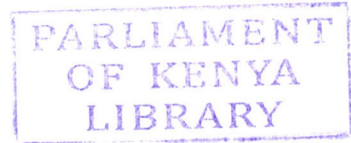


REPUBLIC OF KENYA



TWELFTH PARLIAMENT– (THIRD SESSION)

THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

(No. 11 of 2019)

**ON ADMISSIBILITY OF THE RECOMMENDATIONS OF THE REPORT
OF THE PUBLIC ACCOUNTS COMMITTEE ON ITS EXAMINATION OF
THE REPORT OF THE AUDITOR GENERAL ON THE FINANCIAL
STATEMENTS FOR THE IEBC FOR THE YEAR ENDED 30TH JUNE
2017**

Honourable Members, You will recall that on Thursday 7th March 2019 and before debate on the Motion for the adoption of the Report of the Public Accounts Committee on its examination of the Report of the Auditor General on the Financial Statements for the Independent Electoral and Boundaries Commission (IEBC) for the year ended 30th June, 2017, the Leader of the Majority Party, the Hon. Aden Duale, rose on a Point of Order seeking direction from the Speaker on the admissibility of one of the recommendations in the Report. His Point of Order relates to the General Recommendation No. 3 of the Report, and for clarity, I quote-

"To that end, the Commissioners, Chief Executive Officer and the Directors who were involved in the unlawful procurement should vacate office immediately upon adoption of this report to allow for much needed reforms to be effected to restore public confidence in the Independent Electoral and Boundaries Commission"

Honourable Members, according to the Leader of the Majority Party, since the recommendation seeks the removal from office of the IEBC Commissioners and staff, it expressly flouts the provisions of Article 251 of the Constitution of Kenya on the procedure for the removal of a member of a Constitutional Commission and Article 236 of the Constitution which guarantees public officers protection in the exercise of their duties. It was therefore his view that the House should not proceed to make a determination on the impugned recommendation.

Hon. Members, at the time the matter was raised by the Member, you will also recall that no less than nineteen interventions from other Members of the House both in support or opposition to the points raised by the Leader of the Majority Party were recorded. In the ensuing debate, the Leader of the Minority Party (Hon. John Mbadi), the Minority Party Whip (Hon. Junet Mohammed), the Chairperson of the Public Accounts Committee (Hon. Opiyo Wandayi), the Chairperson of the Justice and Legal Affairs Committee (Hon. William Cheptumo), the Hon. Otiende Amollo, the Hon. Adan Keynan, the Hon. (Dr.) Chrisanthus Wamalwa, the Hon. Ngunjiri Wambugu, the Hon. Jeremiah Kioni, the Hon. William Kamket, the Hon. Jared Okello, the Hon. Dido Raso, the Hon. Bashir Sheikh, the Hon. (Dr.) James Nyikal, the Hon. Kangogo Bowen, the Hon. Kimani Kuria, the Hon. Peter Kaluma and the Hon. Jimmy Ang'wenyi canvassed various points of view.

Hon. Members, at the close of the debate, I undertook to give a considered ruling on the matter raised and to guide the House on the important question of the consideration of the Report containing the said

recommendation. From the point raised by the Leader of the Majority Party and the ensuing debate, I have isolated the following issues as requiring determination—

1. *The extent of the mandate of the Public Accounts Committee under Standing Order 205 of the National Assembly Standing Orders as read together with Standing Order 197 on the limitation of the mandate of Committees;*
2. *Whether a question on the constitutionality of a recommendation of the House should be left for determination by the House through a vote or potential amendment;*
3. *The extent of the mandate of the House to review the conduct in office of a State Officer and initiate their removal from office under Article 95 of the Constitution vis-à-vis the removal procedure under Article 251 of the Constitution;*
4. *The extent to which the House or its Committees may delve into disciplinary matters of staff of a Constitutional Commission or an Independent Office; and,*
5. *Whether the findings and recommendations contained in the Report by the Public Accounts Committee concerning the Auditor-General's Examination of the Financial Statements for the Independent Electoral and Boundaries Commission are admissible.*

Hon. Members, On the first issue, the Public Audit Act of 2015 and the Standing Orders provide adequate guidance on the scope of the mandate of the Public Accounts Committee and the limits of its exercise of such mandate. Standing Order 205 (2) states, and I quote—

(2) The Public Accounts Committee shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit.

A clear reading of the Standing Order and the Public Audit Act reveals that the primary role of the Public Accounts Committee is that of interrogating the accounts of the expenditure of public funds appropriated by the House. The examination of public accounts by the Committee is informed by reports tabled by the office of the Auditor-General on the use of public funds. Necessarily, the work of the Committee therefore includes holding to account any public officer, and in particular, to ensure prudent use of funds appropriated by Parliament, and to clarify any queries raised by the Office of the Auditor-General pertaining to such use or otherwise. Where the Committee, after affording all concerned parties an opportunity to be heard, is of the view that the queries raised by the Auditor General have not been explained to its satisfaction, it recommends to the House appropriate remedial measures in accordance with the law.

Hon. Members, Standing Order 197 limits the deliberations of a Committee of the House to only the matters falling under its mandate, unless the mandate is extended by a resolution of the House. The Standing Order provides, and I quote—

(1) The deliberations of a select committee shall be confined to the mandate of the committee and any extension or limitation of that mandate as may be directed by the Assembly and, in the case of a

select committee on a Bill, to the Bill committed to it and relevant amendments.

(2) In the exercise of its functions, a select committee may not consider any matter that is not contemplated within the mandate of the National Assembly under the Constitution.

The import of Standing Order 197 is not to curtail the deliberation of any matters of concern noted by a Committee. The essence of this rule is to prevent a Committee from misdirecting its efforts to the detriment of its core work. In relation to the work of the Public Accounts Committee, consideration of the day-to-day administration of public bodies would clearly be a misdirection of effort. The key test in determining whether the findings and recommendations of the Committee in the instant case fall within the mandate of the Committee would be the extent to which they address or seek to address any unresolved audit queries raised by the Office of the Attorney General in accordance with the law. In this regard, and addressing myself to the point raised by the Leader of the Majority Party, a finding or recommendation by the Public Accounts Committee in the report tabled before the House which expressly falls outside the mandate of the Committee would be inadmissible. This dispenses with the first issue.

Hon. Members, In prosecuting his Point of Order, the Leader of the Majority Party, while urging the Chair to determine the admissibility of the recommendations of the Motion on the Report before the House could proceed to debate it, did refer to the provisions of Standing Order No. 47(3). Standing Order provides, and I quote, –

(3) If the Speaker is of the opinion that any proposed Motion–

(a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders;

(b) is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament;

(c) is too long;

(d) is framed in terms which are inconsistent with the dignity of the House;

(e) contains or implies allegations which the Speaker is not satisfied that the Mover can substantiate; or

(f) calls for the commitment of public funds for which no provision is made in the Annual Estimates as adopted by the National Assembly,

the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the relevant committee of the Assembly, pursuant to Article 114(2) of the Constitution.

Hon. Members, Ideally therefore, before any business comes to the House, it is approved by the Speaker on the basis of its constitutionality, among the other criteria for admissibility. Standing Order 47(3) is an extension of the requirement placed on the Speaker

under Articles 3 and 10 of the Constitution to respect, uphold and defend the Constitution.

Hon. Members, the question that arises now is whether the Motion by the Chairperson of the Public Accounts Committee having been approved and the Report of the Committee having been tabled, the Chair can consider the issue of the constitutionality of the findings and recommendations of the Report. You will recall that I have previously guided the House that notwithstanding the approval of any business by the Chair under the Standing Orders, the issue of constitutionality can be raised by a Member at any stage of consideration of any business by the House. The only condition such a request would have to meet is that it must be specific in order to capacitate the Chair to revisit the issue with precision and to cure a procedural or constitutional anomaly.

Hon. Members, In this respect, the Chair has had the occasion to re-look at the arguments advanced by the Leader of the Majority Party and noted that he indeed raises a constitutional issue which should, ideally, be dispensed with before the House proceeds with the consideration of a Report with the risk of making a resolution in vain.

Hon. Members, you will also recall that following the request, various Members of the House urged that the Report be allowed to proceed to debate and that any anomaly or otherwise be left for the House to decide. I am fully cognizant of the fact that the decisions of this House are

expressed with the endorsement of the votes of a majority of the Members. Whereas I hold no vote, the Constitution and the Standing Orders of this House oblige me to address any questions of unconstitutionality at any time and not fold my arms and preside over deliberations. I do agree that the possibility exists of the required majority of Members voting against the recommendation in issue or a Member proposing an amendment to expunge the recommendation with the support of the required majority. But what if neither of the two events come to pass? I think the House would stand indicted not just because of the untenable recommendation being adopted, but also for the failure on my part to act to arrest a patently incongruous outcome. It is therefore my considered opinion that a question on the Constitutionality or otherwise of business ought not be left to a vote by the House or potential amendment, but should be resolved by the Speaker once raised.

Hon. Members, The point raised by the Leader of the Majority Party and the interventions by other Members thereafter crystallized the third issue of the mandate of the House with regard to the removal from office of State and Public Officers under the Constitution pursuant to the provisions of Articles 95 and 251 of the Constitution. Article 95 of the Constitution outlines the role of the National Assembly with regard to the issue at hand as follows, and I quote,—

.....

(2) The National Assembly deliberates on and resolves issues of concern to the people.

.....

(5) The National Assembly—

(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and

(b) exercises oversight of State organs.

On its part, Article 251 of the Constitution provides a specific procedure for the removal from office of a member of a Constitutional Commission or the holder of an Independent Office. The Article provides, and I quote,—

.....

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.

.....

Hon. Members, the bone of contention, as discerned from the submissions made by Members with regard to the point raised by the Leader of the Majority Party is whether the removal of a member of a Constitutional Commission, in this case the Independent Electoral and Boundaries Commission, can be legally **initiated** through a resolution of the House.

Hon. Members, On this matter I am constrained to agree with the view that the only procedure that the Constitution envisages for the initiation of the removal of a member of a Constitutional Commission or holder of an Independent Office is through a Petition to the House in accordance with Article 251 of the Constitution. As ably noted in the submissions by the Hon. Kaluma, the provisions of Article 95(5) are couched in general terms whereas those of Article 251 are specific to a particular class of State Officers. Indeed, as Members are aware, the House only initiates the removal from office of the President, the Deputy President and a Cabinet Secretary through a motion filed by any Member under the specific provisions of Articles 144 and 145, Article 150 and Article 152 of the Constitution, respectively.

Hon. Members, Conversely, specific provisions of the Constitution provide removal procedures peculiar to other State Officers. Members will note that the Constitution provides specific methods of removal from office of other State Officers as follows—

- (i) Members of Parliament may only vacate office in specific circumstances including recall under Article 103 and upon determination by court by declaring the seat vacant under Article 105(1)(b) of the Constitution;
- (ii) Judges and Magistrates may only be removed from office via a petition lodged with the Judicial Service Commission under Article 168 and 172 (1) (c) of the Constitution;

- (iii) The Secretary to the Cabinet is appointed with the approval of Parliament but may only be dismissed by the President under Article 154 of the Constitution;
- (iv) The Director of Public Prosecutions is appointed with the approval of Parliament but his or her removal may only be initiated via a petition lodged with the Public Service Commission under Article 158 of the Constitution; and,
- (v) A County Governor may only be removed from office in line with a procedure prescribed by legislation enacted pursuant to Article 181 of the Constitution.

Hon. Members, If the House were to be persuaded by the argument that it does rely on Article 95(5) generally to initiate the removal of IEBC Commissioners, the House must also convince itself that the same argument would hold in the event any Committee were to table a report recommending the removal of the President, the Deputy President, a Cabinet Minister, a Judge, **a Member of Parliament,** a Governor or the Director of Public Prosecutions. This would, clearly, be illogical and procedurally untenable. In addition, section 10 of the Independent Electoral and Boundaries Commission Act, 2011 provides the procedure for the removal of the Chief Executive Officer which **can only be done by the Commission** on, among other grounds, gross misconduct. Section 31 of the same law gives power to the Commission to prescribe regulations for termination of appointment of officers of the Commission. The employment of such officers may also be governed by the relevant employment laws including the Employment Act on dismissal

of employees. In this regard, the Committee's recommendation relating to removal of staff offends the provisions of sections 10 and 35 of the IEBC Act and the relevant regulations in respect of other senior staff of the IEBC.

Hon. Members, The argument that Article 95(5) provides an avenue for the initiation of the removal of a member of a Constitutional Commission also patently fails with regard to the procedural safeguards afforded to State and Public Officers in the exercise of their public duties. As was noted in the ensuing debate on the point raised by the Leader of the Majority Party, the procedure set out under Article 251 of the Constitution grants the House a specific role to play in the process of the removal of a member of a Constitutional Commission or holder of an Independent Office. Under Article 251(3) the House must determine whether a petition discloses any ground for removal before transmitting the petition to the President recommending the establishment of a Tribunal to investigate the facts. The role of the House in the processing of a petition for removal therefore does not result in a final determination of the matter. All the specific methods of removal from office outlined in the Constitution grant a fair hearing to the affected state officers who are given prior notice of the case for their removal, a fair opportunity to answer it, and the opportunity to present their own case. This, **Hon. Members,** mirrors the rights to fair administrative action and fair hearing as set out in Articles 47 and 50 of the Constitution and the protection of public officers as outlined in Article 236 of the Constitution. It is therefore my considered opinion that the mandate of the House to

review the conduct in office of a member of a Constitutional Commission or a holder of an Independent Office may only be done in accordance with Article 251 of the Constitution when it considers a petition filed for the removal of the affected state officer. I commend the work of the Committee in their interrogation and presentation of grave allegations attributable to the Commissioners and staff of the IEBC. However, the Committee has proceeded to utilize that information to propose the removal from office of the Commissioners and staff in an entirely untenable manner.

Hon. Members, I shall now address myself to the admissibility of the findings and recommendations in the Report tabled by the Public Accounts Committee. As you will recall, the point raised by the Leader of the Majority Party, though directed at one of the recommendations of the Report, in essence sought that I declare the findings and recommendations at pages 7 and 130 of the Report as inadmissible in their entirety. As I have noted in this Communication, a finding or recommendation would only be inadmissible if it addresses itself to a matter outside the mandate of the Committee; or if it offends the provisions of Standing Order No. 47(3). I have perused the Report of the Committee at the cited pages. From the perusal I note that the second paragraph of General Recommendation No. 3 accords with the concern raised by the Leader of the Majority Party that the Report recommends the removal of the Members and Staff of a Constitutional Commission in manner not contemplated by the Constitution. Apart from a portion of this recommendation and the section of the Report

titled "**Basis for Committee Recommendation for Vacation of Office**" which, on the face of it, is intended to explain the thinking behind the recommendation, a cursory glance at the other recommendations of the Report does not reveal any relation to the concern raised by the Leader of the Majority Party and several other Members. I note that the General Recommendations and section 4.0 of the Report on the "**Basis for Committee Recommendation for Vacation of Office**" are replicated both at the beginning and at the end of the Report.

Hon. Members, in summary, it is therefore my considered finding —

1. **THAT,** a question on the constitutionality or otherwise of business ought not to be left to a vote by the House or addressed by an amendment which is also subject to a vote, but should be addressed by the Speaker once raised;
2. **THAT,** the mandate of the House to review the conduct in office of a member of a Constitutional Commission or a holder of an Independent Office may only be exercised in accordance with Article 251 of the Constitution when it considers a petition duly filed for the removal of the affected state officer;
3. **THAT,** a finding or recommendation by the Public Accounts Committee in the report tabled before the House which expressly falls outside the mandate of the Committee, or one that offends the provisions of Articles 47 or 251 or section 10 of the

Independent Electoral and Boundaries Commission Act, 2011, would be inadmissible;

4. **THAT**, the words *"To that end, the Commissioners, Chief Executive Officer and the Directors who were involved in the unlawful procurement should vacate office immediately upon adoption of this report to allow for much needed reforms to be effected to restore public confidence in the Independent Electoral and Boundaries Commission"* in the General Recommendation No. 3 appearing at pages 4 and 127, of the Report in so far as it relates to the IEBC Commissioners are **inadmissible**. This is because the text is recommending a mode of removal from office of constitutional office holders in a manner that is not contemplated by the Constitution;
5. **THAT**, sections 4.0 and 34.0 of the Report relating to "***Basis for Committee Recommendation for Vacation of Office***" appearing on pages 6, 7, 129 and 130 of the Report in so far as it relates to the IEBC Commissioners are also **inadmissible**;
6. **THAT**, the second sub-paragraph of paragraph 3 of the General Recommendation No. 3, appearing at page 4, which states that *"To that end, the, **Chief Executive Officer and the Directors** (emphasis on staff) who were involved in the unlawful procurement should vacate office immediately upon adoption of this report to allow for much needed reforms to be effected to restore public confidence in the Independent Electoral and Boundaries*

Commissioner is also inadmissible. This is because, while this section is supported by **admissible** observations of the Committee, the recommendation is proposing the removal from office of staff of a constitutional Commission in a manner that is neither contemplated by the Constitution nor supported by the relevant statute providing for the manner of vacation of office of such staff and governing their discipline;

7. THAT, the observations and findings of the Committee with respect to the staff of the Commission having been found to be **admissible**, I will now expect the Chairperson of the Public Accounts Committee to take into account this *Communication* and move the motion for the adoption of the Report in an **appropriately amended form** pursuant to Standing Order 48 (*Amendment of Notice of Motion*); and,

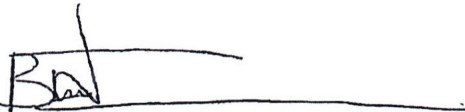
8. THAT, the cited text of "General Recommendation No. 3" and sections 4.0 and 34.0 of the Report having been found to be offensive to the Constitution and therefore inadmissible for debate by the House are forthwith expunged from the Report. The House shall make no reference to either text in its consideration of the Report.

Hon. Members, as I conclude, may I clarify that, expunging the offensive parts of the Report is not to mean that the entire report is discredited. As a matter of fact, the rest of the Report is admissible

and will proceed for consideration by the House upon rescheduling by the House Business Committee. The Committee has duly executed its mandate satisfactorily and carried out commendable task of taking evidence and compiling their Report to the House. That is an accomplishment worthy of credit of this House

Please be guided accordingly.

I Thank you!



THE HON. JUSTIN B. N. MUTURI, E.G.H, MP
SPEAKER OF THE NATIONAL ASSEMBLY

March 14th, 2019