one of us using the relevant institutions.

Mr. Anthony Oluoch: That is---

The Chairperson (Sen. Mutahi Kagwe): Counsel, you have said “last question” about three times.

Mr. Anthony Oluoch: Can I conclude?

The Chairperson (Sen. Kagwe): Yes in 30 seconds.

Mr. Anthony Oluoch: Where did you swear this affidavit?

Mr. Francis Wambua Maliti: In the cabinet office in Machakos County.

Mr. Anthony Oluoch: Before whom?

Mr. Francis Wambua Maliti: Before an advocate called Mutuku.

Mr. Anthony Oluoch: Are you aware of somebody called Justus Mutisya? Is it the same person as Mutuku?

Mr. Francis Wambua Maliti: Mr. Chairperson, Sir, I think I am being rushed.

The Chairperson (Sen. Mutahi Kagwe): Do not harass the witness and anyway your time is over.

Next cross-examination.

Mr. Benjamin Musau: Mr. Maliti, you actually caused the agenda of the cabinet of the 7th July, 2014, amended by moving the motion. Just for the purposes of clarity in terms of ordered sequence, you proposed this amendment after the deputy governor had expressed concerns on his life. Is that so?

From your own affidavit, he had expressed concerns on his security?

Mr. Francis Wambua Maliti: Yes.

Mr. Benjamin Musau: Then secondly the deputy governor said that he had reported that matter. The Governor himself asked members of the cabinet to confirm whether he had any prevailing criminal charges?

Mr. Francis Wambua Maliti: Yes.

Mr. Benjamin Musau: Thereafter you proposed the amendment of the agenda. Is that correct?

Mr. Francis Wambua Maliti: Yes.

Mr. Benjamin Musau: In your evidence-in-chief, you said that the main reason you did that was because of the issue of security that the deputy governor had raised. Secondly also in your evidence-in-chief pointed out that you raised this because of the issues regarding the conduct of the deputy governor. Is that correct?

Finally, you did not actually initiate impeachment proceedings? Is it true that you actually initiated the impeachment of the deputy governor?

Mr. Francis Wambua Maliti: Not myself as a person.

Mr. Benjamin Musau: The purposes of the allegations you drew up at the cabinet; what was the main purpose? You had talked about the issue of censure, could you, please, explain that to the full context?

Mr. Francis Wambua Maliti: The deputy governor is a member of the cabinet and he is bound by the principle of collective responsibility. If he has issues to raise about the county government of Machakos which he serves at a very senior level, he should bring them in the cabinet, we discuss them and still using the principle of collective responsibility, if others are satisfied with what we are doing, he will still go on with the majority.

Mr. Benjamin Musau: Did the deputy governor raise these issues which caused you to make the agenda to be amended in any cabinet meeting?

Mr. Francis Wambua Maliti: He has never. That is why I was concerned that for a period of about three weeks, he continued talking about these things and yet he had an opportunity to present them to the cabinet.

Mr. Benjamin Musau: That is all, Mr. Chairperson, Sir.

The Chairperson (Sen. Mutahi Kagwe): Sen. Okong'o.

Sen. Mong'are Okong'o: Mr. Chairperson, Sir, I need a small clarification from the witness; who is the deputy governor answerable to? Secondly, were there complaints from the person the deputy governor was supposed to answer to?

Mr. Francis Wambua Maliti: The deputy governor is answerable to the governor. As a member of the cabinet, he is also collectively answerable to the cabinet.

Sen. Mong'are Okong'o: Has there been previous complaints from the governor or the cabinet?

Mr. Francis Wambua Maliti: I would say that there were discussions between individual Ministers about his conduct, but the matter had not been brought directly to the cabinet.

The Chairperson (Sen. Mutahi Kagwe): I think that brings us to the close of presentation from the County Assembly of Machakos. At this juncture, I am going to call for a 15 minute break up to 11.45 a.m. We shall resume and start the hearing from the deputy governor's counsel.

As we do so, to avoid repeating the issues, I am assuming that the counsel on the governors has supplied whatever information is available.

Mr. Harun Ndubi: What we have is on record.

Mr. Wilfred Nyamu: At this juncture, I had informally indicated to the Chairperson that given the Embu witness for the deputy governor--- Given that there is a wide range of documents, I would urge that the ten minute time during cross-examination be waived so that we given adequate time to cross-examine the deputy governor---

The Chairperson (Sen. Mutahi Kagwe): The practice we have set from the beginning is that we are giving some latitudes depending on the importance of the subject. However, we will not waive the rule as such, but we will be amenable to the extent necessary.

(The Special Committee adjourned temporarily at 11.30 a.m.)

(The Special Committee resumed at 12.00 noon)

The Chairperson (Sen. Mutahi Kagwe): Welcome back, hon. Senators, counsels, ladies and gentlemen. At this juncture, I wish to call upon counsel for the deputy governor to start his hearings or advice accordingly.

Mr. Harun Ndubi: Thank you, Mr. Chairperson, Sir, distinguished Senators and Members of this Special Committee. You will note from the record that we filed with the Senate and served, we have stated pursuant to the invitation to appear before this Special Committee; we were required to indicate whether we are calling any witnesses and also to provide their addresses. We, in answer to that particular question, said that the deputy governor does not propose to call any witness; neither is he taking his stand. In fact, the position we take is that we shall be making our closing remarks more similar to the

process in court, where you say whether there is a case to answer or not. We shall be making our submission in that regard.

Mr. Chairperson, Sir, we do not propose to call any witness. We are ready to make our closing remarks at the relevant time.

The Chairperson (Sen. Mutahi Kagwe): Very well. It is the understanding of the Committee then that the only business that is left for us are two things. One, there is the closing remarks. We will call upon both sides from the deputy governor and the County Assembly to make their closing remarks.

In addition to that, the Committee has also invited Mr. Hassan Sheikh Mohammed, who is the Chief Executive Officer of the National Cohesion and Integration Commission (NCIC) for verification on some of the issues that we feel are something that he needs to explain and to verify to the Committee.

Now, that verification was supposed to be done at the time we had invited him at 3.00 p.m. However, because we thought of the three-and-a-half hours, given the fact that we now want to make closing remarks and we also wanted him to testify before the closing remarks by the respective counsels, therefore, we will look for him and ask him to come and testify at 2.00 p.m. Hopefully, he will be here. At that time, we will also ask for the closing remarks from both sides. Now, the closing statements will be made for 30 minutes on either side, starting with the closing statement from the County Assembly. Therefore, we will resume the hearing at 2.00 p.m.

Thank you very much.

Mr. Harun Ndubi: I am most obliged. Thank you, Mr. Chairperson, Sir.

(The Special Committee adjourned temporarily at 12.05 p.m.)

(The Special Committee resumed at 2.15 p.m.)

The Chairperson (Sen. Mutahi Kagwe): I want to call the afternoon session to order. Before we left, I had indicated that the Committee has invited the NCIC, CEO. However, due to unavoidable circumstances, he got stuck *hewani*. Therefore, the Committee has waived that particular presentation on the opinion and may call him at some point if we still think that it is necessary to do so.

At this point, therefore, I want to call upon the counsel for the County Assembly to make their closing statement. You have got 30 minutes.

Mr. Harun Ndubi: Mr. Chairperson, Sir, before my colleagues take the Floor, there is a matter of grave concern related to these proceedings that we wish to place on record and seek your directions on.

Yesterday, you heard a number of witnesses; I think the last one for the day, if I am not wrong, was one Jackson Musyoka Kala, a Member of the CEC of the Machakos County Assembly. This afternoon during the lunch break while we were in the room nearby preparing our closing remarks, the deputy governor did receive a text from mobile number 0722376052, which number he says belongs to Jackson Musyoka Kala. If you permit me to read, the message says thus:-

“Niombee afya; niombee pia Deputy Governor ashindwe kunitaja kwa maneno mabaya au uwongo katika proceedings zilizoko Senate; niombee nipate cheti cha kununua bunduki wiki hii kwa jina la baba.”

At 14.14 p.m., as we are sitting just now, another text message following in the heels of that one has come from the same number saying:-

“Sorry, text not meant for you, but my pastor.”

Mr. Chairperson, Sir, you will recall that the basis for the impeachment proceedings as they began from July was the claim that the deputy governor made that his security or his safety was compromised and that his life was in danger. A witness who is a member of the CEC, who has testified before you, has proceeded to issue a threat, albeit that he did not intend – and that is what happens when you are doing bad things – there is a word that Sen. Mong’are called *amarimu* in his language. When you are doing wrong things, you stumble. This is the equivalent that Mr. Jackson Musyoka Kala has now demonstrated that he has an evil mind; that, indeed, the safety of the deputy Ggovernor is compromised and he is planning to buy a gun.

We, therefore, request you, Mr. Chairperson, Sir, to give us direction:

- a) Whether you will call Mr. Kala and cite him for contempt and sanction him appropriately; and,
- b) Direct, because this is in the statement from the deputy governor himself, that his security was withdrawn, motor vehicles taken away until now and some of his staff dismissed or relocated, you may direct that the deputy governor, in the meantime, be provided with security by the State.

Thank you, Mr. Chairperson, Sir.

The Chairperson (Sen. Mutahi Kagwe): Thank you very much, indeed. Does the counsel for the County Assembly wish to comment on that matter?

Mr. Kioko Kilukumi: Mr. Chairperson, Sir, and hon. Senators, I am hearing this for the very first time when I am seated here. I have no instructions on that issue. All that I may say is that I doubt whether the Chairperson and hon. Senators in their investigative role can order anybody to be provided with security.

The Chairperson (Sen. Mutahi Kagwe): Thank you very much. It is, indeed, natural justice that an individual who is threatened should do two things. As I speak here, this matter is also in public domain and, therefore, with the police. But I would say that it is a matter that should be immediately reported to the police and entered into the Occurrence Book (OB) because, obviously, if somebody is being threatened and you say you have the evidence to such and we know that the police are, in fact, able to track any text message through the very means that they have, I would consider that as a criminal act that I would leave in the hands of the police, because it is that serious at this moment.

Needless to say that the police also can hear and are part of the process that we are in here; it is for them to investigate and see what necessary steps they need to take, including giving the deputy governor that security that you have referred to. However, it is a matter that we take seriously as a Committee. We hope that it is a matter that will, in the course of the day, perhaps after these proceedings are finished, be reported to the nearest police station. We have a police station right here.

Having ruled as such, I now want to invite the County Assembly of Machakos to proceed.

Mr. Benjamin Musau: Mr. Chairperson, Sir, distinguished Members of the Special Committee of the Senate inquiring into the impeachment of the Deputy Governor of the County Government of Machakos, we have presented before you nine live witnesses and the other 16 witnesses have given sworn evidence in the form of statements, which we have provided to the Special Committee. We had all the intentions of leading these 16 witnesses live, however, in view of the constraint of time that is facing this Special Committee of the Senate, we led the nine. So, the first important point is to note that we are relying on the evidence of these nine live witnesses and the other 16.

I would like to go through each particular ground for removal from office of the deputy governor and the evidence that supports this particular ground. I would like to show that we have provided---

The Chairperson (Sen. Mutahi Kagwe): Counsel, I do not intend to interrupt you; but I want us to be clear that this time round, when we say 30 minutes, it means exactly 30 minutes. So, there will be no latitude of extension.

Mr. Benjamin Musau: Mr. Chairperson, Sir, it will be exactly 30 minutes and we will share it equally with my learned friend Mr. Kioko Kilukumi. We have laid evidence which proves that Mr. Bernard Kiala is not fit to hold the office of Deputy Governor in the County Government of Machakos.

In respect of Ground One, the issues that we have proved are: Gross violation of the Constitution as provided for in Articles 179 and 232. We have laid documents to prove through making appointments that abuse the values and principles of the Public Service.

We presented to this Special Committee the evidence of Witness No.1, Lucas Kioko, in which he proved that the CEC members in the County Government of Machakos are unable to work with Mr. Kiala because of his misconduct.

With regard to bias in recruitment, there is on record the unchallenged evidence of Mr. Kala who proved that the Deputy Governor had influenced the employment of 14 relatives. He offered no explanation whatsoever. Under 232, Values and Principles of the Public Service, the Deputy Governor's statement only dealt with two relatives, but he did not give any explanation on the other 12. Even on the two that he mentioned, he did not provide any tested evidence.

The issues of governance, for example, corruption and nepotism that the Deputy Governor (DG) made in his opening remarks are issues that he had never addressed in the County Government. I refer the Committee to the evidence of Kioko Lucas, Francis Maliti and Helena Kiilu.

With regard to Ground Two – Gross Valuation of Various Statutes, the statutes in question here are four in number; the County Governments Act, the Public Officer and Ethics Act, the National Cohesion and Integrity Act, the Leadership and Integration Act.

With regard to the County Governments Act, the material sections are Sections 30 and 32. In his evidence, Mr. Kiala who was directly under the deputy governor submitted and proved that the DG had not been available to provide policy guidance within the public service docket which had been delegated to him in the allocation of functions within the County Government of Machakos. Mr. Kiala actually pointed out that the CCTVs which fall in this particular docket of the deputy governor were installed without the knowledge of the DG and that he was not even aware and that is why he was caught with the cameras without his knowledge.

With regard to Section 32 (3) of the Leadership and Integrity Act, the deputy governor was given the responsibility of the public service and the witnesses have shown that he was absent from several meetings albeit with apology. The key issue for consideration by the Special Committee is the question of absenteeism and continued abdication of duty from not only the office, but also the cabinet meetings.

With regard to the Public Officer Ethics Act and the connected public trust under Article 73 of the Constitution, there is a requirement under that Article, honour and dignity to the office of the deputy governor which is a State office. It is a challenge to do that which demeans the office of the deputy governor. It is unacceptable under the present

dispensation. A public officer is not allowed to give false or misleading information to the public. Here I invite the Special Committee to consider the evidence of CCTV camera presented by one of the witnesses and the evidence of the matatu driver, Mr. Andrew and the matatu conductor, Mr. Joseph.

The deputy governor's conduct in this particular respect is captured by the CCTV and is evidenced by the matatu driver and the conductor. It is so demeaning that it brings the office of the deputy governor to dishonor. That evidence coming from ordinary Kenyans not having any grudge with the deputy governor proves this ground for removal without question. This ground alone is adequate to remove him from the distinguished office of the deputy governor. There is no requirement under the impeachment law that you prove adequate grounds in order to remove a public officer from office. In this case, I refer you to the Nancy Barasa case.

Under the National Cohesion and Integration Act, this is where the whole issue comes from. In this case, I invite the Committee to consider the evidence in this regard of Kioko Lucas, Hellena Kiilu and Francis Mwaliti in particular, apart from the additional evidence which is covered by witnesses who recorded statements on the implications to the cohesion that has been there between Kenyans living at the boundary of Murang'a County and Machakos County. The evidence is on record.

On page 9 of the DGs document, he attempts to change the meaning of "*nguu*". You would want to consider whether it is compatible with the recordings which are available and this translation has been provided and the other evidence laid before the Committee, that the deputy governor has decided not to challenge on his own volition.

There is evidence of bullying and intimidation of CEC members. I wish the Committee to consider the evidence of Naomi and Dr. Dhall. The deputy governor put to the wall, in particular Dr. Dhall for the demand of Ksh500,000 and eventually settling at kshs200,000.

Under the Leadership and Integrity Act, I submit that the relevant sections are Sections 10 and 34 and the evidence tendered to prove this under the Leadership and Integrity Act is the implementing Act of Cap.6 of the Constitution which includes evidence in which the deputy governor pushed for tenders to be awarded to friends. Evidence of Kioko Lucas and Sheila that they have tendered before the Special Committee and this is again unchallenged by the deputy governor.

The SMS evidence proves that the deputy governor solicited and sought to influence award of tenders and put pressure on CECs Naomi Mutie, Kioko Lucas and Sheila Mukunya. This is contrary to the law. He cannot hold office in these circumstances. There is grave risk that if the Committee allows him to continue holding office, he will continue with the same habit.

On ground three, the main issues there are gross misconduct related issues contrary to the provisions of the Constitution. He failed to attend CEC meetings, misleading the public, gross misconduct and false information. The evidence that is relevant in this context is that of Kioko Lucas, Naomi Mutie, Francis Maliti, the matatu driver and the conductor.

Remember there is an attempt by the deputy governor to paint a picture that his car was withdrawn when he knew as proved before the Committee that it was false.

Finally, so as to invite my learned friend, Mr. Kioko Kilukumi, ground relating to abuse of office under the Constitution, unlawful influence of award of tenders, the SMS had challenged the evidence of Kioko Luka and the SMS evidence of Sheila Mukunya. Naomi's evidence in which the Deputy Governor called Naomi to influence the allocation of tenders for supply of drugs and other medical supplies to the Deputy Governor's brother allegedly because the Deputy Governor's brother had financed the Deputy Governor's election campaigns.

It has been proved to the Special Committee Members' satisfaction that using his exalted office of Deputy Governor, he has driven or has made statements to drive away Kenyans living in Machakos County; people who do not hail from Machakos County according to him, the so called *Nguus*. I submit that Mr. Kiala is not fit, and we have proved to your satisfaction and the threshold required under impeachment law that he is not fit and must be removed from the distinguished office of Deputy Governor.

Thank you.

The Chairperson (Sen. Mutahi Kagwe): Mr. Kioko Kilukumi, you may proceed. You have 13 minutes.

Mr. Kioko Kilukumi: Mr. Chairman, Sir, it is important on this occasion to focus on the charges that are before this Special Committee of the Senate. The man on trial before you is the Deputy Governor. The Governor of Machakos County is not on trial before you.

The opening statement that was laid before this Special Committee by the Deputy Governor is nothing short of accusations against the Governor. If these accusations have substance the room and the doors are open to move the County Assembly of Machakos to initiate an impeachment process against the Governor. But what is critical is that it has never been a defense in law to say because so-and-so has also behaved in a particular way, that is why I am also behaving in that way. That has never been a defense.

You cannot appear in a court of law or any investigative committee like this one and urge the position that you are not guilty of what you are charged of because other people have engaged in the conduct you are accused of. It is important to bear in mind that this is not the last impeachment. We have learnt a lot from the impeachments previously done by this Committee. Time has come that we consider defining what opening statement is and

what can properly go to an opening statement, so that this does not become a forum to bring into disrepute the reputation of others in the guise of opening statements.

Mr. Chairman, Sir, as a guide on this, I will refer to the Eighth Edition of Black's Law Dictionary which defines opening statement as:-

“At the outset of a trial, an advocate's statement giving the fact finder a preview of the case and of the evidence to be presented.” Although the opening statement is not supposed to be argumentative, lawyers purposely or not, often include some form of argument. The term is that sometimes referred to as “opening argument.”

I am humbly inviting the Chair and hon. Senators, for future guidance and for purposes of elucidating on the rules of procedure, to determine what properly belongs or does not belong to an opening statement.

Secondly, I wish to address hon. Senators on the question of evidence. You cannot compel the Deputy Governor to give evidence before you. He has the right to decide whether he will give you evidence or he will not but choices have consequences. Once he makes the choice not to give evidence, there are legal consequences that must follow.

When the Deputy Governor presented before you his side of the story, this is what he said at page one of his opening statement:-

“I will not be presenting any witnesses other than myself.”

In his own opening statement, he promised this Special Committee that he will, indeed, take the witness stand. Having listened to the very solid and cogent evidence that we have presented before you, he wisely opted to say nothing. He opted to say nothing because the most critical evidence against the Deputy Governor comes from himself. It is short messages sent by him. He could not run away from evidence that he generated.

If he chooses not to give evidence, in law, the only inference you draw is that these allegations are true. These allegations are uncontroverted and remain unchallenged. That is the option he has taken before you. We are inviting you to make that inference, that if this man was not guilty of all these allegations, he will have seized the first opportunity to clear his name.

On the same issue, he has presented before you a written response. That response is not evidence taken under oath. He has not taken the evidence seat so that, us, as lawyers for the County Assembly can test the veracity of the story he has given in his written statement to this Committee. So, as lawyers, we would ask: What is the probity value of what he says in the documents he filed before you? Do they carry any weight at all? Our submission is, they carry nil weight. They have no value whatsoever. He is assisted by three senior lawyers and they have opted to take this choice which has consequences.

Finally, Mr. Chairman, Sir, and Members of the Senate, you are the guardians of devolution. You have been created by the people of Kenya in our Constitution for one most important function, to safeguard devolution in the country. It is clear from the evidence presented before you, you have seen the Deputy Governor presenting his opening statement before you, that is now apparent that he cannot work with the Governor or the Members of the Executive Committee. There is complete breakdown of breach of trust which is a key element in governance. If this Special Committee and the Senate ultimately were to endorse the continuation of the Deputy Governor, you will be rendering the County of Machakos completely dysfunctional. It will not be able to deliver the services envisaged under our Constitution. The only remedy, and that is why we have impeachment proceedings, is the removal of the Deputy Governor.

The larger interest, the greater public interest of the people of Machakos County must at all times be taken care of by the Senate. The only way you can protect those interests, and Machakos County will have an operational and functional County Government, is to show the Deputy Governor the red card. He deserves it.

Thank you, Mr. Chairman, Sir and hon. Senators.

The Chairperson (Sen. Mutahi Kagwe): Thank you very much. Let us now hear the statement from the Deputy Governor's counsel.

Sen. Ben Njoroge: Mr. Chairman, Sir, before we proceed I just need some clarity from the counsel from the County Assembly of Machakos. What does he mean when he says: "Red card?" What does that refer to?

The Chairperson (Sen. Mutahi Kagwe): What did you mean? I know it is a bit unprocedural to do this on the closing statements, but for just for the HANSARD, maybe you have another meaning.

Mr. Kioko Kilukumi: I am using the analogy of the football pitch. This is a joint player, elected on a joint ticket with the Governor. He has shown he cannot play team work with the Executive Committee, he cannot deliver on the County Government and a red card is sending him out the field. It is basically removing him. That is the sole purpose of impeachment proceedings.

The Chairperson (Sen. Mutahi Kagwe): Well understood. I think after Brazil, we are all familiar with that.

(Laughter)

Please, counsel, proceed.

Mr. Harun Ndubi: Mr. Chairman, Sir, and hon. Senators, from the last statement by my learned colleague, whom I have tremendous respect for, Mr. Kioko Kilukumi, he has put his finger on the pulse. Just because Governor Alfred Mutua is unhappy with the Deputy Governor Bernard Kiala, he must be removed. Since he is unhappy and has lost his trust, not for anything else, this is a political process that he has been subjected to so that he is removed on account of the personal opinion of the Governor of Machakos. I will show you shortly why.

On 7th July, 2014, there is evidence that the Executive Committee met and decided, in the course of their meeting, to alter their agenda and discuss the conduct of the Deputy Governor even when, from the multitude of affidavits we have and the testimonies we have heard from the witnesses, there is cogent reason why that matter had to arise. Remember, in the order of the affidavits, which are all similar, they were copied from the first to the last one, they are saying: “The Deputy Governor made this claim, we decided to discuss him.”

On 8th July, 2014, having been removed, whether he was rejected or excused or whatever manner he moved out of the Cabinet, he received a letter with allegations, under the same allegations, that were taken before the County Assembly. That letter required him to answer to those many allegations the following day, on 9th July, 2014. Obviously, even for anybody who needed to answer accusations of that gravity, he needed more time, for which he requested on 9th. He requested for time on 9th and he was granted seven days, which were to expire on 16th. Here, I request the Committee to pay great attention.

On 9th, the same day that the committee is meeting as the Cabinet ostensibly to hear the Deputy Governor Kiala’s response, there is a filed, in the county assembly, a motion proposing impeachment, with the very same grounds that the executive committee had claimed to have against him.

On 9th, having been granted time to go and come back after seven days, which would have ended on 16th and this Motion having been filed at the County Assembly on that same 9th, affidavits by the very committee members who wanted to give him the opportunity to be heard, have been signed in the Governor’s office. That is the testimony of Mutie. At least, she said that she signed her affidavit in the Governor’s office. The various other witnesses stated that they signed those affidavits in the county executive Cabinet’s boardroom.

Actually, they said Cabinet offices. One may pause there and ask this question; in the context of separation of powers, is the executive whether national or devolved permitted to use a mechanism of accountability between the three arms of government or at least between the executive and the legislature, is the executive permitted to reverse to seek the mechanism of accountability against itself or against its member? That would be unconstitutional completely if not outrightly unreasonable. That is what they exactly did. You will notice that these are affidavits sworn before a number of lawyers in the

Governor's office or the cabinet office are the very same affidavits that are delivered to the County Assembly on 9th in support of the Motion to impeach the Deputy Governor.

That does not stop there. On 10th July, 2014, the County Assembly sent the Deputy Governor a notice of that Motion of impeachment with the grounds. Then they asked him to come on 14th July, 2014. Remember that his colleagues had decided, notwithstanding the issue of jurisdiction that we talked about, whether the Cabinet can have disciplinary proceedings of one of themselves, they gave him time up to 16th July, 2014 but the County Assembly asks that he goes before it on 14th July, 2014. The standing orders which they have purported to apply including Standing Order No.60 of the interim county assembly orders, requires that once a Motion has been proposed at the County Assembly, the clerk receives it, satisfies himself that it is admissible then gives it over to the Speaker who then admits it. Upon admission is given a notice of seven days after which it may be put on the Order Paper. There is no evidence of what happened between 9th and 10th July, 2014 when the clerk considered that Motion, when he satisfied himself that it was fit, where the Speaker admitted it and whether *an ad hoc* committee, there is no evidence on record. All this happened between 9th and 10th July, 2014. That is less than a day because even if you set 24 hours, people have to wake up from their homes and go to work.

That is why we are saying that this impeachment process is initiated, motivated and driven by the executive, by Alfred Mutua. I do not wish to go into why he would have that motive. Remember that at no time did this Motion accord with the law. I know that your inquiry is to establish whether the allegations have been proved. In order to satisfy yourself that these have been approved, you must inquire into the legality of that process and we submit that what we have said shows that there was no Motion of impeachment before the County Assembly. Therefore, it must not be admitted.

The second point I would like to address is that my learned colleagues have stated that they have tendered evidence that is not deniable. These proceedings as we have stated all along is that they are *quasi-judicial* proceedings. They are in the nature of criminal proceedings. They have the duty to prove. They cannot make allegations and expect that it is us or the Deputy Governor who should disprove them. Have they tendered evidence within the appropriate standard that falls within the threshold of proving each and every of the allegations made? The answer is that they have not.

If you look at the ground related to the violation of the Constitution, they have not disclosed or taken the humility to admit that there was a mistake, on seeking to impeach, that there was a criminal case against him. Neither at the county assembly nor here have they stated what criminal case they are referring to. It is the Deputy Governor who has taken the liberty to say that sometime in 2010 there was a claim against him which was dismissed for lack of evidence. At that time, he was not even a candidate. There is no any evidence to prove all the things they have stated against him in the Constitution.

I am advised that in the previous impeachment proceedings both for Martin Wambora and Chepkwony, the Senate has held that there is a threshold which must be reached by the evidence tendered and which must include the following: That the allegations must be serious, substantial and weighty. The allegations we have seen plus the evidence purporting to support them are not clear. If you were seek to remove publics or elected officers from office on account of allegations we have here, there would be nobody who would ever sit in office. The example I am giving is this; short messaging service aid people to assist others, including Ben Musau who has not sought to assist someone else.

Mr. Benjamin Musau: Mr. Chairman, Sir, I have never abused my office as an advocate of the High Court of Kenya. So the sentiments by my learned friend are completely out of order.

The Chairperson (Sen. Mutahi Kagwe): You are free to withdraw the statement.

Mr. Harun Ndubi: In regard to the name of Benjamin Musau, I do withdraw but I am saying all of us at one point in life have sought assistance from someone. There is no evidence regarding those SMSs and it is important to note that they are alleged to have been written in either January or March. There is no consistence and persistence of those SMSs being written and calls being made since then until July, 2014. The period between March and July, there is no allegation against him having written any text or called anyone, is evidence that there is no consistency contrary to the allegation that he has been sending them. In fact, if you refer to the evidence of Dr. Sunil Dhalla, the record shows that one of the allegations made against the Deputy Governor is that he referred to the Dr. Sunil Dhalla as a *Mhindi*. The doctor was here and he never referred to that. In fact, he says he was pushed to the wall about what he meant and he said he was the boss. Therefore, his assessment of intimidation is just because of the designation or the status of the Deputy Governor.

If you take the overall context of the statement from the witnesses, you will see what is false. Each and every of the witnesses who testified before you and the affidavits by the other executives, they seem to hold the Deputy Governor in the housed contempt. None of them shows that they have a sense of respect for him. In fact, one of the witnesses had been advised by the Chair to hold the Deputy Governor in the dignity of his office.

The other threshold they needed to show is that the violation must be glaring. Where is evidence? The other point is that there must be a nexus between the violation and the Deputy Governor in this case. Not even a single shred of evidence has been shown to the Committee that all these allegations made against the Deputy Governor have a direct relationship with him. They were brought on account of issues considered--- The witnesses kept on saying "there were issues" and the last witness said that this matter can be discussed between our Cabinet Ministers. Gossip and rumour is brought to impeach the Deputy Governor and that is what they are asking you to do; to approve and uphold

that the gossip and rumour is cogent or sufficient to remove the Deputy Governor from office.

Regarding the question of publication of hateful leaflets, there is no connection. No one has said whether he saw the Deputy Governor print or give instructions for print. In fact, there is a discrepancy that the leaflets on record are different from those which were brought here as copies.

Mr. Chairman, Sir, another threshold is that the violation must have led to harm, loss or damage. There is no evidence to that effect. The nearest you can say there was loss is this person who claimed to be a *matatu* driver and conductor who said they lost a business of three hours of the day. They did not even tell us through evidence that they are indeed driver and conductor of the *matatu* as they claimed. They also showed us a photograph from a newspaper cutting which has no identity mark. For all I care, it is possible that that was a picture taken when the Governor or any other person might have been campaigning in 2013. It is a photograph that says nothing before you and yet you are being asked to impeach the Deputy Governor on account of a photograph that has no identification mark of any kind. The witness who was here stated that actually there were many other people with checked shirts. I am sure some of you have checked shirts.

Another threshold is that the violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out functions of office with integrity and accountability. Now whose view do you take that this person or the office has lost dignity because of him and he is not capable of holding that office?

Is it the office of the complainants who were invited in writing by the County Assembly to go and testify against the Deputy Governor? How did the County Assembly know who is the one who has a complaint against the Deputy Governor so that they can invite them to come and testify? Usually, when people are being vetted, we see advertisements stating that we have this claim, can you come forward if you have any information about the Governor or Deputy Governor, judge or whoever else. You are invited via a public notice and everybody then goes in promotion of the rights to public participation.

Mr. Chairman, Sir, I want to know how many minutes we have because we have to share a little bit with my colleague to espouse on the law.

The Chairperson (Sen. Mutahi Kagwe): You have 11 minutes.

Mr. Harun Ndubi: Thank you, Mr. Chairman, Sir.

So, if you look at the evidence around the Close Circuit Television (CCTV), which I think is the most “serious” evidence against the Deputy Governor in terms of movement:-

It has been admitted by the witnesses that it is edited, because there are pictures superimposed on each other from different scenes. So, one, we do not know who was managing the CCTV equipment and how the pictures were taken, knowing very well that CCTVs can underwrite or overwrite over another. Two, we do not know the date that CCTV was taken; we do not know the location from the CCTV itself. The CCTV does not speak to the evidence that this is the Deputy Governor. In fact, if you can recall, we were asking about the arrows. The arrows are pointing at images of people without specifically identifying who that person is. There is no court of law and neither should there be a committee that can convict on account of the perception of height, because that is what the lady witness who was here this morning, Hellen Kiiu, purported to say; that if you see the Deputy Governor, he is short or he is taller than the bodyguard. That, with respect, cannot be the cogent and incontrovertible evidence that you can rely on to send the Deputy Governor home on account that people have formed a collective, malicious opinion based on the politics of competition.

It is noteworthy, Mr. Chairman, Sir, that all these events, all these complaints, anger, the emotions and the stress – what did Mr. Dhall describe it as; that he had mental anguish over an attempt by the Deputy Governor to borrow money from him – all this is coming after *Saba Saba*, on 9th of July because politically, Alfred Mutua and the Deputy Governor seem to have different view points. The fact that the Deputy Governor and his Governor have different political viewpoints is not the basis or a ground upon which you can impeach either of them.

In fact, the allegations that have been made against the Deputy Governor, especially with regard to failure for him to perform his work or functions are, if proved, grounds for challenging the Governor's ability to run the county. They cannot be grounds for removing the Deputy Governor because, after all, if the Governor himself has failed to rein in the Deputy Governor, who should be blamed? There is no evidence on record that the Governor has tried, at any one point, to talk to the Deputy Governor over any of these allegations. In fact, in cross examination, most of the witnesses that we asked said that they have never reported these concerns they had to the Governor or to any other person. So, what is it? How can it be that they are signing affidavits in the Governor's Office whereas the Governor is not coming to say "yes, these are the allegations which came to me as the Chief Executive of Machakos and I have dealt with them in this manner; but I am now unable to rein in my Deputy because of A, B, C. Therefore, let him go or I have failed in my duties; let me resign." That is what we expect to have happened. It cannot be that they are using – if my learned colleague permits me to say – a *panya* route to deal with a substantive issue.

Lastly, before I allow my colleague, Anthony Oluoch, to make his remarks, Mr. Chairman, Sir, we have stated in our reply that the way the law is crafted to exclude Governors from impeachment – I know this is a matter that is not settled yet and it is pending on appeal – is intended, indeed, to protect counties. Why? Suppose you impeach Kiala today and next week there be grounds, especially now that in his statement, there

seems to be some grounds – like Mr. Kilukumi says – to impeach Alfred Mutua, Machakos County will have no Governor at all. There is no mechanism under Article 181 of replacing Governor and Deputy Governor, who have both been impeached separately.

So, Mr. Chairman, Sir, the purpose of the Constitution being silent is deliberate; that you must protect the interests of the county because otherwise, if both are impeached separately, it would lead to the national Government taking over the county and managing it, therefore contradicting the very principles of devolution that my learned colleague, Kioko Kilukumi, talks about.

Mr. Chairman, Sir, may I now grant the next few minutes to Mr. Anthony Oluoch.

The Chairperson (Sen. Mutahi Kagwe): Okay; you have six minutes.

Mr. Anthony Oluoch: Okay, Mr. Chairman, Sir. I shall try.

Thank you very much, Mr. Chairman, Sir. I want to highlight just two authorities to emphasize the points that have been made by my colleague. This Committee has had the occasion to consider other impeachment proceedings and I wish to refer and rely on the reports of the Special Committee, which was adopted by the Senate for the Deputy Governor of Embu which is dated 14th February, 2014. I refer to page 41 of the same report, the contribution of the Senator, Sen. Miriam Defensor, the Senator of Philippines in her keynote address delivered at a convention on the 8th of February, 2012, where she said that impeachment proceedings are both *quasi judicial* and *quasi political*. That is to the extent I wish to raise this; and I raise it for a point that I now wish to have the Committee look at, which is at page 82 of another proceeding which was against the Governor of Kericho. I wish to read verbatim at page 82. These were the impeachment proceedings for Bill Clinton and there were two approaches in the expose I am about to read; both pragmatist and the formalist approach to impeachment. I will be concluding in the end by asking this Committee that it must strike a balance in the approach it takes and, perhaps, lean more towards the pragmatist approach to impeachment proceedings taking into account that this is also a *quasi political* and partly *quasi judicial* forum.

I read:-

“The first such feature of constitutional allocation of power for impeachment and removal is that its facilities and rewards are pragmatic or flexible analysis and impedes a formalist analysis of the fundamental question at the core of President Clinton’s impeachment proceedings. Whether his conduct constitutes a high crime or misdemeanor, a pragmatist approach of this issue entails balancing various practical considerations or factors, including the magnitude of harm that an impeachable official misconduct has caused society or constitutional order. There must be also the nexus between the official’s duty and his misconduct, public opinion and other possible avenues of redress such as electoral process or legal proceedings.

In contrast, a formalist analysis employs rigid criteria for or extremely well defined elements of impeachable offences, such as treating every violation of the Federal Criminal Law or every breach of the public trust as justifying removal. By vesting the impeachable authority in the political accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult question of impeachment and removal in the hands of officials well versed with pragmatic decision making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate test by recourse to practical rather than formalist calculations. In fact, Members of Congress decide almost everything pragmatically and decisions about impeachment and removal are not an exception.

The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences of the consideration in the course of exercising such authority. Moreover, if formalist reasoning were the norm in impeachment proceedings, many questions posed by the President's misconduct would not have not nearly been as heart wrenching or politically divisive as they were. Removal would have been extremely easy and straightforward."

In addition, and now I wish to lay emphasis on this; the American people flatly rejected strict liability notion of impeachment. Most Americans acknowledged, and I emphasize, that the President had broken the law, but did not regard this misconduct as constituting impeachable offence or justifying his removal. Most Americans favored a less rigid approach that balanced the harm and the wrongfulness of the President's misconduct against public interest or welfare.

Without prejudice to the denial which the Deputy Governor has placed on record, even if this Committee were to find that there were certain issues of misconduct or breach of the law, we invite you to find or to apply the pragmatist approach that was put in place in the impeachment proceedings of President Bill Clinton, by balancing the wrong itself and the public interest. We invite this Committee to find that, that is the appropriate test in this, notwithstanding the denial that President Bill Clinton has already put in place.

Mr. Chairman, Sir, I also wish to refer to the same page, page 83 of the Report of this Committee on the Impeachment of the Governor of Kericho. In the Supreme Court of Nigeria Case, hon. Muyiwa Inakoju and others, it was stated here and it is quoted that---

The Chairperson (Sen. Mutahi Kagwe): Your time is up.

Mr. Anthony Oluoch: Oh, my time is up? May I have one minute to wind up?

The Chairperson (Sen. Mutahi Kagwe): You have one minute.

Mr. Anthony Oluoch: So, Mr. Chairman, Sir, the saying here that a Governor is a human being and that test again must be applied, we are saying that politicians are human beings. We cannot sanction a decision that seems to suggest that we elect human beings to Parliament – to the National Assembly, to the Senate or to the County Assemblies – and then expect them to be angels.

So, Mr. Chairman, Sir, with that, I wish to ask this Senate Committee to read through and rely on--- We wish to adopt the decisions that have been relied on here at pages 84 and 85, in particular paragraphs 223 and 225, where this Committee found – and I lastly wish to read:-

“It is useful to note the various meanings of the word ‘gross’ in relation to violation. Gross violation is a flagrant violation; a glaring error; nasty, unpleasant, vulgar, and crass. The Special Committee therefore takes the view that the threshold to be applied should take into consideration, one the allegations must be serious, weighty; the violations are flagrant and glaring; there must be a nexus between that and the decision of the Governor.

So, Mr. Chairman, Sir, with those, we ask this Committee then to find that there has not been proved grounds for the impeachment of the Deputy Governor.

Thank you, Mr. Chairman, Sir.

The Chairperson (Sen. Mutahi Kagwe): Very well; thank you very much.

Hon. Senators, who are the Committee Members of the Special Committee, counsel for both the County Assembly and the Deputy Governor, Members of the County Assembly of Machakos present, ladies and gentlemen, we have now come to the end of the hearings.

Before the Committee retreats to write its report, I want to thank both parties and their advocates for all the assistance they have accorded the Special Committee. I also wish to thank members of the press for covering the proceedings of Committee, which has enabled those members of the public unable to attend the proceedings to follow the same from their homes and other places. I also thank those members of the public who attended the proceedings for their interest in the matter.

This Special Committee is now required to report to the Senate on Friday, 15th of August, 2014, at 2.30 p.m. on whether the charges against the Deputy Governor have been substantiated. The Committee shall now retreat to write its report. I want to assure everyone that the Committee shall be guided by the Constitution and all the relevant laws in preparing its recommendations. The Committee shall be impartial and objective and, ultimately, the decision will not be the Committee’s but that of the Senate.

Hon. Bernard Kiala, Deputy Governor of Machakos, in the event that the Committee finds that the charges have not been substantiated, that shall be the end of the matter as far as you are concerned. However, if the Committee finds that the charges have been substantiated, you shall have the opportunity to defend yourself before the whole Senate. You are, therefore, invited to attend the sitting of the Senate this Friday, the 15th of August, 2014, at 2.30 p.m. at the Senate Chamber in the main Parliament Building.

Once again, I thank you all and now declare the hearings concluded. *Asanteni sana.*

The Special Committee adjourned at 3.25 p.m.